

ADDIS ABABA UNIVERSITY
SCHOOL OF GRADUATE STUDIES
FACULTY OF HUMANITIES
DEPARTMENT OF PHILOSOPHY

THE PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS

BY
SHIKUR SEID

February 2011

Addis Ababa

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Abbreviations of Major texts of Jurgen Habermas

- TCA 1 *Theory of communicative action vol.1*, tr. Thomas McCarthy (Boston: Beacon press, 1987)
- TCA2 *Theory of communicative action vol.2*,tr. T. McCarthy(Boston: Beacon press, 1987)
- PDM *the philosophical discourses of modernity*, tr. Frederic Lawrence (Cambridge: MIT press, 1987)
- PMT *Postmetaphysical thinking*, tr.W.M.Hohnegarten (Cambridge: Polity press, 1992)
- BFN *Between facts and Norms*, tr. William Rehg (Cambridge: MIT press, 1996)
- PNC *the post national constellation*, tr.Max Pensky(Cambridge: polity press,2001)
- TRS *toward a Rational Society*, tr.J.J.Sapiro (London: Heinmann, 1971)
- STPS *The structural transformation of the public sphere*, tr. Thomas Burger and F. Lawrence (Cambridge: MIT press, 1989)
- DW *The divided west*, tr. Ciaran Cronin (Cambridge: polity press, 2006)
- IO *The inclusion of the other: Studies in Political Theory*, Cambridge: MIT Press. (1998).

Abstract

The multi-faceted processes of globalization have been associated with the increasing interconnectedness of the world or the creation of a global village. These processes are, however, full of ambiguities in that they challenge human freedom, dignity, rule of law and democratic self-determination. Especially, economic globalization creates what Pheng Chea calls the “inhuman conditions” that describe the defective features of human existence due to commodification, technology and totalitarian domination. In this condition of human existence, cosmopolitanism is being advocated as a practical consciousness of universal humanism and as a political project to regulate the dehumanizing effects of economic globalization. The thesis explores and analyzes Jurgen Habermas’ conception of the cosmopolitan condition as constitutionally structured multi-level global governance without global government geared towards the global realization of peace, human rights, and democracy. Habermas upholds the enlightenment ideals of rationality, freedom, human rights and democracy based on the notion of communicative reason implicit in everyday use of language. Hence, Habermas defends the universality of the constitutional state subject to procedural discourse. The democratic ideal at the level of a state is to bring the political and economic system under the will of the people articulated in discourse. The global realization of human rights and democracy is conceived as the control of supranational and transnational governance by the will of world citizens developed in national and transnational public spheres. I argue that Habermas’ democratic theory seems to be unrealistic in existing liberal democracies where the autonomy of political discourse and public sphere is challenged by political and economic forces. Analogously, Habermas’ cosmopolitan project is problematic in that the development of cosmopolitan consciousness and global public sphere is compromised by economic globalization. In as much as national and transnational public spheres depend on uneven global economic structure; it is unlikely that Habermas’ project will realize the goal of overcoming global economic and social inequalities. I argue that the development of popular based nationalism in the postcolonial south can make the state serve the interest of the majority of the people and also challenge economic globalization.

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Abstract

The question of human right is one of the contemporary world human things. There has been philosophical interest over the different human things that are normative notions such as justice, freedom, rights, the good, etc. As a result, those notions have been conceived and justified by philosophers of the antiquity, medieval, early-modern and modern times in different manner. Most of the philosophers formulated their thoughts questing background reasons for the human things based on the principle of appropriation. Hence, the bases for normative ideals and justifying background reasons were get established as the parts (humans) are appropriated to the whole system of nature and vice-versa. This is observed in the work of almost all thinkers of the natural law and natural rights tradition, which extend from the Greco-Roman antiquity to early-modern time. The first approach is explicitly found in Aristotle, Cicero and Aquinas while the later was initiated by Grotius and further developed by Ockham and Hobbes. The transition from natural rights to the notion of human rights was observed following modern thinkers' normativization, moralization, and humanization of rights and other human things naturalized during the classics and medieval time. The turn could easily be identified as a move from naturalism to humanism of rights whereby the appropriation approach is completely replaced by interrogation of human nature. Accordingly, the modern discourse on human rights has centered in the human things normativized. Modern theorists have conceived and justified human rights based on moral consideration of the human nature. Philosophers holding the view that humans have universal nature arrived at a conclusion asserting absolute moral principles while the relativists establish human rights as grounded in shared beliefs. Nevertheless, both groups have accepted the list of human rights positivized and presented in the UDHR ignoring the suspicion that, if positivized the notion of human right would lose its moral content and authority. Moreover, those theorists effort could not be seen more than as attempts to develop theories conforming to the Universal Declaration, not to formulate unshakable foundation of human rights. In that case contemporary human right theories are flawed and refutable. I propose not to look at human rights as morally, metaphysically or religiously formulated and adopted in positive laws for the purpose of preserving the conditioned human condition. After all, human rights should be seen as protection of the unconditioned human condition from being diffused with any conditionalities that are rampant in what Jurgen Habermas call 'the systemic world' of our time.

Introduction

There are two significant points with regard to the notion of human rights. First, in our contemporary world, human rights are taken to be normative limits to economic and political actions across the globe. It is easier to find lists of human rights enshrined in the constitutions of many countries as well as in international conventions and the UN charter. Secondly, in contrary to this fact it is common to hear about reports of gross violation of human right across the globe. And human right violation have been alleged as the reason behind different responsive actions such as citizens revolting against their governments, diplomatic and economic sanctions being imposed on, and military interventions in, different states. This actual condition of our time (the 21st C.) will certainly invite anyone to raise questions like what is human right, what is their makeup, why do we think any exist, what grounds could there be for assigning rights of this kind, what purposes do they serve, and could we do without them, what after all is that to be human? (Edmundson 2004: 119). In this case there is disagreement with regard to the conception and justification of human rights. Since the purpose of the thesis is to assess the theoretical conceivability of the notion of human rights; I find it important to examine the diverging conceptions and justifications of human rights, which is one of the newly emerging human things. The modern idea of human rights, as one of the human things, was being formulated and affirmed in different manner on the basis of questions of humanity and human nature approached from different philosophical points of view. In the two major theories of human rights of our time, that are moral absolutism and moral particularism, the human right notion was conceptualized and justified based on slightly different characterization of humanity and human nature.

