

**HUMAN RIGHTS: AN INVESTIGATION INTO THE
IMPORTANCE OF SECOND GENERATION RIGHTS**

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ABSTRACT

This study examines the notion of universal human rights in the context of the importance of social and economic rights for the agency and dignity of human beings. It argues that the recognition of basic rights to what is necessary for physical well-being is essential to any adequate theory of human rights, and that rights of the civil and political variety depend on the recognition of social and economic rights if they are to be exercised. Therefore the secondary status which is usually accorded to social and economic rights results in an imbalanced ideal of human rights both in theory and in practice.

This study is an attempt to place second generation rights in their proper context and to argue for them as human rights of equal status and importance. It focuses on the derivation of human rights in general, and shows that second generation rights may be accommodated within this structure. It further supports this position by showing that the categorical differences which are asserted to exist between first and second generation rights are based on a mistaken conception of positive and negative rights and duties, as well as an inadequate conception of liberty.

The thesis shows that all rights generate a variety of duties, both positive and negative, and that an adequate theory of rights has to be able to accommodate the inevitability of conflicts of rights at the level of their enforcement. Consequently, this study argues there is no reason to give either class of right primary importance, as both first and second generation human rights are essential to the agency and dignity of a human being, and they are thus interdependent.

Furthermore, the thesis shows that human rights can be balanced at the level of the obligations which they generate without compromising the deontological nature of such rights. This thesis argues that a theory of rights which is rooted in the liberal democratic notion of rights, such as that characterised by the choice theory of rights, is inadequate. It therefore argues that a benefit theory of rights must be adopted in order to accommodate conflicts of rights when they arise. The thesis argues that as such

conflicts of rights are most common in cases involving the assertion of social and economic rights, this balancing of rights is of special significance for the enforcement of second generation rights.

Furthermore, this thesis argues for a theory of minimal interdependence of first and second generation rights, in order to accommodate the notion of first and second generation rights of equal status and importance, as well as to prevent an inflation of rights claims which would compromise the balancing of rights. It is argued that a reordering of values is necessary to take account of material well-being, as well as civil freedom, as both of these generate fundamental rights of equal status and importance.

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1. INTRODUCTION: THE HUMAN RIGHTS IMBALANCE

The idea of a human rights imbalance, which is defined by one class of rights being given precedence over another, is not an original one. On a positive level this idea is not even a contentious one. However, normative investigations into the status and importance of what may properly be regarded to be the content and objects of fundamental human rights reflect the urgency of the debate on whether second generation social and economic rights merit the same weight on the scale of rights as do their first generation civil and political counterparts. The difficulty of establishing this thesis is that it runs counter to people's intuitions about which class of rights are more fundamental and indeed in some cases which rights ought to be even accorded the status of human rights. These intuitions are rooted in social conditioning, as well as a firm sense of the preservation of liberty as the primary social value, in its negative formulation at least.

However, these intuitions are wrong. They are wrong because they are derived from social values based on only one conception of human rights, and because they rest on a false conception of liberty. In the world today, where an estimated one in five people "live in absolute poverty, ... [and] struggle for survival" (Hausermann, 1992: 55) it is not morally acceptable or theoretically appropriate to rely on conceptions of rights and justice that exclude material well-being on the basis of specious, ill defined conceptions of freedom. Consequently this classical liberal position is indefensible in both a moral and a theoretical sense. As Maureen Ramsay has described this position:

Respect for human beings as rational moral agents requires not only freedom from interference which gives rise to negative rights, but also positive freedom and positive rights ... Both sets of rights are derived from the same moral foundation, from the necessary conditions of human agency, from the claim that human agency requires more than the absence of interference, because the ability to act is restricted by lack of resources as well as by intentional coercion. Therefore, civil and political, social and economic rights are necessary for autonomy ... the liberal prioritising

of civil and political rights is untenable (Ramsay, 1997: 162).

Consequently, a conception of human rights, and by extension international justice, which takes account only of civil and political rights as negative rights is unbalanced. Not only does such a conception take account of only one aspect of the deontological derivation of human rights, such as agency (which requires the ability *to do* rather than just a lack of impediments) but furthermore, it takes account of the rights and justice regimes of only one part of the world. Human rights, if they are universal as is asserted, will then have to have regard to the needs of agency and the demands of equal dignity of all the inhabitants of the earth, and clearly this requires including some conception of rights to basic physical well-being in the case of the developing world. It is unclear why the fact that physical privation as an impediment to agency and human dignity is not a direct issue in the developed world should imply that these considerations are excluded from conceptions of human rights in the rest of the world, or when the world is regarded as a whole.

In addressing these issues, and in stating the case for the equal normative status in theory and in practice for second generation human rights, this thesis consists of three parts. Each section is intended to address a specific area of concern in establishing a theory of justice which takes account of human rights of both the first and the second generation.

Section 2 aims to establish that human rights exist, and to put the idea of human rights into perspective within the broader context of international justice. It is argued that their honouring is of the greatest urgency in theories of justice and projects that endeavour to maximise human well-being, and in addition an effort is made to outline specifically what such rights can be taken to include in terms of their content, objects and limits. Alan Gewirth's agency argument is primarily relied on in this regard, and a minimalist conception of human rights is adopted, as it is only such an account that can arrive at a viable theory of rights of the both the first and second generation.

Furthermore, a brief historical account of the development of the notion of rights, evolving into the twentieth century conception of human rights is given. The intention of this is to show that the justice demands of the modern world inevitably require considerations of material welfare, and thus the development of a body of international law pertaining to human rights in the post-1945 world is of enormous importance in establishing a theory of rights that takes equal account of both first and second generation human rights. United Nations General Assembly Resolution 32/130 asserts the "indivisibility and interdependence of economic, social, cultural, civil and political rights" (Donnelly, 1989: 28). While the recognition of this in theory in international law is an innovation of the second half of this century, in practice of course human rights generally, but social and economic rights specifically remain *in theory* for twenty percent of the world's inhabitants. The perceived dichotomy between the two main "branches" of human rights therefore places those who assert the equal status of second generation rights on the defensive.

The third section meets the central problem head on. It is devoted to an examination of the status of second generation rights, and is an attempt to establish their equal status and importance in the human rights family. This is done by breaking down the elements of the duty side of the equation, and by showing that neither first nor second generation rights are either positive or negative in this sense, and there is therefore no reason for distinguishing between them in this way, either with regard to their importance as fundamental human rights, or with regard to their enforcement. Consequently, the idea of a relationship of interdependence between civil and political and economic and social rights is examined, as this suggests that in the absence of the enjoyment of one class of rights, the other is rendered meaningless. This would suggest that first and second generation rights have equal weight, and thus deserve equal status and concern with regard to their enforcement:

If this suggestion is correct, the common notion that *rights* can be divided into rights to forbearance (so-called negative rights) ... and rights to aid (so-called positive rights), as if some rights have correlative duties only to aid, is thoroughly misguided ... It is duties, not rights, that can be divided among avoidance and aid, and protection. And - this is

what matters - every basic right entails duties of all three types. Consequently the attempted division of rights, rather than duties, into forbearance and aid ... can only breed confusion (Shue, 1980: 53).

Thus the aim of the third section is to break down the distinction between first and second generation rights on the basis of the duties which they generate, as well as to show that the distinction is of no significance in so far as defining what are to be considered to be fundamental human rights is concerned. These, it is argued, are both of the first and second generation, and all human rights demand both positive and negative enforcement if they are to be exercised. The basic rights theory of Shue is relied on here, and the obligations based approaches of O'Neill and Singer are referred to in illustrating how duties to aid may sometimes exceed the demands of rights.

Section 4 considers a problem which is raised in section 3 - that of enforceability and categorisation of rights from the perspective of potential conflict of rights claims. It is at this level that a human rights balance, or indeed an imbalance, occurs, as different theories of rights generate different kinds of duties. The choice and benefit theories are used to construct and examine these different approaches to human rights. The major issue to be resolved is whether or not rights *can* conflict in terms of their enforcement, and if they can, how such a conflict is to be resolved without compromising the deontological nature of such rights by having recourse to teleological considerations.

It is argued that individual rights generate diverse duties, ranging from duties of forbearance to duties to aid under certain circumstances. Therefore a theory of negative rights, which rests upon a conception of negative liberty, the object of which is to derive a set of rights that never conflict in so far as their duties are concerned, is probably not possible nor desirable. Rather recourse has to be had to a theory of rights which both acknowledges and attempts to resolve conflicts of rights. As such a theory is concerned with the object and purpose of human rights in so far as they contribute to human agency and dignity, it does not prioritise either civil and political, or economic and social rights. Rather, the two generations of rights are regarded as having equal status,

although their objects may not always count equally in a qualitative sense, depending on the demands of a particular society.

Ultimately then it is asserted that basic economic and social rights such as are defined by the needs of subsistence, along with their civil and political counterparts, are universal because they are fundamental to the realisation of human agency and dignity. Furthermore, such rights can be balanced against one another in different ways in different societies in order to meet the demands of which rights are most urgent in terms of the duties which they generate.

2. HUMAN RIGHTS IN PERSPECTIVE

2.1 What are Human Rights?

A study of human rights demands some examination of what is meant by the term "human rights" as a subclass of rights in general. It is a term which has become part of everyday vocabulary in the twentieth century, and yet carries with it some quite specific characteristics and terms of reference. Human rights have been variously defined by different theorists, but despite this, there are some elements which are common to all notions of human rights, and it is these which this chapter is intended to identify.

However, "the idea of human rights is not an obvious one" (Vincent, 1986: 7) and it is therefore necessary to appeal first to the content of rights as a broader class of moral possession in order to accomplish this adequately. Rights in general may be broken down into five elements:

- (1) The *subject* of the right is the rights holder. This may be an individual, a group, a state, or a corporate person such as a company.
- (2) The subject of the right in question has a claim to something, and this is therefore the *object* of the right. The object of the right may be negative in content, such as the right to freedom from interference; or it may be a positive claim to something.
- (3) The *exercising* of a right may occur in a number of senses ranging from the weakest sense of merely claiming that the right exists, to the strongest sense which involves actual enforcement of a right.
- (4) There is usually an identifiable *bearer of a duty* correlative to the right, as rights in most cases are held against someone or something. This element is obscured in the case of imperfect obligations.
- (5) All rights rely on some sort of *justification* for their existence. This is the grounds for the claim to the object of the right. To put this another way, a right is a

justified claim to something (Vincent, 1986: 8- 9). Naturally there are many different justifications for different classes of rights, and human rights are no exception. In fact, the justification for human rights which one accepts will determine what one considers to be the content of human rights.

Maurice Cranston in What are Human Rights makes the distinction between moral rights and positive rights. This distinction is integral to the identification of human rights as a specific class of rights in general. Positive rights are "a verifiable reality" in the sense that they are recognised by the laws of states, or some other empirical convention. Positive rights are usually regarded as legal rights, with their roots in positive law. Moral rights on the other hand may be regarded as normative rights, with their roots in natural law, as they are indicated by the state of affairs that morally, or ethically ought to exist (Cranston, 1973: 5).

The approach adopted in this thesis is that human rights fall under the category of moral rights: even though in many cases human rights (as they are defined below) are not enforced either in fact or in law, an argument may be constructed that morally they *ought* to be honoured. Of course, in many states, human rights are positive rights as well, upheld by positive law and usually enshrined in a constitutional document. However, as Cranston remarks, "it is essential to keep in mind the distinction between what is and what ought to be, between the empirical and the normative, between the realm of fact and that of morality" (Cranston, 1973: 6). This point is of enormous significance in establishing a case for the importance of second generation rights, as if it can be shown that categorically these rights are of the same status as their first generation counterparts, then the difficulty of their enforcement aside, social and economic rights could be regarded as meriting their status as fundamental human rights, in theory if not in fact.

The concept of human rights is nevertheless a rather elusive one, as there is a certain amount of ambiguity in the term which encompasses in various instances the notions of natural rights, rights that people have by virtue of being human beings, and moral

rights (Pojman, 1989: 592). The central unifying factor of these varying notions of the root or justification of human rights is that they all make an appeal to the universality of human rights (Vincent, 1986: 9).

The idea of human rights as a set of universal moral rights is one which is widely contested. Most theorists who contest the idea of human rights do not deny the existence of all rights. What they do contend is that rights are not "in the nature of things." These human rights sceptics claim that the justification for rights must be sought in positive law, identifiable moral obligations, or even a utilitarian calculation of the outcome of protecting certain values or interests as opposed to others (Pojman, 1989: 593-4).¹

In the first instance of those theorists who contend that all rights are positive rights, such as Austin, Bentham, or MacIntyre (who is discussed below), it is argued that rights must be institutional in the sense that they are recognised by society in the way that legal rights are. In the second instance, a deontological argument is invoked, as in the ethical theories of Kant or Frankena, a right is viewed as being derived from a moral obligation. For example, the duty to repay a loan generates the corresponding right to its repayment by the lender. This view of the nature of rights places duty as the primary element in a system of ethics, with rights being merely correlative to duties. For this reason, human rights according to this duty-based code, logically cannot exist independently from identifiable duties to honour them (Pojman, 1989: 594).

The teleological view of the idea of human rights, as exemplified by the utilitarianism of

¹ This relates to the discussion in section 4.1 which seeks to resolve the tension between the notion of human rights, as normative and deontological in nature, and teleological notions of the good, such as utilitarianism. The benefit theory of rights is used to support the position that conflicts of rights can be resolved without recourse to utilitarian calculations, while at the same time showing that the deontological nature of human rights remains intact. Furthermore, the interest or benefit theory of rights can accommodate the inclusion of second generation rights of equal status, precisely because it is both able to explain and resolve conflicts of rights at the level of enforcement.

J.S. Mill, presents the argument that human rights are derived from what will maximise utility. If we will be happier as a result of having certain of our interests safeguarded, then we have a right to them. The most notable example of this in Mill's argument is our interest in non-interference or negative liberty (Pojman, 1989: 594).

However, these arguments fail to take account of the "power and presence" which attaches to the idea of human rights. Joel Feinberg in "The Nature and Value of Rights" (Feinberg, 1980: 143) counters these critics by arguing that if one were to remove rights from our repertoire of moral possessions (in a thought experiment conducted in an imaginary Nowheresville) people would be stripped of some of their self-respect and dignity, as Nowheresville would exist in the absence of moral claims to justified demands (Pojman, 1989: 594). Even though there are certain duties of beneficence in this abstraction, this is not sufficient to provide the inherent dignity of human beings. As Feinberg describes it:

to think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal self-respect that is necessary to be worthy of the love and esteem of others. To respect a person then, or to think of him as possessed of human dignity, simply *is* to think of him as a potential maker of claims (Feinberg, 1980: 146).

Pojman argues that if this position of Feinberg's is accepted, then an adequate moral theory has to include the notion of human rights in some form, and the human rights sceptics fail in this respect (Pojman, 1989: 595).

Alan Gewirth is a supporter of universal human rights justified by the notion of common humanity. In Epistemology of Human Rights he constructs an argument to show, rationally, why such rights exist. Gewirth considers human rights to be those things which all humans need in order to be agents, that is, "the nature of human rights consists in personally oriented, normatively necessary moral requirements that every human have the necessary goods of action" (Gewirth, 1989: 625). Human rights are therefore "moral requirements" and in a normative sense, it is possible to show the existence of such rights. However, before Gewirth constructs his own formula to justify

the existence for human rights, he considers prior attempts of this kind by other theorists, and the problems with them. In this way, his own "necessary goods of action" formula is intended not only to support the existence of human rights held equally by all human beings, but also to improve upon previous attempts to do so (Gewirth, 1989: 626).

The first argument which Gewirth dispenses with is the intuitionist one which holds human rights to be "self-evident" in the spirit of Thomas Jefferson. Because there are many theorists whose intuition informs them of quite the opposite, this justification for the existence of human rights fails on the grounds that it does not meet the condition of providing an argument (Gewirth, 1989: 627).

A formal argument for human rights contends that humans *ought* to be treated equally in so far as there is no good reason to treat them differently - that is all people have the *right* to be treated as equals. This is then extended to include the right to equal consideration, based on the general principle of treating like cases alike, and the condition of being human is regarded as one particular kind of "likeness" giving rise to human rights. This formal argument for the existence of human rights is problematic in that it fails to provide us with a principle to determine what could be considered to be a good reason for treating people differently. This principle could thus be inverted to sanction inegalitarian norms as opposed to the egalitarian ones to which it aspires. Gewirth therefore writes this off as failing to fulfill the "*condition of determinacy*" as it could result in the justification of an allocation of rights opposed to one another (Gewirth, 1989: 627).

Thirdly Gewirth considers those human rights arguments that attempt to justify the existence of human rights on the basis of human needs or interests. There are a number of ways of constructing such arguments, and some of these will be considered in section 3.1 and 3.2 below. The reasons for their insufficiency according to Gewirth are both numerous and complex, but it is adequate to note that these type of human rights arguments often meet necessary, but not sufficient conditions to support the existence

of human rights (Gewirth, 1989: 627-628).

H.L.A. Hart's argument for equal human rights that is derived from the universal presupposition of the right to freedom, also encounters a number of difficulties, most significantly that it fails to establish universal egalitarian standards. Similarly, Gewirth finds John Rawls's veil of ignorance insufficient to explain why a universal notion of equal human rights will be arrived at and therefore justified (Gewirth, 1989: 628).

Gewirth is also dissatisfied with the notion of human rights derived from the perception of the universal equality, dignity or worth of human beings as espoused by the Universal Declaration of Human Rights, as he contends that there is no empirical basis for connecting the two. Gewirth then moves on to present his answer to providing a justification for the existence of human rights, which "must be a normative moral principle that serves to prove or establish that every person morally ought to have the necessary goods of action as something to which he or she is entitled" (Gewirth, 1989: 628).

Gewirth argues that action is the "non-question-begging answer to the problem of the independent variable in morality" as all moral questions are concerned with how people should act towards one another. That is, all ethical questions are based on some normative questions about human activity (Gewirth, 1989: 630). Gewirth then uses this idea to construct his argument for equal human rights in the following way. He begins by pointing out that all actions which are informed by some moral precept have the features of both voluntariness (freedom) and purposiveness (intentionality) on the part of the agent (Gewirth, 1989: 632).

Thus any person, acting on a moral precept, would be acting in order to attain some end or purpose which they perceive to be for their good. In order to pursue this subjective notion of the good, the potential agent must have the necessary conditions of action, and these are not only voluntariness (freedom) and purposiveness (intentionality). In addition the potential agent also has to have the reasonable

possibility of success in pursuing their subjective good end, and this then extends to include well-being as the other necessary requirement for action in addition to freedom.

Well-being is defined as

having the various substantive conditions and abilities, ranging from life and physical integrity to self-esteem and education, [as these] are required if a person is to act either at all or with general chances of success in achieving the purposes for which he acts. So freedom and well-being are the necessary conditions of action and of successful action in general (Gewirth, 1989: 632).

The next step in the argument is to show that these necessary goods of action, freedom and well-being, are *rights*. Gewirth proceeds by constructing the argument that if freedom and well-being are necessary, then the agent would consider that they *must* have freedom and well-being in order to act to pursue their subjective conception of the good. Consequently the agent considers that they have *rights* to freedom and well-being in a practical, prudential sense, "as the criterion consists for each agent in his own needs of agency in pursuit of his own purposes" (Gewirth, 1989: 633). However, it is necessary to add some additional steps to the argument to show that freedom and well-being are also *moral* rights.

If an individual considers that they have rights to freedom and well-being because they are a potential agent, then this agency is both a necessary and a sufficient condition for concluding that all others must have these rights too, as all other individual agents are also potential agents. Thus by accepting that all others equally have these rights to freedom and well-being, the agent is morally committed to respecting the rights to freedom and well-being of all other agents (Gewirth, 1989: 633).

Gewirth therefore shows that every rational person would agree that they need both freedom and well-being in order to act. Every person would therefore agree that they have rights to freedom and well-being

as the necessary conditions of [their] action, as conditions that [they] *must* have ... [an] agent must accept that logically all other prospective purposive agents have the

same rights to freedom and well-being as [they] claim for [themselves] (Gewirth, 1989: 634).

Furthermore, these are universal human rights (in the sense of belonging to all humans equally) as every person is an "actual, prospective, or potential agent", and every person would therefore require both freedom and well-being to fulfill their agency, and therefore "the rights in question belong equally to all humans" (Gewirth, 1989: 634). Therefore, as Gewirth states it, this argument meets the requirements for specifying human rights, "as both the [s]ubjects and the [r]espondents of the rights are all human equally, ... the [o]bjects of the rights are the necessary goods of human action, and the [j]ustifying [b]asis of the rights is a valid moral principle" (Gewirth, 1989: 634).