Having said this, clear understanding of the philosophical presuppositions and basis behind those theories idealization of human rights requires some discussion of the history of the general discourse about the human things or normative questions about the human. The notions of justice, rights, good, etc. are some of the philosophically interesting human things. Philosophical interest over those issues about the human extended back to the antiquity. In that case the author has organized this paper into three major parts. Thus, in the first chapter the philosophical thoughts of ancient, medieval and early modern time thinkers and their understanding of the human things such as the just and rightful rights are discussed. For the purpose of this paper the author has selected Aristotle, Cicero, Aquinas, Grotius, Hobbes, Locke, Rousseau, and Kant. Those thinkers are discussed as part of that we often identify as natural law and natural rights tradition.

Almost all thinkers of that tradition have formulated the notions of justice and rights as grounded in and justified on the basis of overarching principles. Aristotle, Cicero and Aquinas have arrived at the justifying overarching principle holding the view that human things should be formulated as matters of the parts (humans) appropriated to the whole (nature/the natural). Like the classical and medieval natural right theorists for early-modern natural right thinkers such as Grotius and Hobbes the naturally just and natural rights were founded in an overarching principle called the law of nature or natural law. However, the early modern thinkers, except Locke, have formulated the defining principle as the natural/the whole is appropriated to human nature itself. Locke has followed the line of classical and medieval thinkers. Besides, though they are slightly different in some respects, the emotive and contractarian conception of natural rights of Rousseau and his ilk, in which rights are assumed to be derived from natural law dwelt within the people as a collectivity and could be identified by reference to the 'general will', and the rational-moralistic conception of 'law' and 'right' of Kant are also covered in my presentation of natural law and natural rights tradition.

Positivistic and utilitarian objections of Hume and Bentham, with Edmund Burke's, Hegel's and his proponent British idealist's like Green and Bosanquet criticisms of the natural law and natural right theories with their alternative philosophy of right is discussed in the second chapter. Besides contemporary legal, moral and political thinkers' response to the positivistic and utilitarian criticism of natural right theory and their attempt to reformulate natural right theory of the ancient and medieval times, in a slightly different way, as rights of morals or rational creatures is also included in this part so as to show that the modern human right theories are derivatives of the early theories of natural right.

In the third chapter the modern human right discourse is presented with an emphasis on the turn from 'natural' rights to 'human' rights. Thus, the individualism, moral absolutism and universalism foundationalist theories of James Griffin and Alan Gewirth; contra, the consensual human right theories of neo-Hegelians and communitarians including Charles Taylor, R.J. Vincent, Jeremy Waldron, Rex Martin, and others like John Rawls are discussed so as to show the philosophical presuppositions behind the current human right talks. And the conceivability of the idea of human rights materialized in the UDHR lists of rights and freedoms is examined based on the philosophical debate about their universalizability in the last part of this paper, so as to arrive at certain conclusions about the conceivability of the notion of human rights.

Chapter One

The Historical Origin and Philosophical Bases of the ‘Right’ Discourse

As most of us are familiar with the history of western philosophy, pre-Socratic thinkers were mainly concerned with the general question about the beginning and ultimate source of the whole universe. They wonder about everything that is in cosmos and ask themselves where all those things came from, their initial source. The questioning, wonderment, and attempt to understand matters about ‘the human’ or human things have began with Socrates. Socrates has formulated and discussed the different human things without making distinction between the conditioned (customary) and unconditioned (natural) matters about the human. Human things such as justice and right clearly distinguished and classified as customary and natural are formulated in the works of most philosophers who have lived after Socrates. More specifically, with regards to rights almost all of the early enlightenment thinkers were mainly concerned with what they call ‘natural rights.’

1.1. The Natural Law and Natural Right Tradition

Examination of the history of the discourse and philosophical engagement to discern human things such as the naturally just and natural rights requires introducing and briefing some thinkers of the natural law and natural rights tradition. Thinkers of natural rights have focused in the philosophically relevant conceptual and justificatory questions about the nature and origin of rights. Even though the two questions are inseparable, ancient and medieval thinkers emphasized on the later and claim that the ground for rights is ‘the natural’. Though what they call ‘the natural’ and ‘law’ varies from one thinker to another, those rights were generally seen as derived from ‘natural laws’ (Griffin 2008: 9). And the typical features of modern natural rights characterized as: rights derived from nature, having validity even if they were not posited by human beings, inalienable and imprescriptible, innate, immutable, universal, timeless, unchanging, self-evident and fundamental (Boucher 2009: 150-51) were the result of the total-sum effort of different thinkers of natural law tradition extending from Aristotle to Kant.

For the purpose of this thesis, therefore, I have discussed this tradition by classifying in to two as the classical-medieval and early-modern theories of natural rights. Both the classical-medieval and early-modern thinkers have formulated what they call natural law as a determining overarching principle of the naturally just and natural rights.

However, they differ in that classical and medieval thinkers' formulation of the natural law principle as background reason for the human affairs was done as what is considered to be human is appropriated to the natural while the later argued the other way around i.e. – as the natural is appropriated to human. Among the classics and medieval thinkers I glimpse through Aristotle's naturalism, Cicero's stoic thought, and Aquinas's religious view. Whereas, Grotius, Hobbes, Kant and Rousseau are some of the early-modern thinkers, who have formulated the overarching principle of natural law based on appropriation of nature, the natural to the very nature of human kind. They have justified natural law as rational and moral; in doing so they have reduced the natural system, purpose and order to the sociable, reasonable, emotional (like Hobbes's idea of the interest for self-preservation or Rousseau's idea of sympathy and compassion) nature of humanity.

1.2 Classical and Medieval Natural Rights

Some contemporary writers have resisted the imputation of rights to earlier thinkers such as Aristotle (Miller 1996: 881) while some other opposed such claims. To begin with, the term right is not mentioned by any one of the ancient Greek philosophers and it does not have a counterpart in classical Greek. Does this, however, mean that it is modern invention and ancient philosophers never think about it. As Alasdair MacIntyre quoted in William A. Edmundson, in ancient times-

it would of course be a little odd that there should be such rights attaching to human beings simply qua human beings in light of the fact . . . that there is no expression in any ancient or medieval language correctly translated by our expression "a right" until near the close of the middle ages: the concept lacks any means of expression in Hebrew, Greek, Latin, or Arabic, classical or medieval, before about 1400, let alone in Old English, or in Japanese even as late as the mid-nineteenth century (MacIntyre 67; Edmundson 2004: 4).

The above quotation shows that thinkers of the ancient and medieval time have no the concept and conception of right for the mere fact that the term does not have a counterpart in old and medieval English, Greek, Latin, or in some other language. And it has the implication that the 'right' concept is modern invention which only makes sense for those who think of it at a particular juncture in time hence it is not appropriate to talk of 'right' conception of the ancients. However, the mere fact that the term does not have a synonym or relative in Greek or some other language; and/or human kinds of the ancient or medieval time never uttered the expression- this is my right does not mean that thinkers of that time have never thought about it.

Fred D. Miller responded to Macintyre's argument by saying that- it is true that "no single word in classical Greek was a precise counterpart to the modern English substantial noun-right... it does not follow, however, that Aristotle or others lacked the linguistic resources to make right claims" (Miller 1996: 881). Miller has gone further and argued that writers who "have embraced the Hegelian analysis of rights and his principle of subjective freedom as criterion and have resisted the imputation of rights to earlier thinkers like Aristotle" (ibid, 876) are mistaken in so far as "not all theories of rights assume Hegel's principle of subjectivity" (Miller 1996: 876). By this Miller is acknowledging the existence of slightly different- objective and subjective- conceptions of the 'right' idea. Till the time of early modern natural right theorists, Hobbes and Locke, the natural right discourse centered in objective right that is conceived as object of justice and of its prevalence. And the just or the idea of right as to Aristotle, the Stoic Cicero, Aquinas, and other medieval Aristotelian and Thomist's – *dikaion*, *ius* – is primarily objective, meaning giving someone his or her just due, what is just, or the just thing to do.

Moreover, the question when did a word or phrase whose meaning is close to the meanings of our modern sense of "right" emerge is debatable, in so far as terms indicating an "objective" sense of "right" came also to bear our "subjective" sense of "a right" (Finnis 1980; Wenar 2007). Aristotle's notion of '*dikaion*', for example, is used to indicate that a society is "rightly ordered": that it displays the correct structure of human relationships. Which means his (Aristotle's) objective conception of "right" can also be attributed to individuals. This is also manifested in the modern debate about whether rights are: "derivable from a deeper theory of justice or fundamental and irreducible moral concepts; based merely on convention or objectively grounded; merely prima facie claims or indefensible" (Miller 1996: 875). These all makes the right discourse very complicated and begs the question what is the criterion for different conceptions of the phenomenon to be count as a theory of right, subjectivity or objectivity? Leaving the criterion aside, as we all probably are familiar in their work, most of the ancients have shown a huge concern about humanity and it is them who have had contributed more about questions concerning the different aspects of human life- political, social, moral etc. Thus, as Fred D. Miller did, I do believe that our decision about whether ancients have the concept and their own conception of rights requires thorough examination of their works. Because, it is the message or information content of their writings that matter most, not the concept. The concept plays no significant role in their thinking.

1.2.1 Aristotle's Naturalism and 'Natural Right'

The natural rights and naturally just idea could be said to be first formulated in Aristotle's theory of natural justice that lies in the assumption that man by nature is endowed with some virtues and qualities that are basis for implicit principles governing his relations with others. As we all know, for Aristotle nature is hierarchically ordered, having design, form and purpose to which individuals have to conform and discover their purpose. In that case the naturally just and right is doing any action in accordance with their position in that system. This is also observed in his politics in which he has indicated that the just and right in a polity is partially natural and partially customary. Hence, as F.D. Miller's interpretation we can talk of Aristotle's theory of natural rights in the sense that he has a theory of natural justice that serves as the basis for his recognition of the rights (Kraut 1996: 756). And his theory of natural rights depends on philosophically determined background reason based in appropriation of the human to natural.

Fred D. Miller, in his book titled 'Nature, Justice, and Rights in Aristotle's Politics', contends that "Aristotle's Greek has an ample supply of locutions to do substantially the same work as modern "rights" locutions" (Miller 1996: 881). Miller argued in this way because he has observed in his review of Aristotle's politics and ethics that Aristotle has stated "of political justice part is natural, part legal, natural, that where everywhere has the same force and does not exist by people's thinking this or that, legal; that which is originally indifferent but when it has been laid down is not indifferent" (Aristotle 1999: 82-83). Accordingly, for Miller Aristotle's conception of natural right is to be found in his idea of natural justice. Nevertheless, said Miller, Aristotle does not recognize natural rights as a right that is possessed in a state of nature, or a time prior to the existence of political communities (ibid, 756). Miller writes:

Aristotle distinguishes two senses of natural rights, and emphasizes that it is only in the first sense that Aristotle can be said to accept natural rights: a natural₁ (in the first sense) right is based on natural justice; a natural₂ (second sense) right is possessed in a state of nature, i.e. in a pre-political state. The senses are not equivalent, because the political rights which a citizen possesses in a just polis may be natural₁ without being natural₂. Moreover, modern theories of natural₂ rights typically treat rights as universal and inhering in human beings as such apart from any social or political relations. Natural₁ rights have no such implications (Miller 1988; Long 1996: 780).