It is been necessary to note the steps in Gewirth's argument leading to this conclusion as, despite the rigorous derivation of rights in this way, Gewirth's argument is in its turn not immune to criticism. Alasdair MacIntyre is an opponent of the idea of rights-based morality, and in his article "A Critique of Gewirth and the Notion of Rights" he specifically focuses on what he perceives to be the flaws in Gewirth's account of equal human rights. A.J.M. Milne however finds the argument of MacIntyre specious both in its conclusions and in its methodology. It is worthwhile to consider briefly both these arguments which MacIntyre introduces in his article, before moving on to consider the history and development of human rights.

MacIntyre's problem with Gewirth's justification of human rights is that Gewirth derives the notion of rights from needs. As MacIntyre observes,

the claim that I have a right to do or have something is quite a different type of claim from the claim that I need or want or will be benefitted by something. From the first - if it is the only relevant consideration - it follows that others ought not to interfere with my attempts to do or have whatever it is, whether it is for my own good or not ... And it makes no difference what kind of good or benefit is at issue (MacIntyre, 1989: 636).

MacIntyre also rejects Gewirth's argument for the universality of rights derived in this

way on the basis of common humanity, by arguing that in the absence of a set of rules or institutions to honour such rights (defined as social goods) in all societies, then such rights factually cannot be deemed to exist (MacIntyre, 1989: 637).

Historically human rights have not always existed in this sense, and in the contemporary world, human rights do not exist universally in this sense, according to MacIntyre. MacIntyre illustrates this point by making an analogy with cashing a check: "Lacking any such social form, the making of a claim to a right would be like presenting a check for payment in a social order that lacked the institution of money" (MacIntyre, 1989: 637).

MacIntyre goes on to qualify this by exempting all positive rights (which are derived from law or custom) from his criticism of the notion of rights. He is specifically referring to universal human rights grounded in the notion of universal humanity and need. He claims, rather speciously, that there is no equivalent in language or fact in any ancient or medieval society which corresponds to the modern notion of a right. If there were such things as universal rights in these societies, then, argues MacIntyre, nobody would know what they were. For this reason, to believe in the notion of universal human rights is as facile as to believe in unicorns and witches:

The best reason for asserting so bluntly that there are no such rights is precisely of the same type as the best reason which we possess for asserting that there are no witches and the best reason which we possess for asserting that there are no unicorns: every attempt to give good reasons for believing that there are such rights has failed (MacIntyre, 1989: 637):

There are three problems which may immediately be identified with this line of reasoning which Milne's critique of MacIntyre deals with. Firstly, it is incorrect that ancient and medieval societies had no term which translates into our notion of a right - MacIntyre chooses to ignore that the Roman notion of *jus* is translated as *right* and furthermore that the Romans did have a system of law which they regarded as universal and which applied to all humans. Milne points out that the Greeks were also familiar

with the practice of promising and the institution of property which inevitably gives rise to obligations and in turn rights. In fact it would be impossible to have any social life at all in the absence of property and related promises (Milne, 1986: 6-7). Medieval philosophers were concerned with the idea of natural rights, which were the ancestors of modern human rights.

Secondly, rights are bound up with the idea of social membership. The notion of reciprocal duties, and therefore rights, is integral to one's membership in *any* society. Without this, anyone could be subject to arbitrary treatment, and if this were the case, there would be no motive for participating in society at all: "In this elementary but fundamental sense, the notion of a right is necessary for social life as such" (Milne, 1986: 7).

Thirdly, the existence of witches and unicorns is completely unconnected with questions of ethics which inform human rights discussions. As Milne observes:

Whether or not there are unicorns is an empirical question ... whether or not there are human rights, respect for which is required by universal minimum moral standard ... is a question about the implications of social life as such and whether these include such a standard. The answer turns on the outcome of an inquiry into the nature of morality and its role in social life (Milne, 1986: 7).

In fact, it could be contended that witches *do* exist, (but not in the mythical or fictitious sense to which MacIntyre is referring) and unicorns may well once have existed but their extinction does not raise normative, but rather positive questions. The existence of unicorns and witches is completely irrelevant to the issue of the normative existence of a class of moral possessions on a universal scale.

Undoubtedly human rights are not honoured universally, and frequently this is because the necessary laws and institutions are not in place, but the argument is that all humans *ought* to have their fundamental rights honoured. MacIntyre's empirical argument establishes nothing other than the fact that human rights are violated in many societies,

and this is of course particularly relevant to social and economic rights. However, to argue that these are not human rights because they are not enforced makes no more sense than saying the right to life, or the right to vote are not human rights because they too are not honoured in some places. The question which this construction begs, and indeed the major issue which is identified by the critics of second generation rights, is the *possibility* of the enforcement of social and economic rights, as if it can be shown that second generation rights *can* be enforced at some level at least, and if there is good reason to believe that they are of equal importance relative to their first generation counterparts, then this makes the case, at least partially, for second generation rights as human rights of equal status, and an adequate theory of rights therefore has to be able to take account of this. This issue is addressed in section 3.1 below.

Milne therefore disposes of MacIntyre's argument in an attempt to establish the idea of universal human rights as "a minimum standard" (Milne, 1986: 5). He begins by noting that an attempt to justify the existence of human rights, in addition to meeting MacIntyre's objections noted above, must be able to meet three objections:

- (1) Human rights, in the sense of the liberal-democratic and social-welfare rights that are usually upheld as the ideal standard, are completely irrelevant in their unattainability to most people in the world, particularly the large numbers living in the developing world.
- (2) The very notion of some "ideal standard" for universal human rights flies in the face of the reality of cultural diversity in different societies in the world.
- (3) On an individual level, the notion of human rights as "those which belong to all human beings at all times and in all places" not only fails to take account of cultural diversity, but it also ignores personal identity as rooted in society: "It presupposes homogeneous desocialised and deculturalised human beings and there are no such human beings" (Milne, 1986: 5).

Milne, in taking these into account, as well as considering MacIntyre's objections, argues that a rationally defensible idea of human rights is not that of an ideal, but rather one which sets a minimum standard. This implies that a universal moral standard

requires respect for certain rights, which are not necessarily of the liberal-democratic or modern social-welfare variety (Milne, 1986: 6). It is only if human rights are regarded in this way that they may be contextually interpreted to take account of (1) - (3) above as well as MacIntyre's objections, while still maintaining their universal status (Milne, 1986: 9).²

Universal human rights then may be regarded as the necessary goods of action, which encompass a minimum level of freedom and well-being completely independent of cultural diversity. They are moral possessions which all human beings ought to have in order to realise their agency as human beings. Freedom and well-being, as the necessary goods of action therefore imply rights that not only require non-interference if they are to be honoured, but also the right to certain things, such as food and shelter, that are necessary for basic well-being. A minimalist universal derivation for human rights, such as the necessary goods of action formula, therefore makes no distinction between and gives equal weight to both first and second generation rights, as it does not distinguish between these rights in terms of their purported positive or negative nature, or on the basis of the different objects and duties which they generate.

A final point worth mentioning in this regard before the history of human rights is examined is the conceptual link between human rights and the idea of human worth or dignity. The notion of human rights as understood by Gewirth is closely connected to the idea of human dignity, albeit that this is a necessary but not sufficient requirement for the grounding of human rights. Clearly, without a basic level of freedom and well-being, the attainment of a dignified life for a human being is an impossibility. In human

² The idea of human rights being generated by a minimum universal standard for human existence may be problematic, as it then has to be specified what this standard actually is, and in addition it has to be shown that it is truly universal. However, Gewirth's necessary goods of action formula, and Shue's conception of basic rights (which is extensively referred to in section 3.2 and 3.4 below) both seek to show how such a universal minimum standard may be derived by referring to generic features of human existence, such as agency, which would then make this standard universal, as well as minimal by definition.

rights discourse, as articulated in international human rights documents, human dignity is regarded as an inalienable characteristic which is rooted in the notion of the inherent (and equal) worth of human beings. However, as conceptions of the ideal of human dignity vary across societies, so too conceptions of what constitute inherent human rights vary too, although agency remains a generic feature of human life. Therefore "[h]uman rights are a particular social practice that aims to realize a distinctive substantive conception of human dignity" (Donnelly and Howard, 1989: 66-67) and this practice may take on different forms from place to place.

However, Gewirth's basic goods of action, freedom and well-being, while being flexible in terms of being able to accommodate subjective interpretation, are nevertheless independent of culture in so far as they are derived from a universal, generic feature of human existence. Regardless of culture and position in any society, one's essential "humanness" and dignity are compromised by imprisonment or starvation, because these then preclude agency.

2.2 A Brief History of Natural Rights Before 1945

It is necessary to put what has been discussed above into perspective. Human rights as they are understood today developed over centuries out of the idea of natural rights, and a historical backdrop must therefore precede further discussion of their nature. Such an historical examination reveals that "there have always been difficulties with the notion of universal human rights" (Vincent, 1986: 19).

Conceptions of rights have changed and developed over time, and just as they are discovered and adapted to specific circumstances, so Vincent uses the analogy of a train journey, with the train stopping at certain stations along the way, to illustrate the development of the understanding of human rights up to the present day. If the point of embarkation is natural law, then the destination is universal human rights (Vincent, 1986: 19-20).

The first station in this analogy is therefore the Greek and later the Roman understanding of the nature of a right. It is true that in ancient Greece there was no term comparable with the contemporary understanding of a right, yet this is not significant or conclusive in itself. The Greek system of laws contained an advanced notion of obligations, albeit legal ones pertaining to property. These in turn are congruent with the recognition of property rights, and "[a]lthough these are legal concepts, it is hard to see how they could fail to be paralleled by moral rights" (Pennock, 1981: 2). Therefore, the idea of rights was implicit in this system, although the understanding of the very nature of such rights may have been at variance with how such rights are understood in the present.

In addition, ancient Greek thought on ethics and justice included the notion of an ideal world against which the standards of the real material world could be measured. It is from this idea that the conception of natural law arises, as natural law constitutes a general standard common to all societies and for all time (Vincent, 1986: 21). The Romans shared with the Greeks the legal emphasis on rights arising out of the law of property and contracts, but in addition, Roman jurisprudence was concerned with the rights of citizens, such as those which entail participation in the making of laws and the running of the state. This is an important distinction, as it marks the step forward from the recognition of the rights of one individual against another to the recognition of rights against the state. In as much as this right is exercised by a special class of persons (*cives*), it nevertheless requires that such people be accorded equal status in the course of exercising such a right (Pennock, 1981: 2). This is at the root of the idea of first generation rights, and indeed by extension, human rights in general.

While neither of these conceptions of the notion of a right can properly be regarded as human rights, or even natural rights strictly speaking, nevertheless, both the Greek Stoic and Roman conceptions of law laid claim to universal application, and in this way are related and precedent to the idea of natural rights: "law implies rights and natural law implied natural rights" (Pennock, 1981: 2).

Roman law was to lay the foundations for canon law in the Middle Ages, and natural law may therefore be regarded as stemming from the branches of Roman law. Furthermore, Roman law was at that time in practice the form of law closest to being universal. Canon law raised natural law up above the other branches of the law, and "it was the law which expressed the organic unity of the whole of mankind" (Vincent, 1981: 22). This idea therefore marked the distinction between a body of universal moral law and positive law.

In opposition to this was the emerging idea of a theory of natural law based on the value and rights of the individual. The humanist thought of the Renaissance reveals the emerging importance of the individual as opposed to the community or the state. However, while humanism was based on the idea of the inherent dignity of people, the Reformation engendered the Lutheran school of thought which held people to be sinful and unworthy, and that salvation from this state was only possible through God's grace. It was these ideas which gave rise to the absolutist state, as it was regarded as a sin to resist God ordained leaders, even tyrannical ones, as these rulers were instituted a direct result of people's sin (Vincent, 1986: 23).

Ironically, the massive abuse of power to which such tyrannical rule subjected the people was to be the germ of the idea that ultimate political authority resided with the people, and from this developed the theory of the right to rebel against authority when it was not fulfilling its functions adequately. Nevertheless, duty was still seen as being antecedent to rights. It was the seventeenth century Dutch jurist Grotius who proposed that such duties and rights are reciprocal, and who is credited with transforming the law of nature into the practice of respecting the rights of others (Vincent, 1986: 24-25).

Thomas Hobbes was a contemporary of Grotius. His conception of a right, as "liberty to do or forbear" hinges on what he considered to be the most fundamental, inalienable right - that of self-preservation by any means possible. It was Locke's work however, less than a century later, that laid the foundation for modern natural rights. Locke articulated the ownership of every person in themselves, and this implied the rights to

life, liberty and property, as well as the right to resist a tyrannical leader. Most importantly, the individualism of the conception of rights of Grotius, Hobbes and Locke was one of the distinguishing characteristics of the theory of natural rights expressed and asserted by the French and American revolutions (Vincent, 1986: 25).

However, these ideas, particularly those of Locke, were to come under fire from the enlightenment philosophers. For Locke, "[r]ights represented the respect owed by ourselves and others to our nature and status as creatures of God" (Waldron, 1987: 13). David Hume in particular was sceptical of the notion of rights grounded in an appeal to nature, as he remarked in A Treatise of Human Nature that nature could no more be considered to prefer good above evil than heat above cold. The essential problem which the enlightenment identified with the Lockean understanding of the nature of human rights was that it tended to infer a normative conclusion from a positive state of affairs (Waldron, 1987: 15). At best it could be shown that respect for rights increased utility. In this regard it is significant that J.S. Mill, the arch defender of liberty, nevertheless maintained that rights are rooted in utility (Pennock, 1981: 4). The tension between these two opposing ethical approaches is examined in section 4.1 below.

The other problem with the rights theories of Hobbes and Locke which excited criticism from the enlightenment theorists was the idea of the social contract. Both factually and morally, it was impossible to show that the hypothetical contract referred to should give rise to rights - as Hume was to ask, "[w]here is the mutual agreement or voluntary association so much talked of?" and indeed how was the consent of forebears to be taken to continue to bind their descendants? (Waldron, 1987: 19).

However, it must be noted that the idea of natural rights is distinct from the idea of the social contract. While Hume's epistemological point about the problem of inferring a normative conclusion from a positive state of affairs is taken, the idea of natural rights was nevertheless to survive, as "[i]f people have certain rights in virtue of their human nature, those rights ought to be respected by the powers that be, no matter how their power was instituted" (Waldron, 1987: 20).

The social contract idea, and the idea of natural rights attendant upon it, was to survive in a Utopian form as an aspiration, replacing its former historical hypothetical context. This was what was conceived of by Rousseau in The Social Contract. Far from claiming that governments were and always had been based on consent, Rousseau was to appeal for future governments to be established in this way in the hope of "reconciling power with liberty, political authority with the moral autonomy of the individual" (Waldron, 1987: 20).

Rousseau's influence on the thinking underpinning the French Revolution, and consequently The Declaration of the Rights of Man and the Citizen of 1789 is open to some controversy. The Declaration is styled after the earlier American Declaration, but the ideas on popular sovereignty are attributable to Rousseau. However, it was the revolutionary flavour of The Declaration which was to inspire the most virulent ideological critiques of the idea of natural rights, such as those of Burke, Bentham, and Marx (Waldron, 1987: 21).

Burke's central problem with the theory of natural rights was that it tended to oversimplify by abstraction the complexity of politics. He viewed the notion of a set of natural rights as a recipe for anarchy, as

[a]gainst the "Rights of Men ... there can be no prescription; against these no agreement is binding; these admit no temperament, and no compromise; anything withheld from their full demand is so much of fraud and injustice" (Burke in Reflections cited in Vincent, 1986: 28).

The French Revolutionary construction of the idea of natural rights was therefore not only a challenge to a particular leader or political arrangement, but for Burke was a challenge to the whole of civil society (Vincent, 1986: 28).

Burke conceived of rights as being inherited laws and liberties, and rights are therefore particular, according to nationality and social position. Burke therefore contested the social contract idea of natural rights by asserting that commonwealths are not constructed, but rather that they grow. He furthermore challenged the individualism

behind the idea of natural rights, by questioning the limits of such rights to destroy the fabric of an existing social order (Vincent, 1986: 29).

Bentham's utilitarian attack on the idea of natural rights was more direct. The propositions which such rights asserted was, Bentham maintained, nonsense as it is observable that people are not born free, nor equal, and even if they were, they would not remain so. All people are born into families and social and economic structures which are based on hierarchy of position. Not only did Bentham hold natural rights to be false in this empirical sense, but furthermore such rights are inconsistent with one another. In making this observation, Bentham was raising the same concern as Burke that natural rights tend towards anarchy. Bentham therefore held that the only real rights were those which arose out of positive laws: "[f]rom real law came real rights, but from imaginary laws, such as the law of nature, came imaginary rights" (Vincent, 1986: 30). This position and the issues it raises, particularly the enforceability of positive rights such as second generation rights are perceived to be, are considered in more detail in section 4 below.

The contemporary socialist critique of human rights is beyond the scope of this thesis, but it is necessary to briefly cover the Marxian critique of the notion of natural rights, as this will contribute to laying the foundation for the subsequent discussion of the development in the twentieth century of the idea of human rights, by demonstrating the circumstances under which such a notion arose and developed.

Marx considered the theory of natural rights to be specific in its application to the time and place in which it developed. Natural rights were intended to protect a specific group of interests. Outside of their context however, natural rights could be misused to justify an unequal distribution of property (Vincent, 1986: 31). In terms of this Marxian critique of natural rights, taken out of their historical context they could be perverted to become an instrument of the strong to suppress the weak, and prevent the disadvantaged in society from articulating their interests at the expense of the advantaged. This is relevant to the question of second generation rights, as these are regarded in some

instances as laying claim to the resources of the wealthiest members of society, and are therefore condemned as being a brake on liberty. The Marxian conception of the matter therefore highlights how the prioritisation of liberal values may serve to entrench the privileges of one class in society and protect these from the rights claims of another, less materially privileged class.

Yet, in the face of such virulent criticism from across the political spectrum, the notion of natural rights survived and grew up to become the twentieth century doctrine of universal human rights. Pennock identifies two factors which brought about the resuscitation of rights dominated political discourse. The first of these was totalitarianism in the first half of the twentieth century and the repugnant treatment of humans by totalitarian governments, particularly during the course of the Second World War. This occasioned the second development in rights theory, which was the spread of democratic doctrine. After 1945 there was an increasing demand for constitutional protection of the individual in the form of bills of rights. However, as distinct from their natural rights predecessors, these emerging human rights increasingly stressed the value of equality as a democratic ideal, and positive welfare rights. The Universal Declaration of Human Rights (discussed below) was intended to encompass and articulate these new universal human rights (Pennock, 1981: 4). Thus second generation rights evolved from the increasing concern with the physical needs of all human beings as a requirement of human agency and dignity, and this only appeared on the international agenda after the Second World War.

These popular demands were in turn expressed by philosophers, and therefore ethical theory was affected by the horrors perpetrated by the Nazis and later the Vietnam War. The combined torture and genocide of these two historical forces made it clear that morality was not served by purely utilitarian or other teleological aims: "Certain things are wrong, period. And human beings have *rights* to life, to respect, to decent treatment" (Pennock, 1981: 5).

Although there is no single theory of human rights that can be identified as dominant

in terms of being widely agreed upon, and while controversy on the subject of such rights abounds, the point is that in the debate being resurrected, the importance of the idea of rights has been reasserted and the "anti-utilitarian" nature of rights has been reconfirmed. Thus while there is no hegemonic theory of human rights, it is now the generally accepted position that "a right is a claim that it would be wrong for the government to deny an individual even though it would be in the general interest to do so" (Dworkin cited in Pennock, 1981: 5). This position came about as a result of the development which the doctrine of human rights underwent after 1945. However, human rights, because they are universal, generate universal duties, and are not just rights held against the government of one's own state. Thus the increasing urgency of the levels of physical privation suffered in many parts of the developing world, in terms of this thesis, have massive implications for obligations of international justice.

2.3 The Development of Human Rights After 1945: Three Generations of Rights and the UDHR

The 1945 London Charter, agreed to by the United States, the Soviet Union, the United Kingdom and France, provided for the establishment of an international military tribunal to try the Nazi leaders for crimes against humanity. The Nuremberg Trials which were the result of this were the first of their kind, as crimes against humanity had never before been recognised in international law. The only other such tribunal held since were the Tokyo Trials which tried the Japanese war leaders at the end of World War II for similar crimes against humanity (Dugard, 1994: 199-200).

Although these tribunals have been severely criticised from both a legal and a moral point of view, as "the judges were appointed by the victors to try the vanquished" these trials were nevertheless to have a great impact on the development of human rights in international law. In 1946 the General Assembly of the United Nations approved without dissent the principles of the London Charter and the judgment of the Nuremberg

Tribunal, and it was from this (G.A. Resolution 95[1]) and the United Nations Charter, that the Universal Declaration of Human Rights (UDHR) of 10 December 1948 (G.A. Resolution 217A[III]) was to stem (Dugard, 1994: 200).

In 1946, the Economic and Social Council to the United Nations appointed a Commission on Human Rights which was charged with the task of drafting an International Bill of Rights, which was to consist of a declaration and a multilateral treaty. The drafting of the UDHR was the first move towards completing this task (Dugard, 1994: 204).

It is significant to note that the UDHR was adopted by the General Assembly with 48 votes in favour and no dissenting votes, although there were 8 abstentions - South Africa, Byelorussia, Czechoslovakia, Poland, Saudi Arabia, Ukraine, Soviet Union and Yugoslavia. This would seem to indicate some kind of general ethos regarding the existence of fundamental human rights (Pennock, 1981: 5; Dugard, 1994: 204).

The UDHR proclaims first, second and third generation rights, but all are declared in aspirational language. This is of great significance as it contradicts the Proclamation of Teheran of 1968 which declares all the rights in the UDHR to be universally acknowledged. The preamble to the UDHR begins: "This Universal Declaration of Human Rights [is] a *common standard of achievement* for all peoples and all nations ... [all] shall *strive* by teaching and education to *promote respect* for these rights and freedoms ..." (my emphasis) (Dugard, 1994: 204; Harris, 1991: 604).

The inclusion of all three generations of rights in the UDHR is something in the nature of a compromise, and a compromise which in itself casts doubt on the universal nature of all the rights in the UDHR. The "first generation" of rights are civil and political rights, which in western political thought (stemming as it does from the natural rights philosophy) are considered to be the only real universal human rights. The "second generation" of rights are the economic and social rights which are regarded in western liberal thought as "societal goals" rather than actual positive rights. The third generation

of rights has gained increasing ascendancy since the 1970s and are most commonly articulated by the developing states, as they express collective cultural interests (Harris, 1991: 601).

Before this, and in the UDHR, they were simply grouped under the second generation rights, and they are also grouped together in this way in the international covenants discussed below, but for reasons of convenience and conceptual clarity, they are considered as a separate group of rights throughout this thesis. The primary focus of this discussion is the status of second generation rights, and it is therefore in the interests of accuracy that economic and social rights are isolated and examined separately from the third generation collective rights, although it is acknowledged that there is some overlap between these categories.

Nevertheless, it took the better part of 20 years to reach any consensus on the details of what each of these generations of rights should be taken to include. In 1966, the UN General Assembly adopted two international covenants each dealing with a different subset of rights: civil and political, and economic, social and cultural rights. It took another 10 years for the required number of countries to sign and ratify each of these covenants in order to bring them into force (De Kadt, 1980: 97).

In spite of the specious optimism reflected by the Teheran Conference, "[i]deological differences between East and West made it impossible to produce a single multilateral treaty giving legal effect to the Universal Declaration" (Dugard, 1994: 206). To overcome this difficulty, two covenants were drafted, one dealing with first generation rights, and one dealing with second generation rights. The International Covenant on Civil and Political Rights (ICCPR) articulates first generation rights, while the International Covenant on Economic, Social and Cultural Rights (ICESCR) is expressive of second generation rights (Dugard, 1994: 206-209).

It is often considered that the rights contained in the ICCPR are negative in nature, requiring mere forbearance on the part of the state and all others, and are therefore

capable of immediate implementation. On the other hand, it is held that the rights expressed in the ICESCR are positive rights, requiring active implementation on the part of the state, in some cases at great expense to the state, and that for this reason they are frequently regarded as aspirational. Because of this widely held opinion, states who are parties to the ICESCR are not required to honour the rights in the covenant immediately they have ratified it, as they are in the case of the ICCPR, and they are only expected to honour such rights in so far as they are able to according to their level of development (Dugard, 1994: 210; De Kadt, 1980: 98).

Consequently, the first generation of rights are often seen as being primary, or rather civil and political rights are regarded as universal human rights, while the idea of economic and social rights is regarded as a misnomer, as they are considered to be more in the nature of a standard which should be aspired to, but should this standard not be achieved no violation of rights has occurred. Section 3 of this thesis challenges the distinction between the two classes of rights on the basis of the classification of rights as either positive or negative, as well as on the basis that either class of right is more important in terms of meeting the demands of human agency and dignity.

In conclusion it is worth mentioning one further development in the practice of human rights since 1945. This is the existence of the regional human rights conventions which have been ratified in various parts of the world. Unlike the UDHR, these regional conventions have a stronger influence on their signatory states, and are therefore to some extent more powerful instruments of international law pertaining to the enforcement of human rights. The most significant of these is the European Convention on Human Rights which is binding on the municipal law of its member states. Also of great importance is the American Convention on Human Rights, and since 1986 the African Charter on Human and People's Rights. These regional developments in the international law of human rights are worth noting, as different rights are stressed in different parts of the world. Consequently, social and economic rights are more pressing in the developing world than in the developed world, but because of the primarily western genesis of universal human rights, there may be imperialist reasons for

regarding this class of rights as secondary. Furthermore, because of the regional nature of such conventions, they are

likely to be more successful than their universal counterparts because political and cultural homogeneity and shared judicial traditions and institutions within a region provide the basis for confidence in the system, which is necessary for effective implementation (Dugard, 1994: 218-219)

and this has inevitable implications for the asserted universality of human rights.

The significance of covering the historical development of human rights in the twentieth century from their roots in the natural rights tradition, is that in comparing the purported practice of such rights with the theory surrounding their implementation, it is hoped that some insight may be gained into what may be considered to be universal human rights. These would have to be held up to harsh light of the reality of the conditions of existence of the majority of the world's population, and if they are to meet the standard of universality, there must be some standard of fundamental importance which they must meet. How this standard is to be determined is considered in section 3 below.

Furthermore, the question of the enforceability of what are considered to be human rights has to be addressed, and it is intended to show that first and second generation rights are of equal status in this respect too, as both classes of rights may be regarded as both positive and negative, in that both require both forbearance in some instances and a commitment of resources in others if they are to be exercised. Furthermore, it is argued, both classes of rights must therefore be regarded as minimal in content if their enforcement is to be a realisable aim, and Henry Shue's basic rights construction is used to illustrate this particular hierarchy of rights that is not "class conscious" in so far as distinguishing between different classes of rights is concerned, but which serves to place limits on what are properly regarded as universal human rights in terms of the universal obligations which they generate.

3. THE STATUS OF SECOND GENERATION RIGHTS

In recent years, the locus of the debate on human rights has shifted to focus on the status of second generation social and economic rights. The difficulty in assessing the importance of this class of rights is that there is the perception of a dichotomy between these rights and those of the first generation, the civil and political rights. Social and economic rights are regarded by some rights theorists as not being human rights *per se*, but they are rather regarded as aspirations or goals not actually giving rise to identifiable duties and obligations. As a result, there are a number of arguments which pertain to the enforceability and justiciability of second generation rights.

This section seeks to challenge the perception that civil and political rights are of more importance than social and economic rights, and to argue that the second generation of rights are of equal consequence, and thus deserve equal status in terms of their enforcement. This section also examines the distinction made between positive and negative rights which is sometimes invoked to argue for or justify the logical priority of the first generation of human rights. It will furthermore explore the notion of the interdependence of human rights, which suggests that the attainment of the first generation of rights depends on the existence of the second, and *vice versa*, in support of the contention that these rights are of equal status.

Section 3.1 examines the current status of second generation rights and emphasises their comparative importance in the international human rights dispensation. This is done by examining the argument that civil and political rights are the only human rights that are justiciable and enforceable, and assessing the problems with this argument. The focus then moves to the relationship between needs and rights, with special attention paid to the basic rights argument of Henry Shue in section 3.2. Shue's theory is given special emphasis as it illustrates and supports the argument for the minimum content of human rights which is central to this thesis. Shue also clearly demonstrates the interdependence of first and second generation rights as basic rights, and thus

lends further weight to the argument that these rights are of equal status at a minimum level.

Section 3.3 considers the universal obligations approach articulated by O'Neill (in a Kantian formulation) and Singer (in a utilitarian formulation), followed by a re-examination of Shue's argument from the perspective of duties in section 3.4. Shue's position, it is submitted, is able to support the argument for fundamental universal human rights of both the first and second generation most adequately.

3.1 The Comparative Importance of Second Generation Human Rights

In 1941, President Roosevelt in his address to Congress, identified freedom from fear and freedom from want as two of the four main freedoms for which all humans and all societies ought to strive. This address gave rise to a lively debate which continues into the present as to the nature of freedom, and by extension the nature of a right (Morphet, 1992: 74). Although the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both of 1966 are in force, the realisation of the rights enshrined in these covenants is not a reality for the majority of the inhabitants of the earth. Particularly in the case of the ICESCR, the physical privation suffered by millions of people in the world today seriously brings into question the viability of second generation rights.

It is necessary to be clear about what is at stake, and therefore some definitions of second generation rights will be covered, and the objections to them considered. This is intended to give an overview of their philosophical and legal status, which is linked in turn to the question of their justiciability.

R.J. Vincent gives this brief description of social and economic rights:

Economic and social rights include the right to work and for a just reward; the right to form and join trade unions; the

right to rest and leisure, and to periodic holidays with pay; the right to a standard of living adequate to health and well-being; the right to social security; the right to education; and the right to participation in the cultural life of a community (Vincent 1986: 11).

This definition however includes social and economic rights which may be regarded as non-basic, which casts doubt on the notion of second generation rights in terms of their viability in a practical sense, and in terms of their existence as human rights in a theoretical sense. Szymanski considers basic economic rights to consist of the right to food, secure employment, a "viable" living standard, access to economic decision-making, health care, education, adequate and affordable shelter, and retirement and disability benefits (Szymanski, 1984: 128).

This is a better definition because it is more specific, but it is still not clear why these should be rights and not goals. Raymond Plant refers to second generation rights as "welfare rights" (Plant, 1992: 22) which suggests that these are goods which are required in order for a decent, or even a dignified lifestyle to be attained in a climate of political equity, but this still does not capture the essence of why these should be regarded as human rights.

This thesis has argued that human rights are by definition minimal in content. If this were not so, the result would be a completely unmanageable rights "inflation" which would prevent *any* right from being effectively exercised (Gewirth, 1996: 55). The necessary conditions of action formula of the Gewirth referred to in section 2.1, and the basic rights theory of Henry Shue referred to in this section support this position and set the parameters of what may properly be included in the category of fundamental human rights. Thus it is only what is basic or fundamental in this sense that ought to be regarded as deserving the status of a human right and this applies equally to first and second generation rights. Thus for the purposes of clarity, the social and economic rights which are being defended by this thesis may be regarded as the following, which are what Shue considers to be necessary to meet the requirements of subsistence: "unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter,

and minimal preventive public health care” (Shue, 1980: 23).

By defining social and economic rights as narrowly and specifically as this, it is possible to assess more effectively some of the more common objections to second generation rights, such as the limitless inflation of such rights as positive rights, and their unaffordability which strips them of their rights status on the basis that there cannot be a right to what it is impossible to attain. Furthermore, it is also possible to evaluate whether these then deserve their status as basic rights in terms of either fundamental rights formula, the necessary goods of action of Gewirth, or the basic rights of Shue, and so it may be made clear why second generation “rights” in this context deserve the status of human rights at all. With this specific and narrow definition in mind, objections to the notion of second generation rights may be addressed directly, and the categorical distinctions which are asserted to exist between these and rights of the first generation may be more effectively assessed.

The critics of the idea of second generation human rights are numerous, and many of these critics are defenders of first generation rights as negative rights or as values which uphold liberty. This sets up an interesting contrast, and in many instances permits of some ironic conclusions. It is most logical to address some of the most common criticisms of social and economic rights at the outset, and then move on to consider their importance, and the problems with them, in context.

Maurice Cranston is a fervent opponent of the idea of social and economic rights as being of equal status compared with civil and political rights in the overall human rights equation. He considers the concept of human rights to be philosophically “muddled, obscured, and debilitated” by the inclusion of second generation rights on an equal footing with first generation rights (Cranston, 1973: 65).

Cranston uses the idea of the purported universality of human rights and the ease or difficulty of converting human rights in the abstract into positive rights in practice to discredit the notion of second generation rights as equally important on the scale of

human rights. However, this argument is severely flawed, and it contradicts many of the points on human rights which Cranston makes elsewhere in his book. By the end of the chapter, Cranston seems to be advocating some sort of system whereby the property rights of the wealthy are protected against the right to subsistence of the poor, and this then leads logically into Shue's discussion on basic rights which is considered below.

It is questionable in light of this conclusion whether Cranston is discussing a conception of human rights at all, because it seems as if the mere difficulty of enforceability as a criterion for the exclusion of particular rights from the calculus could well have startling implications for the notion of first generation rights too. Cranston's argument thus needs to be examined in some detail as it also raises the integral related issue of the idea of positive and negative rights, which opens the door for a comparison of this dichotomy in relation to the perceived dichotomy between civil and political, and social and economic rights. It is necessary to examine each step of Cranston's argument in order to assess its validity.

Cranston holds that "traditional" civil and political rights qualify as human rights. These are rights such as the right to life, the right to political participation, the right to a fair trial, and liberty. Cranston raises two objections to including economic and social rights in the category of universal human rights. Firstly, there is the philosophical objection that "the new theory of human rights does not make sense" and secondly there is the political objection that "the circulation of a confused notion of human rights hinders the effective protection of what are correctly seen as human rights" (Cranston, 1973: 65).

Cranston claims that the second generation human rights that are asserted are not universal human rights at all. Civil and political rights may, he claims, easily be honoured as "[a]ll that is needed [for this to come about] is an international court with real powers of enforcement" (Cranston, 1973: 66).³ Economic and social rights, argues

³ Ironically, the difficulty of establishing such a court in terms of material and moral resources would rule it out as being unenforceable on the basis of the same criteria Cranston uses to exclude social and economic rights from consideration.

Cranston, present insurmountable difficulties of enforcement which serve to strip them of their status as human rights (Cranston, 1973: 66).

Cranston expands on the problem of the enforceability of second generation rights by presenting the difficulty of where the duty of honouring such rights lies. He gives the example of the duty to rescue a drowning child, and argues that while one is morally obliged to save the child if one can (that is if one is able to swim oneself and if one is in the vicinity and not on the other side of the world) one cannot be considered to bear such a duty if it is impossible to fulfill. Therefore, a right which demands holidays with pay for everyone is absurd because it is impossible (Cranston, 1973: 66).

Now undoubtedly this is true, but it also evades the issue. It raises questions about what is possible and what is not, and if one is to apply the converse of Cranston's argument one would have to infer that what is possible implies a moral obligation. So if one can conclude that it is possible to feed every person in the world, then one would be duty bound to do so, and therefore nutrition would be a universal human right, in a way in which holidays with pay is not. Vincent has observed that Cranston makes out his case for the priority of civil and political rights by comparing more important liberty rights with less important economic rights, and this is "no more valid than choosing a very bright yellow and a very dull red to demonstrate that yellow is brighter than red" which completely discounts the fact that "starvation is quite as much a threat as violence" (Vincent, 1986: 12).

Cranston goes on to assert that economic and social rights cannot be secured by legislation as civil and political rights can, as these are properly regarded as rights against the government in the way that, for example the right to work, is not (Cranston, 1973: 66). It is worth mentioning as an aside that the right to work *is* a right that can be enforced against the state in some countries,⁴ so on this score too, Cranston's

⁴ See Szymanski (1984: 5; 137-140) on the state's responsibility to provide employment in the former Soviet Union and the People's Republic of China.

argument for the universality of first generation rights only on the basis of practicability falls apart.

Cranston also argues that for a state to be expected to provide social security and for this to be regarded as a legal duty of the state, the government must have access to capital resources which many countries in the world do not, and it is therefore an impossibility to expect the enforcement of second generation rights in such countries (Cranston, 1973: 67). However law courts, regular elections and security also require that the state has access to resources and Cranston regards these as being universal first generation rights, which the government bears the duty of enforcing.

Furthermore, Cranston has smuggled into his argument the assumption that human rights are only enforceable against the government of one's own state. However it seems that one of the facets of the idea of universal human rights is a universal duty to enforce such rights, otherwise they are reduced to the status of legal positive rights and take on an entirely relativist character. This appears to contradict Cranston's introductory statement which describes human rights as being derived from natural law and natural rights or "the rights of man" (Cranston, 1973: 1), and it also runs counter to his purported aim of showing that human rights, those of the first generation at least, are universal.

Cranston also claims that second generation rights do not meet the criteria of universal human rights as they fail the test of "*paramount importance*" which he claims is passed by first generation rights, and which give rise to corresponding paramount duties: "It is a paramount duty to relieve great distress, and it is not a paramount duty to give pleasure" (Cranston, 1973: 67). Quite so, but it can be argued that to starve is to be in great distress, in which case, on the strength of Cranston's own claim, the second generation right to basic nutrition is a universal one with a corresponding universal duty to its provision.

When Cranston makes this point by using the following example of "paramount

importance" he is actually contradicting the basis of his argument: "Common sense knows that fire engines and ambulances are essential services, whereas fun fairs and holiday camps are not" (Cranston, 1973: 67). The provision of fire engines and ambulances, which Cranston here claims to meet the requirement of paramount importance, will fall under the fulfilment of social and economic rights, and therefore this example suggests that Cranston is actually arguing for universal *basic* rights, and not civil and political rights at all. Furthermore, nowhere has it ever been asserted that there is a universal right to funfairs and holiday camps, so the comparison between these two kinds of goods serves no other purpose than to weaken Cranston's attempt at justifying the sole existence of first generation rights as universal human rights.

Cranston also provocatively states that "[t]o deny that the 'economic and social rights' are the universal moral rights of all men is not to deny that they may be the moral rights of some men" (Cranston, 1973: 69). The gist of this argument is that wealthy people in wealthy states are perfectly entitled to the fullest satisfaction of their material needs, while there is no injustice in the starvation of the poor in poor states. This peculiar relativist twist of Cranston's applies only to economic and social rights, and not civil and political rights. It would be an injustice to have a full stomach and no freedom of speech, but conversely no moral right is violated when freedom of speech is accompanied by starvation, according to Cranston's case for universal liberty rights.

These are the most obvious problems with Cranston's defence of first generation rights as having the exclusive status of universal human rights. However, it still remains to be established that second generation rights are entitled to this status, and having established this, which second generation rights meet the criteria must also be considered.

Dilys M. Hill is concerned with two aspects of the controversy surrounding second generation rights and their realisation:

First, there is the alleged inherent difficulty in asserting that these concerns can in fact claim the status of rights.
Second, and relatedly, there is the issue of whether they

are justiciable, that is, can they be the subject of adjudication and enforcement? These two problems are inextricably intertwined (Hill, 1992: 1).

Hill observes that there is a distinction made by many commentators, particularly jurists, between realizability and striving towards realisation. This distinction is used to distinguish between a right which is or ought to be immediately realisable, and between desirable goals which are the objects of policy (Hill, 1992: 1). The former is the province of first generation rights, the latter the province of second generation "rights" which in terms of this view of human rights are not regarded as human rights at all.

The root of these objections lies in the claims to universality which are made on behalf of human rights: "Rights theorists claim that there are basic and universal features of human life which can be recognised as existing within any moral, ideological or religious framework" and thus independently of the specifics of a belief system, certain rights are universally recognised. Two criteria must be fulfilled in order for the basic features of human life which give rise to human rights to be identified: the first criterion is universalism and the second is moral relevance (Hill, 1992: 2).

Hill notes that critics of second generation rights would argue that all that agency as a universal feature of human life would require for their fulfilment is for humans not to interfere with one another. Agency is made possible by a mere absence of coercion, and no claim to social and economic resources is implied by human agency, and therefore second generation rights cannot be regarded as universal human rights in the same way that the first generation "liberty" rights are (Hill, 1992: 2).

The reasoning behind this position is that the claim to resources which second generation rights imply, must be considered in light of the scarcity of such resources. First generation rights on the other hand are regarded as "negative" rights which merely demand forbearance on the part of others in order to be honoured, and they are therefore "costless" in the sense that there is a vast difference between refraining from killing and providing the material means of life in the case of the right to life (Hill, 1992:

3).

However, both classes of rights have to be regarded as requiring scarce resources for their fulfilment, as the establishment of a judiciary to enforce the first generation right to a fair trial may be just as costly in terms of material resources as building schools and training teachers to enforce the second generation right to education. In this sense, “[b]oth negative and positive rights are matters of scarcity and if categorical judgments can be made about negative rights, regarding them as justiciable, then the same must be true of other rights” (Hill, 1992: 3).

However, as Hill points out, this still does not answer the other criticism, that negative and positive rights are morally of a different kind, as acts and omissions morally have different requirements. Theorists who cleave to this criticism argue that rights (of the first generation negative variety) and benevolence (of the second generation positive variety) may be distinguished from one another in that the former are justiciable and the latter are not. Benevolence can never be enforced, as to do so would be to place an unbearable burden on those who bear the duty of honouring the corresponding rights, while rights, in their negative formulation, are justiciable in this sense. Only if someone has specifically contracted to fulfill a positive duty can there be considered to exist a positive right entailing a claim on the resources of the contracting party (Hill, 1992: 3-4).