As I have already mentioned it, Miller's understanding of Aristotle is based on the distinction that Aristotle made between 'physis'- nature and 'nomos' law, custom. Aristotle then "makes use of this distinction when he contrasts natural and legal justice" (Kraut 1996: 755). So, how can we understand Aristotle's conception of natural₁right, which is derived from natural justice in relation to the modern subjective senses of rights? Wrote Miller-

Does Aristotle hold that individuals possess natural rights in some sense? ... Recall the two senses of "natural rights" distinguished earlier: natural₁ rights based on natural justice, and natural₂ rights possessed in a pre-political state of nature....Aristotle...endorses natural rights in the first (which I am calling "rights based on nature") but not the second sense....That Aristotle would not derive political rights from pre-existing pre-political natural rights seems clear. Unlike Locke, who regards the natural law which governs the state of nature as prior to political justice...Aristotle's natural justice presupposes a political context. Because natural justice is inherently political, it obviously cannot support pre-political natural rights possessed by individuals in a pre-political state of nature (Miller 122-3; Long 1996: 780).

Hence, Miller denies that Aristotle recognizes rights in a pre-political community. But, his treatment of political justice concerns rights within the political community because from an account of objective right (that is justice) one can derive a corresponding account of subjective right (Miller 883-4; Miller 1996: 884). Even in a political community "the natural rights Miller finds in Aristotle's politics are not possessed by all, rather when the polis arises certain people have a natural right to hold various political offices and to own property, because Aristotelian natural justice requires that political systems be structured in ways that recognize the rights of certain human beings" (Kraut 1996: 756). However, if the base for Miller's justification for the presence of natural rights in a polis is that natural justice allows some to be free and endowed with some rights benefit from their relation with others what makes it absent before the formation of the polis?

Unlike Miller's understanding, Richard Kraut contends that "Aristotle's conception of rights as political justice in a polis does also apply to those pre-political relations; for he notoriously argues that the master-slave relation is based on justice when the master really does possess a certain kind of superiority and the slave has a natural inferiority" (ibid, 758). Thus, if you are naturally free, then others owe it to you to recognize your status and not to treat you like a slave; and if you have done nothing harmful to others, they must not humiliate, assault, or kill you. If you are a free person you will get the right not to be treated in these ways (ibid, 759).

However these rights are not human rights- that you get just because you are human kind, rather natural rights granted by the presupposition that you are naturally a free person. Accordingly, for Aristotle it is the natural order that ought to provide the basis for all truly rational systems of justice. An appeal to the natural order provides a set of comprehensive and potentially universal criteria for evaluating the legitimacy of actual 'man-made' legal systems. And we are entitled to what we are naturally endowed with. Because, says Aristotle in his *Nicomachean Ethics*, "the natural is that which has the same validity everywhere and does not depend upon acceptance" (Aristotle 1999: 189).

Aristotle's conception of natural rights could also be exposed in light of his influence on other objective and subjective natural right theorists like Thomas Aquinas, Ockham, Locke, Kant and others. First of all, "St. Thomas draws on Aristotle at two crucial points: he cites Aristotle's comparison of the superiority of a master over his slave and uses his definition of the slave as "animate tool" to underline his own contention that a rational creature as such is not ordered as a means to something else. In particular he says one human being is not a means in relation to another" (McGrade 1996: 810).

In St. Thomas this conception has further implication that rational creatures be treated as ends in themselves (ibid, 815). The other fundamental point that St. Thomas takes over from Aristotle is the idea of a right as the object or objective of justice. In his *Summa Theologiae* Aquinas argues that "the 'just' is the object of justice, for the Philosopher (*Aristotle*) says that 'all men mean by "justice" the habit which makes men capable of doing just acts'. Therefore, right is the object of justice" (Dyson 2002: 159).

Ockham also used Aristotle in his different works. McGrade's inspection of Ockham's writings has shown that, particularly in his later works, Ockham enlists Aristotle in support of his own views. For example, in his argument about the right to private property and appropriation, that it "was introduced after the fall from innocence as something rationally necessary and useful to the human race after sin, Ockham cites Aristotle's defense of property in book 2 of the politics" (ibid, 821). Ockham, as quoted in McGrade, argued that

Power to appropriate temporal things... must be regarded as something necessary and useful to the human race after sin... For Aristotle considered that the crowd is bad and given evil, and therefore common things are by most people less loved, and consequently less cared for, than things which are their own; among such people, therefore, the appropriation of things is better than community (ibid, 821).

Liberal right theorists including Locke have shared Aristotle's claim that "some people are by nature free, and need to be treated in a certain way" and argued that "one's status as a free person and one's full possession of reason entitle one to be treated in certain ways by all others" (ibid, 759). Aristotle's theory of natural slavery could also be seen as basis for the Kantian theory of right. According to Kantians we have rights only as having a capacity to transcend the determining influence of natural inclinations in order to choose freely- i.e. the capacity to reason. This idea is founded in Aristotle's theory of natural slavery in that, as Miller pointed out, there is "a less often noticed corollary a theory of natural freedom" (Miller 1996; Long 1996: 801) in it. That is, "just as those human beings who lack the fully functional capacity to run their lives by reason deserve to be enslaved, so those who do possess that faculty in good working order have the right to be free" (ibid, 801).

Some other philosophers have also used "the sharp distinction drawn by Aristotle between political and servile relationships... to work out their conclusions that seem equivalent in substance to the affirmation of important natural rights such as the rights to resist flagrantly unjust government, a sphere of personal autonomy" (ibid, 826). I referred to other thinkers' usage of Aristotle's theory of natural justice and law, found in his ethics and politics, in their formulations of right because it shows how the natural law and natural right traditions have got their base in Aristotle's politics and ethics. It is from his comprehensive ethical and political thoughts that other thinkers including Cicero, Aquinas, Locke, Rousseau, Kant and others formulation of laws governing individuals and guaranteeing them rights, social relations and inter-state relations derived.

1.2.2 Cicero's Stoic-Naturalism

Though as shown above there is a theory of natural justice in Aristotle and other ancient Greek thinkings; it is the Stoicists and Thomists who have contributed more in the formulation of the theory of natural justice and natural rights based on natural law and reason. One of the figure in Stoic philosophy "Chrysippus, for instance, has developed the two crucial elements necessary for a theory of natural law. He emphasizes the authority and control of law over both the divine and human assisting them in living the good life by recommending what should be done and prohibiting those things that should not" (Mitsis 1992; Boucher 2009: 27). So there is imposed duty upon all of us to obey the will of God or law of nature. The law of nature, according to stoic philosophy, is universal. And the universalizability of the law is the result of humans shared relationship with the 'divinely' or God- i.e the divinely

nature of humans ability to reason. In other words, “as rational creatures, we are united in a single cosmopolis, or city of God; all men, then, should consider themselves as fellow citizens subject to a common order” (Barker 1934; Boucher 2009: 31). And, every principle governing our relations within the cosmos originated in the rational will of God and a natural, moral law whose authority transcended all local legal codes could be discerned on the basis of the existence of a cosmic city. Only that way, stoicists contend that, natural justice could get served and natural rights of human kind preserved. And these laws “are capable of being apprehended by reason and are naturally and universally valid” (Boucher, 2009: 27).

The Roman stoic- Cicero, though contributes nothing original, has clearly shown and exemplify how the stoic conception of natural law and reason (the pantheistic force governing the universe) could be applied in political context about human relations. First of all the dogmatic natural right theory of Cicero lies in the basic principles of the naturalistic and rationalistic stoic stance that “emphasized the importance of law, and provide a natural basis for this law from the stoic doctrine of *oikeiôsis* (appropriation)” (Sharples 1996: 127). This doctrine, *oikeiôsis*, is about how human beings are appropriated to things by nature, rather than appropriating things to themselves. Thus, as we appropriate or identify our selves with what is as it is in nature, we will start to follow the law of nature. In doing that we will recognize our own nature as rational beings and identify ourselves to certain family, of humanity. Our reasonableness forces us to form a family of fellow rational animals- humans. And since rationality is sort of divine nature it will link us with gods. And it can be argued that the universe is the common home of gods and human beings, in which its order rests on justice that is a principle of the universal law of nature.

To elaborate, according to Cicero “first of all the world itself was made for the sake of gods and humans, and whatever there is in it was prepared and devised for the enjoyment of humans. For the world is, as it were, a common home of gods and humans, or the city of both groups; for only those who have the use of reason live by law and right” (Cicero 1999; Sharples 1996: 127). For him, therefore, the first thing that humans being rational or capable of reasoning reveals to us is that we possess something of the divine and that the reason that resides in us ‘is a sort of consecrated image of the divine’ (ibid.). Since “nature has endowed all men with reason, namely right or true reason, revelatory of true law in commanding what is good and forbidding what is sinful or evil” (Boucher 2009: 33).

It follows that, according to Cicero, “reason in harmony with nature exhibits a law that is unchanging and universal. This law is not thought up by human minds, nor is it legislation enacted by popular assemblies, but it is something eternal which rules the entire universe through the wisdom of its commands and prohibitions” (Cicero 1999; Boucher 2009: 33). That is what we call the law of nature, out of which our natural rights and duties arise. The law acts as a constraint on wrongdoing for good men, but the wicked who have abandoned their better selves cannot be constrained. They may evade human punishment, but God nevertheless will visit the severest of consequences on them. And, this idea of doing in the right way as nature permits, if we do otherwise there will be some consequences-punishments, is a question of justice. Cicero, therefore, maintained that justice is a principle of the universal law of nature upon which the order of the universe rests. It is correlative with true or right reason, in conformity with nature, constant and eternal. This law compels us to fulfill our duties, and deters us from practicing deceit.

Accordingly, “since this law of nature applies universally, all men are subject to it; because all are subject to it, all must be in some sense fellow citizens; and because all men are fellow citizens, all men are equals.” Thus, Cicero rejects Aristotle’s argument that there is a natural inequality that befits some men to be slaves. Instead, Cicero emphasizes natural equality which is manifest in a universal capacity for learning. The fellowship is natural and based upon the unifying principles of reason, speech, and natural equality (Cicero 1991; Boucher 2009: 35).

To explain, Cicero argued in his *De legibus*:

Out of all the discussion...there surely comes nothing more valuable than a clear understanding that we are born for justice and that right is constituted not by opinion, but by nature. This will become clear as soon as you perceive the society and union that men have with one another. For no single thing so exactly resembles anything else as we ourselves resemble each other. Indeed, if bad habits and false beliefs did not corrupt weaker minds and lead them into the paths of their own inclinations, all men would be as much like other men as each man is like himself ... For those creatures who have received from nature the gift of reason have also received right reason. Therefore they have received the gift of law, which is right reason applied to command and prohibition, (Cicero; cf Sharples, 1996: 105) out of which their rights and duties arise.