However, those who argue for the existence of second generation rights assert that the existence of such a contract is irrelevant to the question of causation. If someone, as a result of inaction, causes the violation of a right, then they are causally responsible.⁵ Therefore such positive duties do exist, and consequently both first and second

⁵ Hill (1992: 4), argues that responsibility for outcomes which could have been prevented exists independently of whether there is a contractual basis for the right. So, “the death of a child that could have been saved” is the infringement of a positive right as there is *causal* responsibility (in the sense of a direct link) between the inaction and the death of the child, and it would be difficult to explain how this responsibility could morally be evaded. (See also Gewirth 1996: 34). The breakdown of the distinction between positive and negative duties is dealt with in section 4 below.

generation rights may be recognised as the same “species” of moral goods. If this were not so, the outcome would be that it is “apparently more acceptable to die of hunger than to be shot” (Rehof cited in Hill, 1992: 4). Alan Gewirth has also argued that this distinction may be morally irrelevant depending on the circumstances, because if one is able to save someone from dying, and does not do so, rather than actually killing them, it is unclear why the latter action is immoral and the former is not. Therefore, under *these* circumstances “the distinction between the duty to refrain from interfering and the duty to provide active assistance makes no moral difference” (Gewirth, 1996: 34).

Nevertheless, some theorists who argue for universal social and economic rights hold that people have a quasi-contractual relationship with one another, as all humans share the capacity for rational agency and share the “passions of sympathy.” Thus even in the absence of an explicit contract, all humans have a positive duty to act and to commit resources to the protection of rights, and in principle this duty is no different from the negative duty of forbearance which applies in the case of negative rights:

Judgements have to be made about the commitment of resources to protect rights. And this is true for both negative and positive rights. The resources needed may be much higher in the former than in the latter case, but this does not mean that there is a difference of principle between the two as negative rights theorists claim (Hill, 1992: 4).

Raymond Plant is also interested in the idea of the justiciability of second generation rights, and expands on Hill’s argument in discrediting the negative rights position. He argues that there is no “sharp contrast” between first and second generation rights on this basis, by taking the “liberal view” that if civil and political rights are justiciable, and if there are not categorical differences between these and social and economic rights, then in principle, the latter are equally justiciable. His argument turns on whether these purported categorical differences between the two generations of rights can be shown to exist or not (Plant, 1992: 22). Plant’s methodology is to use Gewirth’s necessary goods of action human rights formula (discussed in section 2.1) to assess the relationship between positive and negative rights and their corresponding duties.

Plant constructs the liberty argument which is used to support the notion of civil and political rights as having the exclusive status of human rights, and then he probes the implications of this by inquiring into the "worth of [such] liberty" in Rawlsian fashion, as "while agency, autonomy and liberty are universal and necessary preconditions for any moral code, they do not imply any welfare rights" (Plant, 1992: 27). As Plant observes, the reason that liberty is valued, is that freedom from coercion or interference means that a person is able to do what they wish to do: "In this sense the idea of ability, of being enabled to do more things, enters into the justification of the worth of liberty" (Plant, 1992: 27).

The worth of liberty in this sense depends as much on material resources as it does on non-interference, and this would imply that if people are to be regarded as moral equals, which the equal right to non-interference suggests, then there must similarly be a right to those resources which would result in equal worth of liberty for all people as moral equals. In this manner, an argument can be made out for second generation rights of equal status to their first generation counterparts, because, as Plant observes, if one accepts an equal right to liberty, then

there is no clear reason why this should only be defined as an equal basic liberty to be free from coercion, as opposed to an equal right to those basic resources which are necessary for individual agency and which will secure an equal basic value for liberty between individuals (Plant, 1992: 28).

This same argument in support of the equal status of second generation rights can be reformulated by a needs approach. Although this is discussed in more detail below, Plant's basic needs argument is of some relevance here, as it applies specifically to the requirement of human agency. As Plant observes, the satisfaction of basic needs is the *sine qua non* for any action at all, as without basic physical survival, there can be no question of agency, and in this sense positive material rights are even more integral to the whole question of agency than liberty rights, and these are independent of culture and specific morality (Plant, 1992: 28-29).

However, "there is more to the physical needs of agency than mere survival - agency must also include some element of a worthwhile life or physical well-being" because if a person's whole effort is concerned with attaining the means of survival, then there can be no question of the pursuit of "a life of rational agency" (Plant, 1992: 29). Therefore, a person requires not only the negative right to non-interference, but also the right to those resources commensurate with both basic survival and well-being: "Hence, food, shelter and health care of a sort relevant to and effective in a particular society would constitute basic goods of agency" as would "other kinds of basic goods such as education ... needed to sustain a capacity for agency, choice and effective functioning" (Plant, 1992: 29).

It must be added that the securing of these basic resources equally to all people as a necessary condition for the securing of the right to freedom is not with a view to providing the freedom to do any individual thing. Rather, these are the basic conditions which are necessary for a person to go on to do anything at all, and thus subsequent specific goals (in terms of what a person wishes to do as a rational agent) can only be attained if these conditions are met (Plant, 1992: 29). In other words, these conditions are the necessary but not specific conditions for any rational life plan.

Plant also challenges the objection to second generation rights that they are impracticable because they place impossible demands on scarce resources. Undoubtedly, say the critics, it would be a good thing to provide the basic resources outlined above, to every individual, and undoubtedly this would secure the equal exercise of freedom far more effectively than the mere enforcement of negative rights. However, this is an impossible goal, and to attempt to fulfill it, would be to limit the exercise of negative freedom, and therefore, the lesser of two evils is the goal of the universal enforcement of negative, civil and political rights. Another way of making this point is to state that positive rights have limitations that negative rights do not: "If I am left alone, the commodity I obtain does not seem to be a scarce or limited one. How can we run out of people not harming each other, not lying to each other, leaving each other alone?" (Fried cited in Plant, 1992: 30).

These are valid points, and an argument which asserts the existence of positive rights, and in this context the existence of welfare rights, has to meet these objections. Firstly, it has to be shown that negative rights and positive rights may sometimes require an equally costly commitment of resources in so far as their enforcement is concerned, and secondly the problem posed by the distinction between acts and omissions in relation to preventing harm has to be dealt with. In Plant's example, a positive right to life could imply a right to a dialysis machine for someone with a terminal kidney disease, and this has utilitarian implications which may confuse the question of universal human rights (Plant, 1992: 31).⁶

The first objection is disposed of quite simply:

Negative rights are not costless because the appropriate amount of forbearance may not be present and will require legislation which is not costless, and sanctions, police, law courts, prisons, to secure the appropriate degree of compliance with forbearance and abstinence from action (Plant, 1992: 31-32).

In this sense then, a scarcity of motivation implies as costly an enforcement process as a scarcity of material resources, and on this count, negative rights too are susceptible to a utilitarian calculation which may undermine the basis of human rights (Plant, 1992: 32).

However, this raises the further objection that there are inevitable limits to the costs of enforcing first generation rights, while this is not necessarily so in the case of second generation rights. Therefore it is necessary to be clear about the minimalist conception of human rights which is being argued for, as this will serve to place reasonable restrictions on the cost of the enforcement of both classes of human rights. Alternatively, one could show that these purported limits on the costs of enforcing first generation rights do not exist as is claimed. For example in South Africa, a seemingly

⁶ This problem of rights in conflict at the level of their enforcement is dealt with in section 4.2 below.

unlimited amount of public revenue is spent on attempting to shore up the ailing justice system, which is intended to give effect to a number of first generation rights. If the enforcement of first generation rights is really constrained in terms of costs, then this seeming anomaly needs to be explained by its advocates. This problem will be dealt with in more detail below when Shue's duty based analysis is considered.

Critics of positive welfare rights refer to a further difference between these and civil and political rights in attempting to establish why the former are disqualified from the category of human rights. They maintain that the locus of the duty of honouring such rights is vague and undefined, because the objects of such rights are also unclear. It is argued that in the case of negative rights, the duty of forbearance is easily understood, and can be incumbent upon all others. Not so in the case of, for example, education as a universal human right. On the one hand, it is difficult to specify exactly what such a right implies, and on the other, whose duty it is to enforce such a right is equally unclear (Plant, 1992: 34).

This is related to "the categorical moral distinction between killing and letting die" mentioned above which distinguishes between duties to act and duties to omit. However, as Plant points out, the duty implied by negative rights is the duty not to harm, and therefore if harm results as a result of one's omission, then surely positive duties, and consequently positive rights are implied as well (Plant, 1992: 38). If one is in a position to prevent starvation, but fails to do so, then this violates the duty not to harm. Once again, this relates to Gewirth's argument that under these circumstances (where one can prevent harm) then morally the distinction between killing and letting die is of no relevance (Gewirth, 1996: 34). Furthermore, if it is conceded that starvation is not an inevitable and inescapable feature of the international economic order, Plant's construction then lends weight to the viability of both first and second generation universal human rights with a minimum content.

Julia Hausermann is also a critic of the idea of first generation rights exclusively as universal human rights. She comments on the fact that the idea of human rights implies

that they are inherent in every person, and are a function of the human dignity which accrues to every person at their birth. She goes on to remark that although human rights are sometimes confirmed by instruments of positive law, this is not whence they are derived - human rights precede law:

Human rights are not granted by any authority or government, but are derived from the essential nature of humankind. They are not limited to civil and political rights, such as freedom from torture and physical oppression, or the rights to freedom of conscience, thought and belief. *Human rights include economic, social and cultural rights such as the fundamental rights to adequate food, shelter and other necessities for life and dignity* (my emphasis) (Hausermann, 1992: 48).

Hausermann goes on to examine where the duty of enforcing such social and economic rights lies. She observes that the fact that these rights have been incorporated into many international human rights instruments, such as the UDHR and the ICESCR, which are binding on states parties, suggests that "ensuring social welfare is part of government responsibility" (Hausermann, 1992: 49). This of course raises the objection (by Cranston most notably) that second generation rights in this sense can never be anything other goals or aspirations, and that in any case, they are of a less fundamental nature than the civil and political rights. It is only these first generation rights which a government can properly be regarded as bearing the duty of honouring, as it is maintained that this is done by the government restraining themselves in the use of their power. Because the duty is one of forbearance and not commission, it can reasonably be required of any government, while the enforcement of second generation rights which, it is argued, imposes positive duties, may place an untenable burden on a government (Hausermann, 1992: 50).

Hausermann makes a very cogent point by arguing that economic and social power, as well as political power, has to be wielded with restraint by governments. In this sense, economic and social rights are as fundamental as civil and political liberties, requiring similar duties of forbearance: "It is equally essential that economic or social power should not be permitted free reign to dispossess the less fortunate of the ability to feed

and clothe themselves, nor should it be allowed to obstruct them in their attempts to gain education or employment" (Hausermann, 1992: 50).

Hausermann's central argument is that the two "branches" of human rights (civil and political, and economic and social rights) are of equal status and importance. Both of these classes of rights are essential to the life and dignity of a human being, and both need to coexist in an interdependent manner for human rights as a broader social goal to be attained. She also remarks that owing to cultural diversity, there is more than one way in which such an aim can be pursued, provided that first and second generation rights are recognised as being of equal importance (Hausermann, 1992: 53-54).

Hausermann is sensitive to the criticism to which such a conclusion exposes her that this is desirable, but impossible. It can be argued, as Hausermann does, that "the obligations of states to ensure economic, social and cultural rights should be interpreted as including a prohibition of any action which violates or negates rights or creates an obstacle to the enjoyment of these rights by its population or a section of the population." However, even though this negative duty would be relatively easily fulfilled, in reality this mere forbearance would be insufficient and would fail to alleviate the material suffering in many parts of the world, particularly the developing world (Hausermann, 1992: 54-55).

For this reason she adopts the idea of transnational duties to honour human rights. This notion will be considered in more detail below when the arguments of Shue, Singer and O'Neill are examined, however, it is interesting to note in this regard that

[t]he cost of providing shelter, education, health care and social services to the world's poor has been estimated at US\$ 4.5 billion per annum. It is a massive sum, but roughly the same figure that the world spends on arms in just two weeks. This obscenity denies one fifth of the world's population their fundamental human rights to survive and live in human dignity (Hausermann, 1992: 57).

Figures such as these pose a serious challenge for those theorists who seek to discredit the notion of universal second generation rights on the basis of the

impossibility of their enforcement.

Before dealing with the relationship between needs and rights, particularly the notion of basic rights, and how these are related to the human rights dichotomy, it is useful to consider Wojciech Sadurski's discussion of three objections to the idea of second generation rights and the problems with them. His article, "Economic Rights and Basic Needs" (in Sampford and Galligan, 1986: 49) serves as a link between this section and section 3.2, as it has been commented on elsewhere that it is the contention of this thesis that universal human rights are minimal in content, but derived from both generations of rights.

Sadurski notes that "the right to a minimum subsistence" is far from an established right in both the philosophical and political communities in many parts of the world. He uses a basic rights argument to discredit those theories which wish to divorce second generation rights from the rest of the human rights family. He assumes that every person has basic needs, and that without the fulfilment of these, they can neither live nor act in the sense of participating in their society. In addition to this, he assumes that these basic needs are the same for everyone as they are "grounded in regular features of human life" and so it is possible to assess the minimum level at which such needs should be satisfied (Sadurski, 1986: 50).

In order to establish that basic needs give rise to basic subsistence rights, Sadurski considers the major criticisms of the idea of second generation rights, and proposes counter arguments to these. He challenges the ideas of the absoluteness of rights, negative duties and side constraints, and impracticability which are used to discredit the idea of basic subsistence rights, and in doing this he shows how these rights are as basic and universal as some of those which are considered to be civil and political rights (Sadurski, 1986: 50-51).

Sadurski notes that in the classic Nozickian conception of rights, the idea of rights derived from needs is challenged on the basis that such "rights" would violate existing

rights, such as the right to property. Therefore, such rights are not really rights at all, as "[n]o one has a right to something whose realisation requires certain uses of things and activities that other people have rights and entitlements over" (Nozick cited in Sadurski, 1986: 51). This argument contains the assumption that rights can never come into conflict with one another, as if this were to occur, one of the rights being asserted would not be a right at all.

However, it can be argued that an adequate theory of rights can take account of a conflict of rights, thus challenging the purported absolute nature of even the most fundamental rights. Furthermore, even liberty rights as Nozick defines them may come into conflict with one another, and yet this in no way detracts from their content as rights. The example which Sadurski uses to illustrate this is the conflict between the right to freedom of speech and the right not to be slandered (Sadurski, 1986: 52). Both of these are first generation, negative rights, and both would be acknowledged by critics of second generation rights such as Cranston and Nozick to be human rights which are absolute and inalienable, and yet the two frequently come into conflict with one another:

The hierarchy of rights chosen depends on a particular hierarchy of values, but the suggestion that if one right is effectively overridden by another, then the first one is something less than a 'right' is not justified. Rights correspond to protected interests and, since interests have to be balanced against each other, the exercise of various rights will involve balancing in cases of conflict. It is commonplace that we must sometimes place limits on the exercise of one right in order to make the application of another right possible, and this is a notion which can be perfectly well accommodated in the general framework of a theory of rights (Sadurski, 1986: 52).

What this shows is that the doubt cast on the existence of second generation rights on the basis that they may result in the limiting of other (first generation) rights is unjustified. Social and economic rights cannot be discredited on this basis, as *all* rights are subject to the caveat that they may be limited under certain circumstances and are therefore not absolute rights. However, this does not impact on their status as human rights, and it completely fails to show why first generation liberty rights should take

precedence over second generation welfare rights, especially when the latter are considered in their basic rights formulation.⁷

The second objection to social and economic rights which Sadurski considers and disposes of is the argument that the "classical" human rights (first generation rights) when compared with "rights to satisfaction of basic needs" (second generation rights), are negative rights in the sense that they require mere forbearance on the part of others, especially the government, for their enforcement (Sadurski, 1986: 54-55). This argument has been dealt with above, and it is therefore sufficient to comment on Sadurski's point that all human rights require positive action of some sort for their enforcement whether this be in the form of law courts, a police force, or the provision of food or schools, and therefore the negative-positive distinction made by the defendants of traditional first generation rights cannot be sustained.

Finally, Sadurski considers, and rejects, the argument that economic and social rights are impracticable, presumably in a way which civil and political rights are not. This argument, which has also been mentioned above, is that while the satisfaction of basic economic rights may be desirable, in many (or even most) societies it is impossible. Sadurski, in concordance with Hausermann, challenges this objection in the following way:

One possible reply would be by showing that there is no reason to restrict the 'justice constituency' to one society or one country. Even if there are societies which are unable to meet the basic needs of all their members, such possibilities exist if the material resources of the entire world are taken into account (Sadurski, 1986: 59-60).

This notion of transnational obligations will be considered in the following section of this chapter under Henry Shue's discussion on basic rights. However, it is worth mentioning

⁷ The implications of this teleological "balancing" of the objects of rights against one another are considered in sections 4.1 and 4.2, as an account has to be given of how this relates to the purported deontological derivation of human rights of both the first and second generation given here.

here, as clearly the notion of universal human rights raises questions about the dispensation of international justice, and the specifics of transnational obligations to enforce universal human rights in their second generation formulation would have tremendous practical implications for the notion of international justice.

This section has been intended to show that the current status of second generation rights is at odds with their philosophical position as human rights of equal importance compared with their first generation counterparts. However, what has not yet been shown is that there are any rights which are fundamental in the sense that they pass the test of paramount importance. Ancillary to this is the question of practicability which is intended to show that not only are there some social and economic rights which are so basic and fundamental that they merit their inclusion in the category of universal human rights, but furthermore that the enforcement of such rights is both possible and obligatory. Both of these issues will be considered below and the arguments of Shue, followed by Singer and O'Neill, will be invoked to demonstrate the equal status of some social and economic rights and civil and political rights in these two senses.

3.2 Needs and Rights: Henry Shue and Basic Rights

Shue's argument for universal human rights as basic rights is in keeping with the conclusions drawn from Milne's argument in section 2.3 for a minimum content for such rights, as "human rights, as 'basic rights', appeal to what is rudimentarily necessary for the enjoyment of a dignified life" and thus for Shue, basic rights are those rights (most importantly subsistence and security) which are necessary for all other rights to be enjoyed (Vincent, 1986: 14).

Shue therefore identifies two kinds of human rights - basic rights and non-basic rights, and it is only the basic rights which can truly be considered to be universal and therefore to have universal duties of enforcement which correspond to them (Shue, 1980: 112). Because Shue defines his basic rights as those things (subsistence and

security) without which the enjoyment of other, non-basic, rights would be impossible, it is evident why these deserve their status as basic universal human rights. Quite clearly, in the absence of a minimum level of security and subsistence, it would make no sense to refer to the existence of human rights.⁸ For this reason, the government of any state has a duty to honour such basic rights, both in a negative and a positive sense. Furthermore, all individuals are “required to sacrifice, as necessary, anything but one’s basic rights in order to honour the basic rights of others” (Shue, 1980: 114). It should be noted in this regard that Shue makes no distinction between first and second generation rights in identifying basic rights, as the right to subsistence is clearly a second generation right, while the right to basic physical security is usually regarded as being a first generation right.

Shue comes to this conclusion by arguing for a principle of priority for rights, which places basic rights at the top of the scale, as those things which one can never be required to sacrifice, followed by non-basic rights, followed by cultural enrichment and finally preference satisfaction. He uses these categories to outline what are “required, permitted and prohibited transfers according to the priority principle” (Shue 1980: 115). The outcome of this is that degrading inequalities, such as those “constituted by protected affluence and unprotected subsistence” are prevented. The principle of priority for rights makes provision for the protection of the basic rights of the least well off to be ensured by the sacrifice of preferences on the part of the most affluent (Shue 1980: 119).

Shue argues that there should be a legal duty to fulfill the obligation of honouring the

⁸ Of course a liberal would object to this point by arguing that the normative existence of the right is not challenged under these circumstances, but rather that *worth of liberty* is compromised. While this distinction is conceded, it seems as if it is a rather pedantic to insist that the right exists while not recognizing the urgency of the conditions for the exercise of the right, such as security and subsistence in this instance. Thus security and subsistence as basic rights cannot conveniently be divorced from the issue of the existence of human rights, as the whole point of establishing their existence in a normative sense, is to make out an argument for their enforcement in a positive sense.

basic rights of others, as without this, there would be a heavier burden on some than on others. Therefore, this duty falls first on the most affluent, as it is this group which has the most preferences to sacrifice, and that they are obliged to sacrifice these to avoid degrading inequalities. It is only in the event that this sacrifice of mere preferences is not sufficient to honour the basic rights of all that those things which contribute to cultural enrichment may also have to be sacrificed.⁹ Finally, if this is insufficient, non-basic rights may also have to be limited in order for the basic rights of everyone to be realised. However, this is only in accordance with the priority principle *qua* principle, as Shue believes that:

in fact it is most unlikely that anyone would need to sacrifice anything other than preferences, to which one has no right of satisfaction and which are of no cultural value, in order to honour everyone's basic rights, *provided everyone with the duty to make some sacrifice of preferences does so* (my emphasis) (Shue, 1980: 114).

Shue then goes on to argue for transnational, or universal obligations to fulfill these basic rights. This translates in a practical sense into an international duty on the part of the affluent to aid the least well off, as it is the affluent who consume the most in the satisfaction of mere preferences, and thus the priority rule would make the affluent the most primarily accountable for the fulfilment of basic rights on a universal scale (Shue, 1980: 120). In defending this argument, Shue relies on the connection (noted in chapter 1) between the idea of human rights and human dignity, or "the integrity of the person." This is explained by using the example of allowing a person to die from want of material resources in order to protect the unneeded resources of another person, as this is to imply that the unneeded resources are in fact more important than the person whose existence is threatened. This is a profound indignity, as "the person's most vital needs are to be subordinated to someone else's preferences" (Shue, 1980: 122). Shue

⁹ It is imperative to stress that preferences and cultural enrichment goods are *not* accorded the status of rights, and so, contrary to the liberal position, it is not a limitation of the rights of those making the sacrifices to limit their enjoyment in this way. Rather it should be regarded as the limitation of privileges (to which nobody has a stronger entitlement than anyone else) in order to honour fundamentals such as basic rights (to which everyone is entitled).

remarks that there can be no reasonable compromise on the sacrifice of preferences to fulfill basic rights, as the world's resources in total are adequate to provide for these on a universal scale with some resources left over (Shue, 1980: 123).

Another way of stating this case by way of example, and one which certainly meets the criticism that this theory would place an unbearable restriction on liberty rights, is Shue's comment on the right to property. This would qualify as a non-basic right in Shue's classification, and it is one which may be limited in order to honour basic rights. This is an outcome which is rather upsetting for those libertarians who defend the idea of first generation rights, as this right in a negative sense is considered to be fundamental. However, as Shue remarks, it is unjust to have laws which prevent theft (and thereby protect property) by someone who is starving. According to Shue, one may justly have such protection of property "only if the same set of institutions provides guarantees that the person in question will not in fact degenerate from insufficient consumption" (Shue 1980: 125). Crudely put, the implications of Shue's priority principle are that the law justly ought to be able to demand someone to sacrifice their hi-fi to feed someone else who is starving, rather than (as is the case in most legal systems) to punish the person who is starving for stealing the hi-fi in order to get enough to eat.

Shue makes out an implicit case for the mutual dependence of first and second generation rights using his conception of basic rights. He does this in the second chapter of Basic Rights entitled "Correlative Duties" by approaching the problem from the perspective of the respective duties that apply in the case of subsistence and security rights, and in doing so, he illustrates that not only are these rights equally fundamental, or "basic" but also that the exercise of each depends on the enforcement of the other. Although Shue does not actually push this argument to its conclusion, it is clear that both classes of basic rights, subsistence and security, rely on one another in order to function as the conditions for the exercise of any other right.

Before this argument is considered, it is necessary first to consider two alternative approaches to the issue of subsistence as a right from the perspective of obligations,

as Shue's handling of the issue resolves many of the problems raised by the imperfect obligations approach of O'Neill, and the utilitarian approach of Singer.

3.3 O'Neill, Singer and Universal Obligations

Onora O'Neill is also concerned with the question of the relationship between needs and rights and how this is connected to questions of economic privation. In Hunger, Needs and Rights (in Luper-Foy, 1988: 67) O'Neill considers how the rights of the hungry may be influenced by the identification of obligations on an international scale. The relationship between needs and rights, according to O'Neill is one which hinges on the existence of an identifiable obligation on the part of some person or agent to fulfill a need and consequently honour particular rights. Thus to speak of the right to food as a basic right of the starving millions in many parts of the world, despite its being asserted by the UDHR, "is mere, and callous, rhetoric" because the obligation to honour such a right does not fall on anyone who is in a position to be likely to fulfill it (O'Neill, 1986: 70).

O'Neill considers two possible solutions to this problem in an attempt to identify who has the obligation to honour the basic rights of the impoverished. The first is the libertarian position on human rights which regards them as rights to non-interference, and positive obligations can only be derived from a voluntarily undertaken agreement between the parties. Clearly needs cannot be met by the obligation not to interfere, but a libertarian will defend this position on human rights by arguing that this vision of human rights provides for, and indeed applauds, charitable efforts to feed the hungry, and that the solution to starvation may lie in such charity, but that this charitable action can never be considered to be a duty (O'Neill, 1986: 71).

Now this is obviously a problematic position, none the less because the magnitude of the contemporary problem of world poverty is far too great to be passed off as being soluble by charitable measures. It is impossible to see how charity can result in a

sustainable solution to problems of severe economic privation, as "charity cannot substitute for good development policies" (O'Neill, 1986: 71).

Charitable action as a solution to human needs including hunger is also unacceptable because it is not taken seriously by libertarians who rely on this argument. In the Judeo-Christian tradition, charitable action was regarded as an obligation, albeit an imperfect obligation. What this means is that the obligation to help the needy is an incomplete obligation in the sense that it is impossible to assist all who need such help at all times, while it is perfectly possible to refrain from interfering with all others at all times, making this a perfect obligation. However, while such obligations are imperfect (and therefore imply rights for *unspecified* others) they are not optional in the way that charitable action is considered to be in the libertarian criticism of the notion of the rights of the hungry:

In traditional views, help to the needy and justice are both obligatory, but justice can be accorded to all, while help can be given only to some. Hence the allocation of justice assigns rights to the recipients, but the allocation of help does not (O'Neill, 1986: 72).

The welfare position on human rights and the rights of the hungry is that while liberty rights are central to the issue of human rights, there are nevertheless rights to some goods and services which are necessary for the satisfying of basic needs. This position therefore holds that there is a universal human right to food, basic health care, and education, but O'Neill correctly points out that "establishing that there are such rights is another matter" (O'Neill, 1986: 73), because as has already been noted in the section above, the current practical status of such rights is in theory only, expressed in the international charters and declarations on human rights.

In seeking a solution to this perceived impasse, O'Neill briefly outlines the minimal rights position of Shue, Gewirth and Milne, but she points out that the problem with the basic right to have needs met, as Shue and Gewirth describe it, is the allocation of the duty to honour such rights. She then reconstructs the argument from "the perspective of obligations" in order to show that a theory of rights that takes account of both perfect and imperfect obligations, can well accommodate the notion of the rights of the hungry

as well as the liberty rights of the affluent: "A change of perspective from rights to obligations makes agents and agency central ... Nothing then is lost by adopting the broader perspective of obligations, and something may be gained" (O'Neill, 1986: 78).

What is particularly interesting about this argument is that it raises questions about the nature of liberty rights and their corresponding laissez-faire obligations. O'Neill points out that duties of non-interference make no sense in a world which is characterised by interdependent relationships between states. The states and institutions of the affluent north determine the conditions and rules of trade and credit for the rest of the world, and this is certainly not laissez-faire. As long as "these actors fix the conditions of life and survival for others" they bear an obligation, albeit an imperfect one, to honour the basic rights of the impoverished people of the states which they engage with, even if this means only dealing with such states in a non-coercive and non-deceptive way (O'Neill, 1986: 80-81).

Therefore, the implicit interdependence of the world economic system implies mutual obligations and rights between states. The participation in a world system that operates to their benefit prevents developed states from abdicating responsibility for honouring the rights of the developing world. This is because even the honouring of the duty of forbearance (that is to refrain from harming) which is generally acknowledged, would require a massive reordering of relations between the developed and developing world. In the same way that all humans are obliged not to directly harm one another as individuals, no matter how great the advantages to one of doing so, so too at a collective state level, this obligation exists too.

This is the key to O'Neill's argument for the universal right to basic resources to satisfy basic needs. By developing a theory of imperfect obligations on an international scale, and showing how these obligations correspond to basic needs, O'Neill is able to show that the notion of welfare rights has a place both in theory and in international political action, because:

imperfect obligations are obligations; they are not optional

forms of self-expression or heroic action that exceeds all obligation ... [and] we may find courage for these tasks if we realise that our obligation is to do something, not to do everything. For doing something lies within our powers, while doing everything does not. (O'Neill, 1986: 82).

As a final remark on O'Neill's argument it is necessary to comment that this makes provision for obligations that exceed the notion of rights. The universalizing construction which she identifies and which consists of treating all others in a non-coercive and non-exploitative manner means that "we have good reason to look at the framework of obligations within which rights have a place, but not the whole place" (O'Neill, 1986: 82). This theory therefore outlines an addition to what is required for just action on an international scale.

Peter Singer is also interested in international obligations to aid the impoverished, however, he constructs his argument from a completely different set of assumptions, and arrives at far more radical conclusions than either Shue or O'Neill. Although Singer is not actually addressing the issues related to universal human rights, he is nevertheless discussing a particular notion of international justice from the perspective of international obligations based on a utilitarian calculation in the context of famine relief (specifically the Bengal famine of the early 1970s). As a result, he comes to conclusions practically similar to those of Shue and O'Neill. Furthermore, it can be contended that as Singer is discussing a system of enforceable obligations, so too then he must be referring, implicitly at least, to a system of enforceable rights, and because the goods which he refers to are basic in the sense of being those which ensure survival, they are therefore the basic rights which correspond to the basic needs referred to above, even though Singer deliberately eschews the language of rights. The steps of his argument are as follows.

Singer bases his argument on the assumption that to suffer and die as a result of starvation, and a lack of adequate medical care and shelter is a bad thing, and he holds furthermore most people would agree with this assumption. He then goes on to make the point that if one is able to prevent something bad from occurring, without oneself

giving up something of comparable moral value, then one has a moral obligation to do so. The example he uses to illustrate this assumption and the resulting point in question is (following Cranston) that of a drowning child, and one's obligation to rescue the child if one is able to do so, even at the risk of muddying one's clothes. One is obliged to risk the damage to one's clothes as this is morally insignificant when compared to the life of the child (Singer, 1986: 574).

Singer goes on to argue, that in principle at least, this premise does not take account of distance in resulting in the obligation to help, and furthermore, that the obligation is not weakened by the fact that there may be others similarly positioned to render the assistance required. Singer acknowledges that proximity makes it more likely that one will assist a needy person, but that this does not mean that we are absolved from assisting those far away if we are able to do so without sacrificing something of comparable moral value. Furthermore, "the development of the world into a 'global village' has made an important, though still unrecognized, difference to our moral situation" (Singer, 1986: 575). Secondly, one is not absolved from responsibility for alleviating the suffering of others as a result of one not being the only person suitably placed to assist, because as in the case of the drowning child it would be no excuse to allow it to perish on the basis that there were other people as well disposed to save it who also did nothing (Singer 1986: 575).

So too in the case of famine relief, it is false to claim that responsibility to reduce the suffering is diminished by the fact that the starvation is taking place on the other side of the world, and that millions of others also are doing nothing to help. Singer points out that the conclusion that we ought morally to prevent bad things, like starvation, from happening if we can without compromising anything of comparable importance, is a challenge to the moral categories which are traditionally accepted, as this principle does not make the usual distinction between duty and charity (Singer, 1986: 576).

It is not charity, or a supererogatory act (something which it is good to do, but not wrong not to do) to donate to famine relief instead of, for example, buying new clothes, despite

that fact that the organisations which work for famine relief are called “charities” and that such a sacrifice would be praised as “generosity.” Indeed, seeing as how new clothes are purchased (by most people in the developed world at least) for the purpose of appearances and not necessity, it would be to sacrifice something significantly less important (something along the lines of what Shue would label as a mere preference) in order to prevent the starvation of others, and therefore far from this being a charitable act “[o]n the contrary, we ought to give the money away, and it is wrong not to do so” (Singer, 1986: 576).

Having considered possible objections to this view, Singer moves on to consider whether or not the donation of money is the best means (on a utilitarian calculation) to alleviate the suffering caused by starvation. Firstly, in response to the argument that overseas aid is the responsibility of the government, and that private donations and private organisations therefore allow the government and non-contributing members of society to evade their responsibility, Singer argues that the opposite is true: “if no one gives voluntarily, a government will assume that its citizens are uninterested in famine relief and would not wish to be forced into giving aid” (Singer, 1986: 578).

Secondly, Singer deals with the objection that by donating to famine relief in the absence of adequate population control, one is merely postponing starvation. Singer argues that one could support population control initiatives as an alternative method of preventing famine. Therefore this objection is no excuse for doing nothing when one can do something (Singer, 1986: 579).

Singer then moves on to consider how much an individual would be required to give to famine relief on the basis of this utilitarian calculation. The “strong version” of his argument is that everyone ought to give to the level of marginal utility, which is the level at which further sacrifices would reduce one and one’s family below the material circumstances of, in this case, a Bengali refugee (as to do this would be to increase and not decrease the total utility in the world) as it would be to sacrifice something of *comparable* moral significance.

While Singer believes this to be the correct version of his principle, he nevertheless proposes a weaker version, which would no doubt be more palatable to most of those doing the giving. This suggests that "we should prevent bad occurrences unless, to do so, we had to sacrifice something [merely] morally significant" (rather than something morally more significant) and "even on this surely undeniable principle a great change in our way of life is required" as "we would have to give away enough to ensure that the consumer society, dependent as it is on people spending on trivia rather than giving to famine relief, would slow down and perhaps disappear entirely" (Singer, 1986: 579).

Thus while Singer's utilitarian argument is a slight detour from the human rights position outlined above, he nevertheless makes a strong case for a system of international justice which provides for material welfare. His conclusions, stressing as they do obligations to the poor, suggest a very similar ethos to Shue and O'Neill. It is significant that this utilitarian argument should lay down principles requiring greater sacrifices for the poor than the human rights arguments do, and it underlines the point made before that human rights ought to be regarded as having minimal content, or as being basic rights. It is also interesting that on a utilitarian calculus such as Singer's, economic or material welfare takes precedence over such goods as freedom and political participation which are given precedence in the traditional human rights structure.

The link between Singer's utilitarian argument and O'Neill's imperfect obligations argument, and universal human rights is identified by Raymond Plant. Plant points out that even in the case of imperfect obligations, and even if one accepts Singer's principle of obligation, that it is the meeting of social needs which is the ultimate goal. This can best be done by supporting the agencies best placed to realise this goal. Strict obligations to support such initiatives could be achieved by taxation on the part of the government. In response to those theorists who oppose such initiatives on the grounds that they unbearably impose upon liberty, Plant retorts: "To see the human right to welfare as implying a duty to support government welfare measures would be equivalent to seeing due process of law as a human right" (Plant, 1992: 45).

Before moving on to the discussion of second generation rights and the right to development, it is instructive to revisit Shue's argument to see how it can be reconstructed from the perspective of obligations, in accordance with the approach of both O'Neill and Singer. While Singer's utilitarian construction is most eloquent in demonstrating the practical possibility of honouring subsistence rights and he argues strongly for a universal duty to do so, his approach precludes a discussion of the indivisibility of the two generations of rights. O'Neill's construction of imperfect obligations towards the needy, while being useful in demonstrating how obligations fall squarely on the shoulders of those states which most vehemently deny and successfully evade them, nevertheless fails to conclusively build a case for universal basic rights of both a civil and political, and an economic and social variety, and nor can her construction accommodate the purported indivisibility of such rights which is being argued for in this section.

However, it is significant to note that by constructing universal obligations based arguments for material well-being, the demands on those who bear the duties according to these two approaches are in excess of a rights approach. This goes to the heart of the matter, as it challenges the objection that the duties generated by second generation human rights are impossible to fulfill. Alternative ethical approaches which argue for greater responsibility for the privation of others serve then to highlight that the commitment to basic rights of subsistence is therefore a minimal one, and is thus both possible and universally obligatory.

Therefore, an examination of Shue's theory from the perspective of obligations may serve to draw the threads together. Shue's theory is capable of illustrating both the minimalist content of universal human rights, as well as being able to account for the theory of the interdependence of such rights by breaking down the distinction between security and subsistence as either positive or negative rights from the perspective of "correlative duties" (Shue, 1980: 35).

3.4 Shue's Solution: Correlative Duties

Shue begins by noting that security rights are frequently regarded as being more important than subsistence rights, and furthermore that the basis for this perception is that security rights are erroneously considered to be "negative" rights, while subsistence rights are supposedly "positive" rights. Shue's project is to show that the enforcement of security rights has positive implications which are usually not acknowledged, and furthermore that in the case of subsistence rights, they have a negative dimension which is not usually recognised, and therefore there is no basis for concluding that either right is more basic than the other (Shue, 1980: 37).

In the first instance, as has already been noted elsewhere in this section, the right to physical security entails a great deal more than simply refraining from harm (which would make it a negative right). The cost of the penal and judicial systems alone places unbearable pressure on the claim that security rights are negative, as clearly the enjoyment of the right implies its protection:

A demand for physical security is not normally a demand simply to be left alone, but a demand to be *protected against harm*. It is a demand for positive action, or, in the words of our [Shue's] initial account of a right, a demand for social guarantees against at least the standard threats (my emphasis) (Shue, 1980: 38-39).

More contentious is the claim that honouring the basic right to subsistence involves duties of a negative nature. Shue argues that "protection from the destructive acts of other people" is what is required for basic subsistence rights to be enjoyed. He illustrates this argument with the hypothetical case of a village in a developing state which has its net subsistence level lowered, resulting in the starvation of the least well off members of that community, owing to the "interference" of an outside investor who substitutes the cultivation of beans (for the local market) for flowers (for the export market). This then is "a standard kind of threat that could be controlled by some combination of ... mere restraint ... and the maintenance of protective institutions"

(Shue, 1980; 41).

In the same way that people are restrained from assaulting one another by preventative laws and institutions in the process of honouring the basic right to security, so too, people are responsible for the subsistence of others, and ought to be made to comply with the duty of *not* engaging in economic practices which result in others being deprived of the basic right to subsistence, as "[s]evere harm to some people's ability to maintain themselves can be caused by changes in the use to which other people put vital resources (like land) they control" (Shue, 1980: 44).

As Shue observes, there is nevertheless a useful distinction between different kinds of duties. This is because the enjoyment of both subsistence and security rights depends on the performance of "multiple kinds of duties." Shue identifies three kinds of duties which correlate to every basic right. These consist of the negative duty to "*avoid* depriving", the weak positive duty to "*protect* from deprivation" and the strong positive duty to "*aid* the deprived" (Shue, 1980: 52). The enjoyment of the basic rights to subsistence and security depends on the fulfilment of all three kinds of duties, and there is thus no distinction between them in this regard.

This flowers-for-beans example successfully illustrates the breakdown in the distinction between first generation security rights, and second generation subsistence on the basis of the former being negative and the latter positive in their enforcement, and shows that in this sense they are equally basic. However, it has yet to be shown that this approach can support the weight of the claim that the two classes of basic rights are interdependent.

Although Shue does not push this argument to its conclusion, his actual case example of "illiberal state capitalism in Latin America with its macroeconomic strategies of essential deprivation" demonstrates this position admirably. The illiberal nature of political organisation in such states is directly linked to the economic policies which deliberately enrich some at the price of the immiseration of others. Therefore implicit in

this case example is the notion of the interdependence of first and second generation basic rights, as it is the lack of access to civil and political institutions which makes the deliberate economic and social privation possible in this case example. Similarly, greater access to the resources necessary for the articulation of social and economic rights, would be instrumental in gaining access to the apparatus of civil and political power for the least well off members of society. Although Shue does not take the idea of the interdependence of security and subsistence to its conclusion, and he does not state this as one of the aims of the chapter, his theory can nevertheless both accommodate and account for this essential idea which serves to give basic social and economic rights as much weight on the human rights scale as civil and political rights.

Shue's basic rights construction is therefore successful on three scores. He is able to illustrate and explain why the content of universal rights is necessarily basic for the purposes of enforcement and cultural specificity. Secondly, Shue's reconstruction of his argument from the perspective of duties is successful in showing how the positive-negative distinction breaks down in the case of distinguishing between subsistence and security rights, and thus on this score too, these two classes of rights are equally fundamental and universal. Finally, Shue's example of state capitalism in South America is able to accommodate, albeit implicitly, the notion of the interdependence of first and second generation basic rights.

The basic rights argument has implications for the emerging debate on human rights and development. If such rights are universal in nature, then this is of consequence for all states, but most especially for the developing states of the South. Of course it is also these states that are most severely challenged in terms of meeting the material needs of their populations, so it is here that second generation rights are of the most urgency. This gives impetus to the position that first and second generation rights are mutually dependent, as an agent cannot rationally concern themselves with their civil rights and liberties in the absence of some level of basic physical well-being: "If one is starving, one is hardly interested in the goods of democratic polity" (Gewirth, 1996: 53).