To summarize, Cicero maintains that “we are born for justice and that justice is established not by opinion but by nature” (Cicero 1999: 115). So, he seeks the root of justice in nature. For him, when used in relation to man the term nature means reason.

It is because of his reasoning abilities that man is naturally superior to animals, and better able than them to conceive of a wider community. This distinguishing feature of man entails wider obligations extensive with humanity in general. It follows that, what is just or rights and duties are determined and grounded in nature and reason. Only the law that is constituent of nature and right reason determine the just and the right (Cicero 1999; Kelly 1991: 58).

1.2.3 Religious Natural Right Theory of Aquinas

As I have stated above, in addition to the stoics, “although the doctrine of natural law has ramified roots deep in Greek and Roman antiquity, it has got its most influential statement by Thomas Aquinas” (Griffin 2008: 9). Aquinas’ theory of natural right is dogmatic in that he emphasizes on the divine law as the basis for natural and human laws governing our relations with each other and the entire cosmos. According to Aquinas, God has placed in all things various innate natural dispositions, but only in human beings has he further placed a disposition to reason: that is, a disposition issuing in various precepts to guide action- for example, that we are to preserve ourselves in being; to propagate our kind; to seek knowledge of, and to worship, God; and to live peacefully in society (Griffin 2008: 9).

When it comes to rights, in particular, Aquinas has discussed right as the object of justice. Wrote Aquinas, translated in Dyson, “it seems that right is not the object of justice. Mainly, for the jurist Celsus says that ‘right is the art of the good and equal’. But an art is not the object of justice, because art is an intellectual virtue in itself. Therefore right is not the object of justice” (Dyson 2004: 158). However, in as much as other jurists like “Isidore ... says that ‘*ius* [right] is so called because it is just [*iustum*]’. And this was confirmed by the Philosopher- Aristotle as ‘all men mean by “justice” the habit which makes men capable of doing just acts’. Aquinas then concludes that, it’s logical to consider right as the object of justice (ibid, 159). Because, a thing is said to be just, as having the rectitude of justice, when it is the outcome of an act of justice, without regard to the way in which that act is done by the agent; whereas in the other virtues nothing is deemed to be right unless it is done by the agent in a certain way (ibid). For this reason, justice has its own special object proper to itself over and above the other virtues, and this object is called the just [*iustum*], which is the same as ‘right’ [*ius*]. Hence it is clear that right is the object of justice (ibid, 160). But, what does Aquinas mean by right is an object of justice or simply a just act; and where in did his claim lie?

As observed in Finnis's understanding, "when Aquinas says that *ius* is the object of justice, he means: what justice is about, and what doing justice secures, is the *right* of some other person or persons – what is due them, what they are entitled to, what is rightfully theirs' (Finnis 1998; Boucher 2009: 51). And the principles or laws giving direction to what the just is and get its ground is assumed to be generated from nature, and the orders of its creator. In Aquinas rights and laws are, therefore, discussed as having a rational connection. This means what are rightly ones or what justice secures for someone is directly linked with what is allowed by a certain law. Among which eternal law of God is superior. So, what is divinely right is an act of justice or a just act done in accord with the eternal law. However, this eternal law of nature is not something that God printed in human mind. And it couldn't be used to govern our relations with each other and the law giver, because it's general in its precepts and may lack directives for specific guidance, and therefore requires supplementary rules pertaining to particular conditions. So, humans are required to derive other laws out of it. And, this is possible in so far as they are created as rational and "law is nothing other than the expression and embodiment of reason ...the eternal law being the means by which God instructs us, to achieve Grace" (Finnis 1998; Boucher 2009: 51). What is special about eternal law is that it is like the plan of government for the whole universe, which can be implemented by subordinate governors (Aquinas 1988; Boucher 2009: 52).

According to Aquinas, therefore, there are other human laws that are derivative of God's eternal law. The premise of such thinking was that God exhibits perfect rationality and is capable of producing a coherently designed and ordered universe in which everything has its place. And to assert that someone has a right is to make a claim regarding what practical reasonableness demands of each or every person. But, these rights claims are different and based in different types of rational law, each of which exhibits a different type of reason. Among all the Eternal Law is the Divine Wisdom of God manifest in the whole of creation. It embodies all the purposes for which God's creatures were created and exemplifies God's reason in a rationally ordered universe (ibid.).

The other laws, then, are derivations from the eternal law. This law provides the plan or model towards which all forms of law must look for guidance. Like Pufendorf after him, Aquinas believed that all law emanates from the will and reason of a sovereign or law-giver, 'the divine and natural laws from the reasonable will of God, the human laws from the will of man regulated by reason' (ibid.).

Therefore, a right which is a just act or adjusted to someone else according to some kind of equality may be founded by nature like “when someone gives something in order to receive an equivalent amount back in return; and this is called natural right.” In another way it may be founded “when something is adjusted or commensurate to someone else by means of an agreement. That is positive right” (ibid.). Aquinas had gone further and said that “since the agreement can be...done either by a private arrangement, which is by an agreement confirmed between private persons, or by a public agreement- as when a whole populace agrees that the value of something should be fixed in the same way as if it had been adjusted and commensurate between one person and another,” (ibid., 162) the positive rights can be further divided as civil rights or rights of nations. For example, take the civil right to possession of property. “The reason why a piece of land belong to someone rather than another is that it will be best to cultivate the land and make peaceable use of it, if it has a certain commensuration to be the property of one man rather than another” (ibid, 163). The law of nations, however, is established among all men by natural reason. And ‘whatever natural reason establishes among all men is observed by all equally, and is called the right of nations (ibid, 163). For instance slavery is the right of nations because we can justify that someone is a slave to some advantage consequent upon his being so, in that it is beneficial for a slave to be governed by someone wiser than he, and for a master to be assisted by the slave (ibid, 164). What makes, then, the rights of nations (grounded in public agreement) different from civil right (lying upon private arrangement) is that the former unlike the later do not need to be enacted in any specific way, because they are indicated by natural reason itself (Dyson 2004: 164-165).