At the beginning of this section Maurice Cranston's argument against the existence of social and economic rights as fundamental human rights was considered and challenged. In section 4, the issue of conflicts of rights will be considered. This is imperative to the thesis that first and second generation rights are of equal status, as this chapter has sought to demonstrate that civil and political and economic and social rights, at a basic level at least, are equally important for meeting the demands of agency and human dignity. However, as far as the enjoyment of all rights is concerned, there is still the problem of *which* duties are to be honoured in the event that they cannot all be honoured simultaneously, and are thus regarded as being "impossible." The liberal position dismisses this problem by dismissing positive rights, as it is argued that negative duties generated by negative rights can never "clash" in this way. Consequently, it is held that what are properly regarded as rights are by definition negative, and rooted in a conception of negative liberty. If this were not so, the whole conception of rights, and by extension human rights would indeed be nonsense, as this would imply rights to the impossible.

However, it is argued that rights *can* conflict and that such conflicts can be resolved without compromising the deontological nature of human rights. Furthermore, in so far as conflicts of rights can be resolved by reference to a benefit theory of rights, so human rights consist of both first and second generation rights, and such rights are regarded as generating both positive and negative duties. It is the honouring of these duties which needs to be assessed in light of the "balancing" of human rights, and clearly the "balance" which is chosen will depend on the most urgent demands of a given society.

4. PROBLEMS OF “BALANCING” HUMAN RIGHTS

4.1 Teleological Considerations and Human Rights

4.1.1 Conflict and Compossibility of Human Rights

One of the major issues raised by a defence of second generation human rights is the problem of how conflicts of rights are to be resolved when they arise. That is to say, is it possible for the objects of two rights to be incompatible in the sense that they cannot be enjoyed simultaneously while both the rights in question are still regarded as rights? This raises the question of the compossibility of rights, which in turn hinges on a particular conception of liberty: defenders of first generation rights as negative human rights assert that these properly deserve their status as human rights because forbearance, it is held, can never compromise the simultaneous enjoyment of other rights, in a negative sense at least.¹⁰ Conversely, the potential for rights to clash at the level of enforcement which is implied by positive rights means, for liberal theorists at least, that these are not really human rights at all.

Of course, as has been argued in the previous chapter, both first and second generation rights have both a positive and a negative dimension, and therefore, all human rights generate both positive and negative duties. It is a moot point whether or not negative duties are always compossible in the sense of never resulting in problems of simultaneous enforcement. However, the significant point here is that all rights generate multiple duties, negative and positive, and consequently it is impossible to identify a specific right as being either negative or positive with any accuracy (Waldron,

¹⁰ On a positive level of course forbearance could seriously compromise the enjoyment of another right, for example if someone were about to fall off a bridge, or stumbled into the path of an oncoming train, “refraining from” interfering with them would undoubtedly compromise their right to life, and this is furthermore a contravention of the duty to alleviate distress if one is able to do so. Gewirth observes that under these circumstances “the duty to refrain from interfering and the duty to provide active assistance ... makes no moral difference” (Gewirth, 1996: 34).

1989: 510). Therefore, even if it is possible to establish "a set S1 of individual interests the members of which are perfectly compossible with one another and which can all be served and promoted without posing any hard choices" this nevertheless contributes very little to a theory of human rights, as the genesis of human rights, both civil and political, as well as economic and social, lies in their contribution to human agency and dignity, not their compatibility with the demands of compossibility. Therefore "it would be surprising - indeed a massively improbable coincidence - if a set of interests associated with the special level of concern that rights indicate (call it S2) just *happened* to be coextensive with S1" (Waldron, 1989: 505).

This is connected to the other major issue that needs to be considered with regard to a defence of second generation rights which is whether or not an account of negative first generation rights which is rooted in a rigorous defence of negative liberty may, despite the refuted objections to the idea of second generation rights discussed in the second chapter, still support the case for the exclusive status of civil and political rights as human rights, if they are constructed as negative rights that are vertically enforceable exclusively against the state.

These two issues are integrally related to one another, and in turn to the question of the ultimate justification for any defence of human rights: the conception of liberty which is relied on will inform whether or not the choice or the benefit theory of human rights is preferred, and this will in turn inform whether or not negative first generation rights exclusively are defended as human rights, or on the contrary a theory is preferred that regards all rights as both positive and negative, and therefore does not distinguish between first and second generation rights on this basis.

These conflicting approaches are discussed in detail in section 4.2.2 below, however, it is necessary for the sake of clarity to define these positions here. As the name implies, the choice theory of rights is about liberty in the sense of the freedom of an agent to make decisions about their own position and the exercise of their rights. The benefit or interest theory of rights on the other hand regards rights as being consistent

with outcomes or consequences, and therefore independently of an individual's liberty to waive or exercise their rights, some rights have the status of human rights because of their (beneficial) outcomes. The choice theory tends to support the idea of a deontological justification for human rights, as it is rooted in a conception of pure negative liberty. The benefit or interest theory however, can accommodate some teleological considerations too, as it considers the liberty which informs the notion of rights to have a positive *worth of liberty* dimension (Waldron, 1989: 504).

The issue of a possible conflict of rights is discussed in light of the question of the compossibility of first and second generation human rights in section 4.1.1. This is done by considering the problems raised by consequentialist theories for the "balancing" of human rights, as utilitarianism does, and therefore the problems with the incompatibility of teleological goals, like utility maximisation and deontological aims such as the enforcement of rights, will be considered. The discussion then focuses on the justification for rights in the light of the conflict between the choice and benefit theories of human rights, and reasons will be given why the benefit theory is preferred in terms of its ability to maximise liberty.

There is a strong egalitarian theme that runs through discussions of consequentialist justice, such as utilitarianism. This would seem to suggest that, given the relationship between equality and human rights in terms of the aim of equal consideration, that the connection between the conception of the good argued for by advocates of utilitarianism and human rights respectively, is stronger than is apparent. Another way of putting this is to argue that human rights and utilitarianism are compatible with one another at some level, and this level is the enforcement or enjoyment of certain things that are regarded as contributing to the overall "good" for individuals in society on the one hand, or are seen as the objects of human rights on the other. Furthermore, this congruence is more than just coincidental, as it hinges on the sharing of an ethic or value by both deontologists and teleologists, and that value is the equal consideration of all human beings.

This section is devoted to exploring this relationship and attempting to establish whether or not these links exist, and if it can be argued that they do, then the significance of these links needs to be assessed. First there is a brief account of the classical utilitarian critique of the idea of rights, which considers Bentham's objections to the rights of man in Anarchical Fallacies (in Waldron, 1987: 46-75). This critique will then be examined in light of some of the modern thinking on utilitarianism as a method of the prioritisation of the overall good, or as the title of Goodin's work describes it, "utilitarianism as a public philosophy" (Goodin, 1995: 3).

It is argued that in all societies, various goods have to be balanced against one another. Choices always have to be made at the level of public policy which "goods" or "rights" will have priority in any given society, and if it is a just society, it will attempt to maximise the good or well-being of its members in the allocation of public resources to the enforcement of rights, or provision of goods consistent with the enjoyment of rights, because as was noted in the previous chapter, "[t]he hierarchy of rights chosen depends on a particular hierarchy of values ... rights correspond to protected interests and, since interests have to be balanced against one another, the exercise of various rights will involve balancing in cases of conflict" (Sadurski, 1986: 52).

This would imply that not only is it possible that the notion of rights is compatible with teleological conceptions of justice, but furthermore, that human rights may well be among the tools, or values which may be employed in attaining the goal of maximising the social good. It is submitted that Bentham, in giving consideration to teleological values only, and completely writing off deontological approaches to justice, has left the door open for a deontological reworking of the teleological goals of utilitarianism, because "good is important in nonteleological theories too" (Broome, 1991: 3).

However, it is important to be clear that the utilitarian interpretation of rights in cases of conflict is regarded as being only a residual feature of human rights, because "[t]o make the use of rights contingent on such a utilitarian calculus would make the whole notion of rights spurious" (Sadurski, 1986: 59). Goodin (discussed below), argues that the

proper realm of utilitarianism as a theory of justice is to operate at the level of public, and not private, conduct. Therefore private conduct is determined first and foremost by other deontological ethical considerations such as rights and duties, but when these considerations clash at the level of public enforcement, then some teleological balancing in the interests of the public good inevitably, it is argued, has to take place (Goodin, 1995: 7-8). The very notion of rights implies concern for individual agents. However, the enjoyment of rights takes place within the context of whole societies and in this way, human rights establish an area of individual life which society may not violate, while at the same time creating goals or ends towards which societies strive.

This is especially pertinent to the issue of the status of social and economic rights, as the problems with the enforcement of such rights is one of the primary angles of attack for those who discount them as rights, and therefore a balancing of rights in terms of their enforcement at the level of public policy has most urgent implications for the notion of second generation rights. It is acknowledged that the enforcement of second generation rights usually requires a greater commitment of resources than do first generation rights. It has nevertheless been argued that in so far as their enforcement is entirely possible (albeit sometimes difficult) decisions do have to be made about the prioritisation of enforcement, and the commitment of resources to the enforcement of rights, and in doing this, there is recourse to some conception of the public good. It is also at the level of the enforcement of rights that conflicts of rights occur, as the notion of compossibility turns on the possibility of the performance of correlative duties.

4.1.2 The Utilitarian Critique of Human Rights

The classical utilitarian critique of rights is that of Jeremy Bentham in Anarchical Fallacies, in which Bentham coined the description of natural rights as “nonsense upon stilts” (Bentham, 1987: 53). The subtitle of this essay, (“being an examination of the Declaration of Rights issued during the French Revolution”) (Bentham, 1987: 46) is both misleading and informative. On the one hand, it is less of an examination than a

dismembering of the declaration, but it also indicates that Bentham's critique must be viewed in the context of the ideas of the revolutionary natural rights tradition of the time. Consequently, there are good teleological reasons for being suspicious of the "rights of man" in this context (owing to their anarchical potential), but this does not explain why Bentham gives no account of the deontological route to the establishment of rights as liberties. This omission provides the key to reconciling human rights and utilitarian justice by regarding utilitarianism, as a public philosophy, as the method of resolving conflicting rights based claims in society, which is outlined in the following section.

However, this critique is worth considering, as there is a theoretical connection between the clash of the choice and benefit theories which underpins the perceived dichotomy between the two classes of human rights, and the theoretical incompatibility of the goals of utilitarianism and human rights. The utilitarian position (particularly when it is regarded as a public philosophy) is far more successful as an instrument of the interpretation and prioritisation of social values when second generation rights are included in the structure (denoting the development of natural rights into human rights) as it is at this level that rights frequently have to be "balanced" against one another, and it is here that teleological considerations of justice have a role to play. So it is necessary to consider Bentham's position with two goals in mind. Firstly, the broad goal of establishing whether the deontological status of human rights is compromised by considering the utilitarian critique of natural rights, and secondly the more specific goal of determining whether this critique is appropriate to modern thinking on utilitarianism and human rights, as both have acquired egalitarian elements since Bentham.¹¹

Bentham believed natural rights (within the context of the declaration at least) to be "nonsense" in two senses. Firstly, they were literally non-sense in that he regarded

¹¹ See Kymlicka's account of two arguments for utility maximization. The "equal consideration of interests" position could be seen as being compatible with a notion of human rights of the first and second generation, while the teleological formulation, as espoused by Bentham, is not. Kymlicka goes on to argue that only a formulation of utilitarianism that takes account of equal consideration adequately can be treated "as a plausible political morality" (Kymlicka, 1990: 30-35).

them as meaningless; secondly, there was an endless list of contradictions in the declaration itself (which Bentham painstakingly identified and analysed) which wrote off the declared rights as being false (Waldron, 1987: 34). Natural rights, and indeed their corresponding duties, were regarded by Bentham as being meaningless in a way that, for example, law was not, as such rights are not tangible, while laws correspond to definite commands and consequences for their breach. The only kind of rights that made any sense for Bentham were those conferred by positive law and which had specific and identifiable duties corresponding to them: "Take away the lawgiver, and you take away the law; and 'right' and 'duty' are left high and dry, devoid of any sense" (Waldron, 1987: 35-36).

Now Bentham was well aware of the political usefulness of the notion of natural rights, despite his regarding them to be meaningless fantasies in any logical or legal sense. Furthermore, it was precisely the political function of such rights that made them the dangerous and insidious "anarchical fallacies" that he denounced. In addition, in opposition to the modern positivist critics of natural law and natural rights, Bentham believed that the positive law could be ethically or normatively evaluated, but only from the perspective of its outcomes, that is from a teleological utilitarian perspective (Waldron, 1987: 36-37). Therefore, one can argue, according to Bentham, that certain positive rights (conferred by law) ought to exist because of the beneficial outcomes which they will have, but that this is to be distinguished from the actual existence of the right, as "[r]easons for wishing there were such things as rights are not rights; a reason for wishing that a certain right were established, is not that right - want is not supply - hunger is not bread" (Bentham, 1987: 53).

In addition this is the only normative basis for the questioning of positive rights and laws that Bentham considers, raising the objection that he needs to give an account of the deontological route to a normative evaluation of the positive law, with a view to establishing rights and duties. This omission is where the utilitarian and human rights positions on justice potentially converge, as although Bentham "took 'moral rightness' to mean conduciveness to the principle of utility, he refused to give the substantive term

'right' a moral sense. [One] can see no justification for that refusal" (Waldron, 1987: 38).

Bentham correctly observed that the maintenance of political control cannot be based on absolute notions of liberty and rights. He argued that there are always inevitable limits or constraints on liberty, on property and on rights, otherwise these things would be devoid of meaningful enjoyment and exercise, and that in a legal positivist sense, they have to be qualified. In seeking the solution, which is "a *clearly qualified* commitment to liberty, property, democracy, and so on" Bentham held that it is inevitable that the result is a completely contradictory set of natural rights: "[t]he only way to avoid the Scylla of absolutism and the Charybdis of legalism is to follow the course [that is discerned] in the Declaration: to brazen it out with contradictions" (Waldron, 1987: 39). Once again this has special implications for second generation human rights, because as Cranston objected, the inclusion of social and economic rights in the family will detract from the enjoyment of civil and political rights, which are properly regarded as rights in a liberal view of the matter, as they may be held and enforced against the state without having to resort to contradictions. So in order to avoid such contradictions, or impossibilities (which imply simultaneously incompatible duties), it is preferable to exclude second generation rights altogether and retain only those negative rights that can be held against one's own state. The problems with this position have been considered in section 3.

Ultimately, the classical utilitarian critique of natural rights (and by extension human rights) resides in their individualistic nature, as "human life, to be bearable, involve[s] a substantial commitment to living together in community that is belied by the abstract egoism of a theory of human rights" (Waldron, 1987: 45).¹² So the problem resides at the level of the maximisation of the utility of the entire community, as a sum greater than its parts, rather than that of individual agents. The route out of this impasse is by regarding utilitarianism (in its modern equal consideration formulation) as the public

¹² Maureen Ramsay identifies this unapologetic individualism as a problem of liberal philosophy itself (Ramsay, 1997: 5; 7-8), and therefore a benefit theory of rights, discussed below, may well be able to resolve this tension.

manifestation of the values enshrined in the idea of natural or human rights (which also stem from the ethos of equal consideration) at the level of the well-being of the individual.

Such individual rights, inherent in the idea of the equal dignity of individuals, cannot be repealed or violated justly, but they can be limited in certain definite ways in order to give effect to the greater good of the community, for example in the way that freedom of speech is sometimes limited, in Millian fashion, when its exercise threatens to harm others. By extension, negative liberty may sometimes be limited (but not violated) to give effect to the welfare rights of the majority, which is a public manifestation of the utility maximising potential of basic second generation rights. So ultimately what has to be established is under what circumstances rights may justifiably be limited at the level of their enforcement. The advocates of first generation rights would have it that this is only justified in the course of protecting another right, for example by restricting the freedom of movement of people who have committed crimes to protect the right to freedom of movement or security rights of others in that society.

However, this then begs the question of *which* rights are included in this sort of limitation, for it was argued above that the status of first generation rights as negative rights is not an airtight one. If there are good philosophical reasons for including (some minimal) second generation rights as human rights which then deserve protection and enforcement, then decisions have to be made about the prioritisation of rights (such as education versus security) and the way that this is most appropriately determined is by recourse to calculations of the overall benefits for given societies. This leads to the considerations of the next section, where the idea of utilitarianism as an exclusively public philosophy is explored.

4.1.3 Balancing Utilitarianism and Human Rights

Robert E. Goodin identifies the following relationship between deontological ethics and

utilitarian ethics:

Theories of ethics are standardly partitioned into theories of rights and theories of the good. The latter style of ethical theory, insisting as it does that good consequences be promoted, clearly needs a theory of the good in order to say which consequences are good and to be promoted and which are not. *But even the former style of ethical theory often finds itself needing some theory of the good if only to flesh out the 'duty of beneficence' that is standardly included among the 'right things' to be done: obviously, we will need a theory of the good to tell us how, exactly, to go about discharging that duty to do good for others* (my emphasis) (Goodin, 1991: 241).

However, this interdependence of the two broad ethical approaches operates only at the level of public, or communal decision making. Goodin has identified the interpretational potential of utilitarian or consequentialist ethics when decisions about which deontological values are to be given precedence in any of the specific cases which arise in societies, as they inevitably do. The apparent inability of the liberal deontological position to deal with clashes of rights may well be a weakness which a teleological theory of the public good, or a benefit or interest theory of rights, may be able to resolve. The idea that such "clashes" indicate that one of the rights asserted is not a right in terms of the theory of compossibility is discussed below, as well as the implications of the liberal individualist construction of human rights.

Within the context of this thesis, it is argued that decisions arise in all societies at the level of the weight given to either individual first generation rights, or social and economic second generation rights, and this conviction is shared by proponents of the interest theory of rights. A branch of utilitarian thinking which focuses on the egalitarian side of the equation is that of welfare utilitarianism. This stresses the idea that if individuals are to pursue any of their projects and plans (that is if they are to have the liberty to do so), then there is "a set of generalized resources that [it] will be necessary for people to have" (Goodin, 1991: 244). This is consistent with the position of the theorists who argue for the equal priority of second generation rights in the context of negative and positive liberty, which is the position endorsed by this thesis.

In Utilitarianism as a Public Philosophy Goodin makes this relationship more explicit: "At least one normative theory, utilitarianism, can be a good normative guide to public affairs without its necessarily being the best practical guide to personal conduct" (Goodin, 1995: 4). Goodin argues that while utilitarian principles of justice "make us wince in recommending it as a code of personal morality" the situation is reversed in the case of public morality, where the very things that make utilitarianism inappropriate on a private level, make it entirely suitable for making public policy decisions. Firstly, the "impersonality" or anti-individualist aspect which is inherent in utilitarian ethical calculations, while being completely inappropriate to our private moral deliberations (as we feel that we ought to take account of the individual circumstances of others) is required in the ideally neutral deliberations at the level of the public good. Utilitarianism is suited to this sort of ethical decision, because it gives each person's interests equal weight and consideration *as a member of society* (Goodin, 1995: 8).

Therefore, individualist considerations of human rights, because they are derived from deontological notions of equal worth, dignity and consideration, will demand that we make ethical decisions that do not unfairly benefit some at the expense of others, by requiring that we take account of certain inequalities in ability, that is by being *endowment sensitive*. However, at the level of public policy, a utilitarian calculus will help us to choose between different courses of action, for instance whether to use public revenue for schools or for prisons and justice demands that this be done *without being endowment sensitive*, that is without taking account of inequalities in ability between individuals in society.¹³ These are difficult choices to make, and while equal *consideration* has to be given to the interests of all as individuals or as members of specific groups, when these considerations conflict, equal *enforcement* of these interests may not be possible, and it is at this level that an outcomes based (utilitarian)

¹³ The idea of endowment sensitivity rests on an approach to questions of justice which seeks to equalize people's circumstances in a substantive way, without unfairly prejudicing some individuals in order to give effect to the interests of others. See Kymlicka (1990: 50-94) for an account of Rawls' and Dworkin's approaches to the problem which unequal natural abilities pose for questions of social justice.

compromise has to be struck. As uncomfortable as this conclusion may be for strict deontologists of the first generation stripe, this is how decisions of public policy are made in all societies, because “public servants must not play favourites” (Goodin, 1995: 9).

The second “vice” of utilitarian ethics that is transformed into a “virtue” at the level of public decision making is that it is “a coldly *calculating* doctrine” which in one’s personal moral deliberations runs counter to our intuitions, which give greater weight to our feelings about others than to calculating the consequences of a course of action. However, those who are charged with making public decisions are required to do so with their heads and not with their hearts, as the consequences of their decisions are of primary importance and consideration in their choices (Goodin, 1995: 9). On a personal level as a parent, one may prefer schools over prisons, but as a public official, one may have to weigh up the consequences of this choice for the entire society, and therefore choose the latter over the former, if security (as a first generation right) is a more pressing or immediate concern in a given society (South Africa could fit the bill) than is primary education (as a second generation right).

The inherent consequentialist nature of utilitarian ethical judgments is therefore what relegates it to the ranks of a public philosophy. While one may accept moral precepts, like human rights, that are rooted in deontological or ontological considerations and are therefore “right or wrong in or of themselves, quite regardless of any consequences that may come from doing them”, public officials often have to “make hard choices” by considering the consequences that are maximal for that society (Goodin, 1995: 10). This is because regardless of whether a right is of the first or the second generation, or whether it is perceived as being positive or negative in terms of the duties it gives rise to, rights are indeed empty vessels if their enforcement in real societies is not given consideration, and this then involves a balancing act based on the special features of a particular society.

This is not to say that deontological principles are completely discounted. Rather, some

are in some instances given greater weight than others in order to bring about the best, most appropriate arrangement for a given society. The minimalist content of human rights argued for in the first two chapters of this thesis is entirely consistent with this idea. Clearly public interests are not served in a teleological sense if either first or second generation rights are discounted entirely, because it is logically difficult to imagine a conception of the "good" that does not take account of both freedom and well-being. However, above the minimal level prescribed by deontological considerations, choices have to be made about which rights deserve greater weight in order to maximise the good of that society. The choice is not between having *either* schools or prisons, rather it is between having *more* schools than prisons (or vice versa) in order to address the most urgent requirements of a given society, and this is done by weighing rights against one another in order to assess which deserve priority in terms of their enforcement. The justness of these choices therefore requires that we discard the false distinctions between different classes of rights which are used to give precedence to first generation human rights.

4.1.4 Human Rights as Social Values

If utilitarianism and human rights can reach a compromise, then the problems with each may be solved by a consideration of the other. In so far as human rights are a blunt and useless instrument at the level of public policy if decisions cannot ethically be made about their prioritisation in so far as their enforcement is concerned, so too, the regrettably excessive consequences which utilitarian considerations potentially have can be curbed if these consequences are contained by a minimalist conception of human rights as individual rights. Bentham recognized that positive laws (as a reflection of public policy) ought justly to be probed in terms of their outcomes. However, by not addressing the reasons for discounting a similar probing of positive laws from a deontological perspective, he has left the door open for an examination of the relationship between these two conflicting ethical positions.

By assigning consequentialist ethics a role in the interpretation of human rights, and the prioritisation of human rights at the level of the commitment of resources to their enforcement, the conception of human rights is strengthened and not weakened. One of the major realist objections to the idea of human rights is at the level of the problems presented by their enforcement in real societies, and defenders of negative rights neatly sidestep this problem. However, this is an abdication and not a solution. It might seem like an unpleasant compromise to interpret and prioritise the enforcement of human rights at the level of public decision-making in terms of their outcomes, but this approach is far more palatable than it appears. The idea of human rights is rooted in values: the values of equal consideration, of human dignity, and of freedom to pursue rational life plans. However, these values, while they are derived from a consideration of people as individuals, are nevertheless *social values* which require public enforcement and the commitment on the part of entire societies and those who fulfill public functions to their realisation and enjoyment. Teleological ethics based on the idea of equal consideration as a utility maximising social goal goes a long way towards this realisation and enjoyment.

Furthermore, public officials have strong, defined duties, but their duties are towards individuals only in so far as these individuals are members of society. So then, the realisation of the objects of human rights as communal goals are properly their province. This is not to say that the individualist nature of human rights, or the idea of rights as the "trumps" of social values is compromised. Rather it is a question of the most beneficial use of these trumps in order to ensure that human rights are properly enjoyed by all who are human, and are not just the rights of some. So for example the right to own property may sometimes justifiably be interfered with (in the sense of being limited) in order to give effect to the subsistence or protection of others (through taxation for example) as these basic rights would then "trump" the right not to be interfered with in the enjoyment of that property on a public level because

rights are designed to pick out those interests of ours that are not to be traded off against the interests of others ... [t]hey are, to use Ronald Dworkin's image, our "trump cards," to be played in the last resort to protect the basics

of our individual freedom and well-being (Waldron, 1989: 508).

It is important to note that the right to own property is merely *limited* in order to give effect to other more basic rights. The role of human rights as instruments in the arsenal of the weak against the politically and economically strong is therefore given added impetus and weight by this public teleological dimension, as by stubbornly clinging to the idea of the individualistic nature of such rights, they are relegated to being the rights of some, and not the equal rights of all. This is because having rights in a formal sense, and enjoying rights in a substantive sense are quite different considerations, and where "social freedom" is at stake, then "financial and other obstacles may count as constraints" (Miller, 1983: 85) in order to give effect to a conception of freedom that generates rights of equal worth for all.

However, as has been argued above, a rigorous liberal defence of negative rights might well put paid to the idea of any "balancing" of rights on the basis that this would rule out some of the asserted rights *as rights*. This position holds that rights are by definition negative in terms of their enforcement, because if a right cannot be enforced then, owing to the impossibility of the performance of the duty, it cannot be a right. It has already been argued in the second chapter that in terms of resource allocation, second generation rights escape this test of impossibility. However, the other angle that is yet to be considered is the notion of the impossibility of two rights, in that the exercise of one may compromise the exercise of the other.

In terms of this position it is argued that all that are properly regarded as rights must be able to be enforced simultaneously, and therefore all rights must be negative, as this is the solution to the problem of avoiding conflicts of rights. Consequently, positive rights, such as rights to education and health care, cannot be rights, as their enforcement would compromise the enforcement of other (negative) rights. Accordingly, perhaps it is in the realm of consequentialist social values that second generation rights belong, as aspirations or goals, but not rights. If this is so, it is more than just a misnomer, as if social and economic "rights" are in fact aspirations, then they do not

warrant their trump status, and their weight as human rights (discussed in section 2) is diminished.

4.2 The Ultimate Justification for Human Rights: Choices or Benefits?

4.2.1 The Liberal Position

Liberalism, as the name suggests, is concerned with the prioritisation of liberty, and it thus pursues “those rules which secure to each individual the greatest amount of freedom to pursue his own good in his own way so long as he does not act unjustly and infringe the freedom of others” (Plant, 1991: 76). This illustrates the three central elements of liberal thinking on rights: firstly, it is concerned with individuals, secondly it is concerned with the freedom to make *choices* between different courses of action or things, and thirdly it considers the only justifiable limit on such freedom to be the protection of freedom itself. It furthermore implies that the conception of freedom, and therefore rights, which is being considered is a negative one, as freedom here, in the sense of the liberty to make choices, implies the absence of interference.

The major question which this raises is why liberals regard the liberty which is to be given priority over all other social values as being strictly negative in construction. Hillel Steiner in An Essay on Rights gives an account of the liberal conception of freedom (Steiner, 1994: 7) which is designed to show the purely negative construction of freedom, and by extension, exclusively negative duties to honour rights which then implies the compossibility of rights. This rests on a conception of rights informed by the choice as opposed to the benefit theory, as in “attending closely to how coherent sets of rights assign control to their subjects, we shall see more clearly how rights operate to prescribe distributions of pure negative freedom” (Steiner, 1994: 58). However, before this negative rights position can be assessed, it is necessary to first consider the liberty argument at its root.

Steiner defines and defends a notion of pure negative freedom which consists firstly in a person being rendered unfree to act only if someone else's action makes this impossible - freedom is therefore not defined by random restrictions which cannot be controlled, but rather is defined by relationships between people (Steiner, 1994: 33). Now undoubtedly this is true, but it is unclear why the restriction must be constituted by the action of an individual, which reflects the individualist bias in liberal thought. It is perfectly possible for a potential agent to be rendered as unfree by a set of preventable circumstances, which cannot be attributed to any one identifiable individual or even a group of individuals, as they would be if another person was holding them captive and starving or beating them, but the consequences of which can nevertheless be addressed, if not prevented, by other people.¹⁴

Secondly, restrictions on action are constituted by actual preventions and not mere interventions - being strongly encouraged or threatened to act or not act in a particular way does not constitute a restriction on one's freedom to act or not act in any given way (Steiner, 1994: 33). Now once again this is problematic. It is conceded that encouragement to perform an action does not necessarily interfere with the freedom to do otherwise, but if someone threatens another person's life if they do not perform a certain action (and there is every reason to believe that the threat is likely to be carried out if cooperation is not forthcoming) then surely the choice or freedom to nevertheless do otherwise is curtailed. It is specious to claim in Hobbesian fashion that such fear and liberty are consistent, when the content or worth of the liberty in question is compromised.¹⁵ This particular conception of freedom is too minimalist to be

¹⁴ For example, it can be noted that "the major constraints on personal freedom in modern societies are produced by collective entities, such as states and corporations" and so in this sense, the organisation of the market may be as much a constraint on freedom as is direct interference by another individual (Miller, 1983: 80-81).

¹⁵ Miller gives an example which illustrates this point: if one compares the cases of a person imprisoned in a cage from which they cannot escape, and a person placed in a square chalked on the ground the same size as the cage, and told if they venture outside of the chalked square they will be shot, "On Steiner's view, the [person] is free to leave the square in the second case, but not the cage in the first. We may well doubt,

meaningful in a world of real agents who do not necessarily think of themselves only as a locus of liberty, but also as a locus of rights and duties with consequences which may also serve to influence such choices of action. Gewirth argues that there is a "communitarian specification" for the individual in society, and what this involves "is not the egoistic drives of some individuals as against others but rather a whole system of equal and mutually supportive rights and duties" (Gewirth, 1996: 97).

Steiner then goes on to define what does constitute an interference in the freedom of another, therefore making it impossible for them to act in a particular way. He observes that if one person's action prevents the action of another person, and therefore both actions cannot occur simultaneously, then the actions are impossible, and the one action is truly a restriction on the other, therefore rendering the one person unfree to act in that way (Steiner, 1994: 33). However, it is only if another agent is responsible for this impossibility that liberty is compromised - "I am unfree to do an action, then, if control of at least one of its physical components is actually or subjunctively denied to me by another person" (Steiner, 1994: 38). It is this notion of compossibility of actions defining liberty, and of course by implication negative liberty, that, for Steiner shows why conceptions of positive liberty are confused. They are "conceptions of liberty that consign them to the dustbin of unintelligibility ... [a] pure negative conception [of liberty] rescues them from that dustbin" (Steiner, 1994: 21) because, it is argued that only such a negative conception of liberty can generate rights that are always possible to enforce.

However, if compossibility of actions is what defines liberty, then it sets up a potential problem. Waldron argues that all rights, rooted as they are in liberty, generate multiple "waves" of duties, and all rights are therefore both positive and negative in so far as their enforcement is concerned, and thus sometimes inevitably generate impossibilities (Waldron, 1989: 510). It is unclear how a conception of liberty which

however, whether the two cases are different in a way that bears upon our judgments of freedom. If we examine the relationship between the man and his jailers in both cases, we can say that in each case the [person] is effectively confined in a ten-foot square by [their] captors" (Miller, 1983: 76).

does not permit of such impossibilities can accommodate the inevitable need to place reasonable limits on such freedoms. Furthermore, positive freedoms can in many instances be exercised simultaneously,¹⁶ so if it is impossibility that makes them unintelligible to begin with, then compossibility, not negative freedom as Steiner maintains would rescue them from "the dustbin of unintelligibility." Seeing as how this turns out to be a rather inconsistent test of what constitutes freedom, an alternative approach deserves consideration. Furthermore, such an account of negative liberty is required to give an account of the worth of liberty, as such a consideration could well challenge this construction of liberty as being meaningless and empty.

This analysis of the conception of liberty, as shall be argued below, is an incomplete one, only revealing half of the area of human agency. However, it still needs to be explained how this conception of pure negative freedom relates to the idea of rights, and by implication human rights. This particular conception of liberty, relating as it does to choices, has a corresponding theory of rights. The debate thus shifts from focussing on what constitutes a restriction on liberty, to what constitutes the justification of rights.

4.2.2 Choice Theory versus Benefit Theory

It has been suggested that the choice theory of rights underlies the liberal negative rights position, while the benefit or interest theory of rights is consistent with a conception of positive liberty, and therefore takes account of positive welfare rights as well. Consequently, the former position does not consider the possibility of a conflict of rights, while the latter position not only takes account of such conflicts, but seeks to establish ways of resolving them. Thus whether one sees rights as being derived from

¹⁶ For example, in many countries in the world, the right to a fair trial, and the right to primary education are exercised and enforced simultaneously. Both require a commitment of resources if they are to be adequately enforced, and yet the requirements of each are quite distinct, and in many ways have no effect on one another.

choices or benefits determines whether one considers rights to be both positive and negative, first and second generation, and potentially in conflict with one another in so far as their objects and enforcement are concerned:

[D]ifferent ways of setting up a conception of rights lead to quite different conclusions about the possibility of rights conflicting with one another. The negative and agent relative structure ... more or less precludes such conflict, ... whereas [the] Interest Theory indicates that conflicts of rights, though not logically necessary, are in the circumstances of the real world more or less inevitable (Waldron, 1989: 505).

What distinguishes these two approaches to rights from one another is that in the case of choice theory, the rights holder is able to either exercise or waive a constraint on another person's behaviour. So the enjoyment or exercise of the right rests on the choice of the right holder, and is thus consistent with negative liberty. The benefit theory on the other hand holds that whatever constraints on another's behaviour are imposed or relaxed must be consistent with that person's (the rights holder's) interests, whatever their choices may be. This is consistent with the notion of positive liberty, and also may result in certain conflicts of rights at the level of enforcement, such as the schools-prisons example referred to above. The latter approach has potential teleological implications, or requires "qualifications" which the former does not (Steiner, 1994: 62).

The choice theory is problematic in relation to the notion of human rights however, as human rights are regarded as universal rights, and are therefore regarded as being inalienable. The idea of human rights does not logically permit of their repudiation, as having the liberty to waive such rights would imply having the liberty to waive the humanity which is the source of such rights. Furthermore, in so far as there is a distinction between moral rights and legal rights (discussed in section 2), it is apparent that human rights are the rights of all people whether or not they are acknowledged, or whether or not the human agent is even aware of them. It can also be observed that the holders of rights, even legal or special rights, are frequently not in a position to exercise a choice of whether or not to waive the performance of the duty. Examples of this would

be holders of both positive and natural rights such as minors, the insane, and certain corporate persons. Consequently, it is unclear that the choice theory is appropriate to the establishment of a theory of natural rights such as human rights.

Furthermore, these objections aside, the demands of compossibility imposed by choice theory as a result of the necessity of negative duties mean that the rights that would be accepted by this approach are so narrow and insubstantial as to contribute little to the values of human dignity and agency on which the construction of human rights is based. Rights are usually asserted when they are threatened, and it is under such circumstances that questions about their enforcement are raised, so the question of compossibility in this sense seems rather irrelevant to the notions of agency and dignity which inform human rights. If it is possible to construct a set of rights which are compossible in terms of the negative duties which they generate, then it is extremely unlikely that this set will be congruent with the most pressing demands of agency in any given society (Waldron, 1989: 505).

However, the compossibility argument deserves to be examined in some more detail for two reasons. Firstly, if the requirement of compossibility holds up, then it will serve to support the argument that positive rights, such as welfare rights, do not deserve their status as rights, because it is a valid critique to point out that a right cannot exist if its object is impossible, that is if it cannot be enforced. Secondly, and following on from this, it needs to be assessed whether or not two human rights can conflict at the level of their enforcement, and how such a conflict is to be resolved. This second issue is dealt with by an account of the benefit theory.

On the first issue, if one is obliged to do something as the fulfilment of a duty, then this "implies a liberty to do it" (Steiner, 1994: 86). Quite obviously, if one is not free, in the sense of being unrestrained, to perform the action which constitutes the fulfilment of a duty, then one cannot logically be regarded as having such an obligation. Consequently, it cannot be held to be anyone's right that such an action be performed. However, liberties themselves are, according to Steiner, either "naked" (in the sense

that they are “penetrable” by others exercising their liberties) or “vested” (in the sense that they are “impenetrable” in that they may not be interfered with) and it is only the latter type of liberty that gives rise to rights, as such liberties are not subject to impossibility as far as their duties are concerned, while “[o]n the other hand, a duty which can only be fulfilled by traversing the no-man’s land of naked liberty is necessarily a candidate for impossibility with other duties” (Steiner, 1994: 87). It seems then as if only negative rights can fit into this category of vested liberties, as otherwise their correlative duties could potentially limit other rights. Only the demand of forbearance, resulting in the duty of non-interference, can ever constitute the immutably fulfillable object of a right.

There are two main questions which this position raises. Firstly, it is unclear why liberty should be prioritised, such that the requirement of vested liberty sets the standard for what are properly regarded as rights. There are other considerations, such as equality, agency or well-being that are equally relevant to what properly constitutes a human right. Furthermore, this argument is not only weighted by the assumption that liberty is the primary social value; it has assumed the weight of a particular kind of liberty, negative liberty, which inevitably lends weight to a particular conception of rights, negative rights. However, it is unclear why an account of positive liberty ought not to be considered, because, as was argued above, the premises upon which this conception of negative liberty are based are faulty. It is therefore necessary to consider the second issue which has been raised, which is the question of whether or not rights can conflict, and if they can, how such conflicts are to be resolved. This position is supported by the benefit or interest theory of rights.

Jeremy Waldron in examining this question with reference to its consequences for the status of positive welfare rights begins by contending that “if rights are understood along the lines of the Interest Theory ... then conflicts of rights must be regarded as more or less inevitable” (Waldron, 1989: 503). Furthermore, the interest theory of rights, as opposed to the choice theory of rights which underlies the defence of negative first generation rights, recognizes that specific rights do not have single correlative duties.

Rather rights seem to give rise to a complex variety of duties,¹⁷ which then results in these inevitable conflicts of rights, and therefore demands a theory of rights which can account for the just resolution of such conflicts (Waldron, 1989: 503).

Waldron refers to Joseph Raz's construction of a right in defining and defending the benefit theory of rights. According to this construction, an individual has a right if one of their interests ("some aspect of her well-being") is of such importance as to justify a correlative duty on the part of another to honour that right. However, this idea of rights being based on their importance for well-being is not to be confused with utilitarian considerations, as this is not the same as a calculus of utility maximisation, as a theory of rights is interested in the well-being of individuals, not the overall maximal well-being of an entire association. Therefore the relationship between the two can be described in the following way:

Clearly not all individual interests have sufficient importance to form the basis of rights. There are some interests such that the utilitarian mode of calculation is the only appropriate basis for determining morally the respect that they require. On [this] conception, the idea of rights is a discriminating idea, sorting out those interests that merit special attention from those for which utilitarian calculation seems appropriate. It is the task of a substantial *theory* of rights to provide a rationale for this discrimination (Waldron, 1989: 504).

¹⁷ Waldron goes on to refer to these multiple duties generated by rights as "waves" of duties. This point is illustrated by reference to the example of the right to freedom of speech, which is traditionally regarded as a negative (and vertical) first generation right, which implies a duty on the part of the state not to impose censorship laws. However, the enjoyment of this right also implies protecting people in the exercise of this right, and it therefore has positive consequences too, as "if an individual's interest in speaking freely is important enough to justify holding the government to be under a duty not to impose a regime of political censorship, it is likely also to be sufficiently important to generate other duties: a duty to protect those who make speeches in public from the wrath of those who are disturbed by what they have to say; a duty to establish rules of order so that possibilities for public speech do not evaporate in the noise of several loudspeakers vying for the attention of the same audience; and so on" (Waldron, 1989: 510).

So the central determining factor is that rights are informed by what is most morally important for human well-being, rather than on the basis of the requirement that their correlative duties are compossible. This seems to be a more appropriate approach to the idea of human rights, as these are rooted in the notion of what it is to be human, and therefore that which is most likely to enforce human agency, and that which is most important to the condition of being human. This is clearly a different condition from that which can be most conveniently narrowed down to a set of freedoms and consequently rights that do not encroach on one another's domains in terms of the compossibility of the duties which honour such rights. The latter would seem to imply an entirely different set of considerations from those that are usually regarded as informing the notion of rights, and it is extremely unlikely that the interests that underlie the importance of human rights would be consistent with the requirement of compossibility:

It is unlikely, not only because we have no reason for thinking that these properties - compossibility and moral importance - are invariably associated but also because we know that the human condition indicates that many of the areas in which moral conflicts happen are exactly the areas of life in which important individual interests are engaged (Waldron, 1989: 505).

So the interest, or benefit theory of rights is able to take account of, and accommodate the fact that "in the circumstances of the real world" while conflicts of rights are logically not necessary, they are usually inevitable (Waldron, 1989: 505). An adequate theory of rights therefore has to take account of this inevitability, rather than abdicating this responsibility by retreating into an unworkably narrow (possibly even implausible) conception of rights as defined by the requirements of compossibility.