To summarize, for Aquinas, first; rights in general are an object of justice. That means that what is right is a just act. And it may be so by nature as created by God or because it is as it is molded by the principles of natural law, or it may be so by reason that humans have got from the will of God (i.e. civil law) or by the rules that give natural law a specific determination for a community (law of nations). But all the laws, upon which our natural right, civil right and rights of nations depend, are derived from the ultimate eternal law of God. He has formulated natural rights as grounded in the law of personal God by whom we are endowed with the capacity to right reason through which the laws could be detected. And that is what makes him different from Aristotle’s and Cicero’s naturalistic and pantheistic philosophy of law and right.

Thus, the classical and medieval natural right theorists (Aristotle, Cicero, and Aquinas) have maintained that there are objectively grounded laws entailing what is and what is not one's due, or the rightful rights and duties. And those rights are natural, in that their existence, content and reasons for our possession of them is caused by forces external to us. In other words, they have formulated the justifications or background reasons for natural law and natural rights based on the principle of appropriating the parts (human) to the whole (nature). Natural rights and the naturally just, as human matters, are therefore grounded in overarching principles governing and ordering the whole (nature), which are also assumed to be applicable for the parts.

1.3 Early-Modern Natural Rights

Most of the early modern thinkers have formulated the idea of natural rights and settled justificatory principles/background reasons in a slightly different way. Their conception of natural rights and the justifications were done as that which they identified as 'the natural' is appropriated to the human. In other words, the governing idea that humans deserve to be guaranteed immutable and inalienable rights constituted by natural way of acting and leading lives was established as humans considered to be parts of the whole universe. The whole, nature, as a functioning system consists of general qualities and properties, purpose, and governing principles. Since the whole system can't function without its constituent parts, the parts shared everything of the whole. Nevertheless, the parts have possessed special qualities making them unique and distinct. Hence, the notion of natural rights of man was formulated such that general qualities of the whole are considered in a way that they conform with, and appropriated to the peculiar qualities of its parts. For this reason, Grotius, Hobbes and other thinkers have formulated natural rights based on the assumption that human beings are sociable, rational and have the interest for self-preservation.

1.3.1 Secular Natural Law and Natural Rights Theory of Grotius

Like the classical and medieval thinkers, Hugo Grotius has justified the existence of natural rights, based in the law of nature or natural law. However, the reason he gave for the obligatoriness of natural law make him different from his predecessors. That is why he has earned his reputation as the founder of the modern secular theory of natural law and natural right, for the simple reason that he did not appeal for any, natural or supernatural- like God, force to justify the obligatoriness of natural law upon which natural rights are derived.

He wrote that “what we have been saying (namely, that there are natural laws and that they obligate) would have a certain degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him” (Grotius; Griffin 2008: 10). Nonetheless, he thought that we can establish natural laws through the kind of understanding open to all of us, whatever we believe about religion: namely, that we must act in accord with our rational nature, and that we must do the various things necessary to maintain a society both consonant with reason and composed of inconsistently motivated members such as us—by nature desirous of society yet by nature so self-interested as to undermine society (Griffin 2008: 10). This famous proposition of Grotius- that natural law would retain its validity even if God did not exist, appears as a turning point in the history of thought’ (Grotius 1972; Griffin 2008: 10).

Furthermore, though skeptics who lived during the time of Grotius have argued that there is no “law” of nature other than the imperative of self-preservation. Grotius said that such skepticism ignores man’s “impelling desire for society” and for orderly and peaceful society, at that (Edmundson 2004: 17). And, justice is an expression of a human nature that Grotius believed to be sufficiently determinate to allow him to speak of *laws* governing that nature. Natural law, for Grotius, therefore is inextricably linked with human nature, not super natural power. He thought that an indubitable and immutable human nature: means our social nature and rationality, provides the basis for natural law. And, from the basis of our natural sociableness, Grotius suggests that, proofs of the natural law are almost as self-evident as the data we receive through the senses (Grotius 2005; Boucher 2009: 75). Thus, according to him, “the content of natural law can be determined in two ways. First it may be known *a priori* as a dictate of right reason compatible with our rational and social natures. Second, we may come to know it *a posteriori* with a high degree of probability by identifying what all civilized nations agree upon. The latter must be deemed to have the same cause in all nations, that is, nothing other than ‘Common Sense’” (ibid, 93). Hence, Grotius has classified the laws, upon which our rights are sustained, into natural and volitional. The first, natural law, is a dictate of right reason determining what is consistent with human nature as by necessity morally right, and what is repugnant to it, morally wrong (ibid, 94). Nevertheless, he did not deny that there is an author of nature God, who is also the author of logically deducible natural laws or rights. Rather, he has gone further step and argued that, given our nature- social, reasonable...- the law of nature would be binding irrespective of its author.

Whereas, volitional laws may be divine or human; the first refers to laws that God reveal to human beings binding a particular group of people or the entire humankind, and the human volitional laws are contingently related to the circumstances to which they are a response, and are either civil laws or the volitional law of nations, which must themselves be derived from, or at least not subvert the natural law (ibid, 94). Accordingly, despite the slight differences all the laws: natural law, civil law and the law of nations are whereby our rights get sustained.