However, it is also important to observe that this does not detract from the status of rights, particularly those of the second generation, on the basis of the difficulty of their enforcement. The issue of rights in conflict is concerned with the impossibility of the duties correlative to those rights, and is therefore concerned with their enforcement, and on the basis of the Kantian objection that "ought implies can" this impossibility of duties may lead one to conclude, albeit regretfully, that rights are indeed necessarily negative by definition. However, the liberal here paints herself into a corner, as not only

do the same objections apply to all rights, as was argued in section 3 (in that all rights have both positive and negative implications) but furthermore there is an inherent contradiction in this objection in that it runs counter to the individualistic nature of rights in the liberal ideal. It is only when rights are aggregated that problems of scarcity pose a challenge for the enforcement of rights, so "it is not the duties in each individual case which demand the impossible ... rather it is the combination of all the duties taken together which cannot be fulfilled" (Waldron, 1989: 507). Now a human rights claim must be universalizable as the universality of such rights is one of their defining features. However, it is imperative to note that the demands of universality only require that the *moral basis for asserting the right* is universal - "the reasons for holding that there is a duty to serve the interests of one person should also apply to the same effect in the case of any other ... [i]t does not require compossibility" (my emphasis) (Waldron, 1989: 507).

Now it must be borne in mind that rights at their inception are anti-utilitarian in that they are antithetical to the idea of trade-offs between different courses of action in order to maximise some perceived good in society. Rights therefore are the instrument which limits the extent to which trade-offs may affect the welfare of individuals in society in order to benefit all others. However, this neat role is challenged when rights themselves come into conflict, as they inevitably do, and it is this conflict which a theory of rights has to cope with. The choice however is not between either discounting certain rights, as the ultimate demands of compossibility would eventually result in, or discounting choices between different options involving the consequences of rights, as a crude utilitarian formulation would require us to do (Waldron, 1989: 508-509).

Rather the challenge is to find a theory of how these hard choices may justly be made without compromising rights, and this is possible if we acknowledge that the two sorts of trade-off (utilitarian trade-offs, and trade-offs between rights) are not of the same sort, and that while we give qualitative weight to certain rights, we do not give their enforcement quantitative weight as a utilitarian calculus would demand:

The trade-offs contemplated by the rights theorist are

unhappy enough; but probably inevitable: sometimes one life *must* be sacrificed so that a greater number of lives can be saved. But some of the trade-offs that can be based on utilitarian commensurability seem simply obscene, and the rights theorist should be perceived as resisting those, even though she is not necessarily resisting the idea of trade-offs as such (Waldron, 1989: 509).

This then presents the problem of the level at which trade-offs between rights occur, as if it is the requirement of moral importance which informs rights, then surely rights are qualitatively of equal weight in this sense. However, their duties are not always qualitatively the same, and may even be different for the same right in different societies, depending on what the most pressing demands are in a given time or place. For example, the right not to be tortured has qualitatively different implications at the level of its enforcement in Nigeria than it does in Sweden, but this does not make it any less of a right in Nigeria because its enforcement is more demanding. Rather, defenders of the notion of rights feel that it is of more pressing concern in Nigeria than in Sweden, despite the demands which its enforcement may place on resources and the enjoyment of other rights. Similarly the right to basic nutrition may be far more challenging in terms of such conflicts and balancing of rights in Somalia than it is in Germany, but the same reasoning as applies to first generation rights, applies here, and the status of this right is therefore not compromised as a result.

This then underlines the breakdown in the distinction between negative and positive rights argued for in section 3.1, which is a distinction which is speciously relied upon by the proponents of first generation rights to discredit welfare rights. If rights derived from interests generate duties, then as has been indicated there is no reason for believing these duties to be *necessarily* compossible. In fact the same right may give rise to more than one duty, and these duties may be both positive and negative:

This means that it may be impossible to say definitely of a given right that it is purely negative (or purely positive) in character. And since what actually conflict for us are the duties that rights generate from time to time, it means that it is very unlikely that we will be able to pick out in advance any set of rights - liberal or otherwise - and say confidently,

"These rights will never conflict in any of the requirements that they generate" (Waldron, 1989: 511).

Developing from this, one can argue that in the case of any two given rights, whether they are civil and political, or economic and social, some of the duties which they generate will be compossible, and some will not, but in no instance will *all* the duties generated by any two given rights be compossible, and there is therefore room to trade off rights against each other in this sense, by qualitatively balancing some, but not all, of the duties that are generated (Waldron, 1989: 512). It is at this level that a balancing of rights occurs, and this balancing takes place at the level of public-decision making, as the enforcement of rights in a given society is a public concern. In this way particular rights are not compromised or disqualified, as this balancing of rights implies that any given right may be limited in terms of its enforcement if one, or some of the duties which it generates are not fulfilled in order to honour another right. However, in any given case at least some of the other duties which it generates will be capable of being honoured. Prioritisation and trade-offs are inevitable if society as a whole is to be able to give maximum beneficial effect to rights as the trumps of individuals.

For example, the right to life (in a first generation sense) or the right to health care (in a second generation sense) may generate different duties for different individuals in the same society, or for individuals in different societies, while still stemming from the same morally imperative interest. Thus rights themselves are unyielding, while the duties which they generate are not. So for example in the case of these rights, someone who is dangerously ill and cannot afford the cost of treatment, and someone who is well and can afford the cost of treatment, while still enjoying the same rights to health care (or life) and the same rights to property (or liberty) will nevertheless generate different duties which may have to be traded off against one another in order to give just qualitative weight to the rights in question. This is not the same as the quantitative balancing which a crude utilitarian calculus demands.¹⁸

¹⁸ Although a defender of the modern utilitarian notion of equal consideration (referred to above), in this case equal consideration of interests, would no doubt find

Furthermore, this allows for more flexibility within the framework of the concept of the qualitative weight of different rights. While we may consider, for example, the right not to be tortured to be of greater weight than the right to freedom of speech, some of the duties which the latter generates may in some instances take precedence over those generated by the former. Qualitatively there is an “internal” relationship between rights, which allows us to prioritise the duties which they generate, without necessarily compromising their status as rights:

rights are to prevail over utility precisely because the whole point of setting them up is to correct for the defects in the utilitarian arguments which are likely to oppose them. We do not stare at the utility calculus and then stare at the rights, and discover that the second is sufficiently important to “trump” the importance of the first. Instead our sense of an *internal connection* between the two establishes the order of priorities (Waldron, 1989: 516).

Similarly, this recognition of internal connectedness, which operates at the level of purpose and ethos, may also be used to prioritise rights themselves by establishing “qualitative precedence rather than quantitative weight” (Waldron, 1989: 518). This precedence in turn is informed by which interests in a given society are most pressing, and therefore give rise to what are qualitatively the most urgent rights with correlative duties that have qualitative precedence over others as a result. This then operates independently of whether the rights in question are regarded as being of the first or second generation, as the benefit theory is able to accommodate both classes of rights, in the same way that it is able to take account of, without overemphasizing, the distinction between positive and negative rights and duties. As this distinction is never completely airtight for any right, a theory of rights which relies too heavily on it, such as the choice theory of rights, will also fail to outline an adequate theory of rights and their enforcement, and this is one of the major problems with the liberal theory of rights. However, there are other reasons why a liberal theory of rights fails to account for the whole landscape of what are properly regarded as rights, and thus is an impoverished conception of the area of human agency.

this approach both acceptable and just.

4.2.3 The Problem with the Liberal Conception of Rights

Maureen Ramsay confronts the issue of the liberal objection to second generation rights on the basis of enforceability. She describes the argument for negative rights, and consequently negative duties as “absurd” as negative rights themselves are pointless “unless they can be exercised, protected and enforced ... [i]f having a right does not imply duties to provide the conditions which make it effective, then there is no value in having the right in the first place” (Ramsay, 1997: 151). This is clearly commensurate with the benefit theory of rights outlined above, and it also reasserts that any right is both positive and negative in terms of its enforcement, and that the duties which all rights generate are manifold.

Ramsay also observes that the liberal conception of rights, resting as it does on an abstract conception of the individual as a discreet entity whose primary concern is to protect herself from the interference of others is a false conception of the individual in society. Rather people are socially interdependent, with needs that give rise to rights claims (Ramsay, 1997: 164). So if the liberal conception of the individual is incomplete, then so too is the theory of rights to which it gives rise. A theory of rights which is needs based, and which thus takes economic and social rights seriously, is teleological, and it implies an increase in the duties of the state and society, and this in turn would imply the kind of internal rights balancing at the level of duties referred to in the previous section. However, civil and political rights are also integral to a conception of the individual as an agent in society, as “civil and political rights and social and economic rights are inseparable, interdependent and both necessary for autonomy” (Ramsay, 1997: 163).

Therefore, an adequate conception of human rights, that is a conception which captures what it truly means to be a dignified human agent, is rooted in the benefit theory of human rights, which not only acknowledges the need to balance rights in some instances, but also suggests ways in which this may be done. The choice theory of

rights, rooted as it is in a purely negative conception of liberty, and derived from the notion of individuals as discreet entities who merely require an absence of interference to fulfill the demands of agency is an impoverished one. Even if it were possible to derive a set of rights which generate duties that are compossible, it seems that such rights would be so minimal in content as to be rendered meaningless in terms of their contribution to human agency and dignity, precisely because these are not the demands which such rights are intended to address.

Rather an adequate theory of rights has to take account of positive rights and duties, as well as both the material and political needs of agents in societies as they really are, rather than relying on abstract notions of the individual in ideal societies. Inescapably this involves having to confront the difficult issue of conflicts of rights and potentially impossible duties. However, the requirement of compossibility entails merely evading the composite issues of liberty, rights and justice, rather than confronting it. The difficulty of establishing a theory of rights that acknowledges the potential need to have recourse to teleological considerations at the level of their enforcement is not sufficient reason to avoid this issue, as without doing so, a meaningful conception of rights as requirements of agency is impossible.

5. CONCLUSION: MINIMAL INTERDEPENDENCE OF HUMAN RIGHTS

An adequate theory of rights must take account of more than just negative civil and political rights if human rights are to play their role as the fundamental requirements of human agency and dignity. An adequate theory of rights has to be able to accommodate the inclusion of some rights to physical well-being at a minimal level at least, otherwise the actual exercise of any other right, such as those rooted in civil liberties, is severely challenged. However, if rights are to be attainable, they must be minimal in content. Therefore, a theory of minimal interdependence of the two classes of rights is suggested as a theory of rights that can accommodate universal human rights of the first and second generation as the minimal, or most fundamental, requirements of the condition of being human.

Furthermore, this is a *realistic* approach to human rights. It is able to meet the criticism levelled at rights in general, and second generation rights in particular, that their objects are desirable, but impossible. However, while the urgency of human rights generally is emphasized by their abuse in many parts of the world, the importance of second generation rights is emphasized by the impotence of those human beings who are deprived of these rights directly, and by implication, cannot exercise first generation rights. Therefore the importance of second generation rights rests precisely on this relationship of interdependence. In addition, the relationship of interdependence between the two classes of rights underlies their *equal* status in terms of their importance, because "whilst respect for economic and social rights is clearly vital for the life and dignity of the individual, these rights should not be regarded as having priority over civil and political rights, any more than civil and political rights should take priority over economic, social and cultural rights" (Hausermann, 1992: 53).

The recognition of the interdependence of the two branches of rights reflects reality, because in fact, the restriction of one right implies the restriction of a whole range of

other rights as well:

A political prisoner is denied the right to work, the right to enjoy family life, the right to cultural expression - a far wider range of abuse of rights than merely the right to be free from arbitrary imprisonment. The homeless, lacking an address, are frequently unable to vote or in other ways to take part in civic activities. They suffer diminished opportunities to find work, and their children may be deprived of access to education. Furthermore, a denial of economic, social and cultural rights stems from discrimination and subsequent lack of opportunity (Hausermann, 1992: 53).

Consequently the exercise of *any* right of either class, is contingent upon the recognition and enforcement of the other class, at a minimum level at least.

There are three major issues which an adequate theory of human rights has to be able to address. Firstly, the issue of whether or not either of these branches of rights deserve the status of universal human rights has to be considered, and an adequate theory of how rights are derived and justified has to be established. Ancillary to this deontological issue is the problem of determining the content of such rights, and how this is to be limited. Secondly, the question of which rights meet the criteria produced by an answer of the first question has to be considered, and it is in addressing this issue that a robust defence of second generation rights as universal human rights of equal importance is inevitable, as the demands of enforcement weigh most heavily on social and economic rights. The third key issue is that raised by the problem of conflicts of rights (at the level of the duties which they generate) and how such conflicts are to be resolved without compromising the deontological premises for human rights which are yielded by a consideration of the first issue. Once again this poses a severe challenge for advocates of second generation rights of equal status, as it is apparently the enforcement of such rights which is most susceptible to conflict.

A section of this thesis has been devoted to considering each of these issues, as a defence of second generation rights must be successful on all three scores. It must be able to establish firstly what are human rights, and which requirements a right must

meet to be included in the family; it must be able to account for the eligibility of at least some social and economic rights in this structure; and it must be able to explain how clashes of rights logically can arise, and how they are to be resolved. Consequently, a theory of rights which considers human rights to be both minimal and interdependent can bear the weight of all three issues, and thus a theory of minimal interdependence for human rights is appropriate and adequate to the task.

In section 2 of this thesis, a theory of human rights is argued for which regards such rights as universal moral rights such that they meet the demands of human agency and dignity. The necessary conditions of action formula of Gewirth, which filters out freedom and well-being as fundamental to agency, is used as the central theoretical framework for such a theory of rights, because it is successful in five areas. Firstly, freedom and well-being imply only those rights that are basic, in so far as they give effect to the demands of agency. This therefore preempts a number of objections to human rights on the basis of the difficulty of their enforcement because they are too inclusive of those things which are not fundamental (like holidays with pay). Secondly, agency is quite patently a universal feature of human existence, as all people are potential agents on a positive level. On a normative level, independently of culture, gender, or nationality, all people would want to pursue their own rational life plans, and because they require freedom and well-being to do so, they ought to have the fundamental rights which stem from freedom and well-being.

Thirdly, freedom and well-being can accommodate both civil and political and economic and social rights, and because freedom and well-being are given equal weight, so too are the first and second generation rights which are derived from this formula. Fourthly, Gewirth's theory breaks down the distinction between positive and negative rights. Freedom and well-being, as conditions of action which generate fundamental human rights, imply that those rights must involve not only freedom from interference, but also those things which enforce the freedom to pursue one's rational life plans as a dignified human being. In this sense then, adequate nutrition is as important as the freedom of movement. This then relates to the fifth area in which Gewirth's necessary conditions

of action theory is successful. It illustrates the interdependence of both first and second generation rights at a basic level at least, as without adequate nutrition, for example, the freedom of movement would be impossible in a positive sense, even in the absence of restraint in a negative sense. Freedom and well-being are thus contingent upon one another as necessary conditions for agency.

However, the problems with social and economic rights that are usually raised are at the level of the enforcement of such rights, and this issue is considered in the third section. A deontological theory of rights, such as Gewirth's is all very well, but it is after all a *theory*. It gives no indication of how the implications of such a rights structure are to be resolved in practice in the context of the real world. There thus has to be some way of prioritising rights in terms of the duties which they generate. This then leaves open the question of who has the primary responsibility for enforcing rights, and precisely what the duties entail. And so, it is argued that because first generation rights generate negative duties, the enforcement of such rights is always possible, which is not the case with the positive duties generated by second generation rights.

The theory which is used to challenge this distinction, as well as to indicate that the duty to enforce basic human rights is incumbent upon all others is that of Henry Shue. Shue's clear definition of what constitutes the two classes of basic rights, subsistence and security, limits these to what are necessary for the enjoyment of all other rights, and thus reinforces the notion of the minimalist structure of such rights. He then goes on to argue for a theory of correlative duties which shows that all rights generate multiple duties, both positive and negative, but that the only universal obligations are those correlative to universal basic rights. Second generation rights to subsistence then are as urgent, and as much universal rights as are the rights stemming from the demands of security. Furthermore, restraint on the part of actors in the global economy may well contribute to enforcing subsistence rights as effectively as will active policies. So in this sense, the negative duty of non-interference is as relevant to the question of second generation rights as it is to first generation rights.

From the perspective of obligations, two alternative approaches to the question of international distributive justice are also considered. The Kantian approach of Onora O'Neill and the utilitarian approach of Peter Singer both impose heavier demands of enforcement for material welfare than does the basic rights approach, which is significant because it goes to the heart of the objection against the possibility of enforcing these rights. This demonstrates that the abdication of responsibility for the enforcement of second generation rights on the part of those who bear this obligation, is actually more morally reprehensible than it seems. Far from failing to perform an extremely taxing duty, they are failing to make what is actually comparatively a very small commitment to the lives and liberties of others.¹⁹

However, sustaining the argument that first and second generation rights are of equal status in terms of their enforcement then raises the problem of conflicts of rights which is the issue dealt with in section 4. There are two problems here. Firstly, if it is accepted that all rights are both positive and negative in terms of the duties which they generate, then in the event of a conflict of rights at the level of enforcement in the form of an impossibility, it has to be explained how such a conflict is to be resolved. If human rights are indeed deontological in their genesis, then it would compromise their deontological and normative status to resolve these clashes of rights by reference to some kind of teleological evaluation, such as a utilitarian calculus of benefit and need. This is then linked to the second problem which is the ultimate justification for human rights, because the two competing theories of rights, the choice and the benefit theories, approach the problem of a clash of rights from opposite directions.

¹⁹ A UNICEF report on malnutrition released in December 1997 illustrates this point. According to the report there are 12 million deaths of children under the age of 5 annually in developing countries. Malnutrition is a major contributing factor in 55% of these cases. The director of UNICEF, Carol Bellamy made the following comments on this situation: "Malnutrition not only kills but more terrible in terms of numbers is that it maims in many ways ... It stunts growth, holds down the ability of children to learn, it reduces the capacity to fully experience one's potential ... *for modest sums of money really the health of their [the governments of developing states] women and children can be improved. If that's done, it will contribute economically and socially to the well-being of the entire world.*"

It is argued that while rights are deontological in their derivation, as section 2 maintains, nevertheless rights have to be balanced against one another on a contextual basis in any given society. The utilitarian position on this issue is considered, and an attempt made to reconcile the two by relegating utilitarianism to the ranks of a public philosophy. As such, teleological values are regarded as being competent and useful in balancing rights in terms of prioritising expenditure on their enforcement, but the lacuna in which fundamental human rights reside can never justifiably be penetrated by utilitarian calculations.

This position is consistent with the benefit theory of rights, which considers all rights to be derived from the interests of the rights holder, and rights thus generate multiple “waves” of duties, both positive and negative. This theory not only can accommodate the notion of conflicts of rights and the need, sometimes, to balance rights against one another in terms of their enforcement, it also regards such conflicts to be an inevitable feature of an adequate rights construction. This theory therefore takes account of rights of both the civil and political, and the economic and social variety, and does not distinguish between them as interests, as their *qualitative* weight as rights is subjectively determined in any given society.

The choice theory of rights on the other hand is less concerned with interests than it is with negative liberty, as the issue of the compossibility of rights is central here. It is a matter of little contention that if a “right” cannot be enforced, then, logically, it cannot be a right. A person can no more assert the right to fly to the sun than they can actually do so. Consequently, clashes of rights at the level of enforcement mean that if two rights conflict in this way, the impossibility of enforcing both of them simultaneously means that one of them cannot be a right. The solution to this impasse is to adopt a purely negative theory of rights, which would then more or less preclude the exercise of most social and economic rights, while the negative aspects of civil and political rights would qualify these for rights status. While the problems with this theory are laid out in some detail in the section 4, suffice it to say that this is an inadequate theory of rights, because resting as it does on an incomplete conception of liberty, it reveals and takes

account of only one aspect of rights. In reality of course, all rights have both positive and negative aspects, and most rights generate a range of duties, which are usually not all enforced simultaneously.

Social and economic rights then are as fundamental to the agency and dignity of all people as are civil and political rights. A theory of human rights that truly reflects the requirements of both liberty and need has to take account of both classes of human rights. If it does not, it is an inadequate theory of rights. However, in order to give those rights that are included in the category of universal human rights their full weight, they cannot be compromised by the inclusion of claims that do not qualify as rights, and for this reason, the minimal content of such rights is to be jealously defended. Furthermore, in honouring the obligations generated by what are truly regarded as human rights, there can be no compromising on the insistence that the very exercise of either class of right depends on the enforcement and recognition of the other. So in acknowledging this interdependence of basic human rights, commitments are not necessarily increased, but are unquestionably reordered to take account of some of the more pressing demands in many parts of the world. This commitment cannot be evaded under the guise of a defence of first generation rights which is rooted in a false conception of negative liberty.

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