Grotius is different from other natural right theorists: Aristotelian, Thomists and their ilk's in that he has "acknowledged a subjective sense to the concept of natural rights" (Boucher 2009: 98). Because, according to him, "in addition to being what is just, a 'right is a moral quality annexed to the person, justly entitling him to possess some particular privilege or to perform some particular act'. So, his conception of right "has reference to a person"- means it is "a moral quality of a person, making it possible [for that person] to have or to do something lawfully" – that is, to have or do it justly (Grotius; Edmundson 2004: 35). Here, he is concerned with matters of respecting or exercising rights like "abstaining from that which is another's, the restoration to another of anything of his which we may have . . . the obligation to fulfil promises, and the inflicting of penalties upon men according to their deserts" (ibid, 35).

Grotius' argument about deriving obligations from human reason and his claim that the existence of law of nature is clear as a thing to be perceived provided that humans are social and reasonable is questionable. Because, as Boucher pointed out "Grotius tried to demonstrate the efficacy of natural law and natural rights by reasoning from indubitable data to logical conclusions We have to distinguish, however, the issue of how we come to know the natural law, from our obligation to conform to it. Reason is the route to its discovery and declaration, but often reason in itself cannot create obligation (Boucher 2009: 12).

1.3.2 Hobbes' Descriptive Analysis of Natural Rights

As shown above the subjective natural right theory was first initiated by Hugo Grotius. And this same view was further developed by Hobbes and Locke through different approaches. Hobbes's theory of right lies in his descriptive analysis of human nature while Locke emphasized on natural rights contented with the moral nature of men in their natural condition, that is what makes his theory prescriptive.

As I have tried to show above, Grotius has attempted to affirm the existence of natural law and rights without appealing to any supernatural power by invoking the idea of human sociability. Hobbes, however, rejected this idea and argued that without a common power life would not be livable and it is not our sociableness grounded in reason and nature that is firm ground for our rights. Rather, for him the rights one has are all dependent on the power he/she got naturally to do whatever is needed for self preservation. Thus, Hobbes' descriptive analysis of natural rights and their bases can be shortly presented by using Gauthier's words that, according to Hobbes,

I have the right to do whatever I conceive necessary for my own preservation – in this sense, certainly, I have the natural right to live. But no one therefore has the duty to allow me to do whatever I consider necessary to my preservation. You, having the right to do what you consider necessary to your preservation, may judge my demise advantageous, and so may with right kill me. You deprive me of my life, and prevent my exercise of my right of nature, but you do not violate my right of nature (Gauthier 1969; Boucher 2009: 141).

This quotation from Gauthier briefly shows that according to Hobbes individuals have natural rights to do whatever they want to do, for nature gave them the power and they have to exercise their right of nature. But this is possible for members of a pre-political community. Hobbes descriptively arrived at this conclusion from his description of human nature as selfish and antagonistic. In the Leviathan he wrote that-

Nature has made men so equal in the faculties of body and mind ..., from this equality of ability arise equality of hope in the attaining of our ends. And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end...endeavor to destroy or subdue one another (Hobbes, 1651: 76).

Thus, according to him, whatever the causes, "it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man" (ibid, 77). And all these is directly related to what he call the right of nature, which is "the liberty each man has to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgment and reason" (ibid, 79). And in the same natural condition, in the state of nature, there is a law of nature, which is "a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or takes away the means of preserving the same, and to omit that by which he thinks it may be best preserved" (ibid, 80).

According to Hobbes, therefore, “right is permissive, ‘to do, or to forbear’, and therefore subjective. Law, on the other hand, determines what one should do or desist from” (ibid, 64). This shows that for him law and rights are separate and different and what he calls natural rights couldn’t be derivatives of laws of nature, wrote Hobbes, “law and right differ as much as obligation and liberty, which in one and the same matter are inconsistent” (ibid, 80). So, how can law and rights go together in a political community?

As it is mentioned above, in the state of nature “the condition of man is a condition of war of every one against every one, in which case everyone is governed by his own reason, and there is nothing he can make use of that may not be a help unto him in preserving his life against his enemies; it follows that, in such a condition every man has a right to everything, even to one another’s body” (ibid, 80). And, therefore ... there can be no security to any man, how strong or wise so ever he be, of living out the time which nature ordinarily allows men to live (ibid.). That is why Hobbes suggested transference of rights from one to another. The principle of transference is drawn from the law of nature. There is a law of nature, according to Hobbes, “a precept, or general rule of reason: that every man ought to endeavor peace ... and when he cannot obtain it, that he may seek and use all helps and advantages of war” (ibid.). From this fundamental law of nature, by which men are commanded to endeavor peace, is derived this second law: that a man be willing ... to lay down this right to all things; and be contented with so much liberty against other men as he would allow other men against himself (ibid.). But if other men will not lay down their right, as well as he, then there is no reason for anyone to divest himself of his: for that were to expose himself to prey, which no man is bound to, rather than to dispose himself to peace (ibid.).

Moreover, he that renounces or passes away his right gives not to any other man a right which he had not before, because there is nothing to which every man had not right by nature, but only stands out of his way that he may enjoy his own original right without hindrance from him, not without hindrance from another (ibid, 81). So, a man transfers his right, or renounces it, for some other good he hopes for thereby. Because, the transference is a voluntary act: and of the voluntary acts of every man, the object is some good to himself (ibid). There are some rights which no man will give up, or can be understood by any words to have abandoned or transferred- including, giving away one’s life, being wounded, chained or imprisoned, because he cannot be understood to aim thereby at any good to himself (ibid.).

This being the case, the mutual transferring of rights is that which men call contract (ibid.). However, though the signatories trusted each other, the covenant is void and empty words without a common power to perform it (ibid, 88). Thus, since without the constraints government imposes, life would be “solitary, poor, nasty, brutish, and short” in Hobbes’s estimation (Edmundson 2004: 89). In his view, a sovereign power is necessary in order to avoid the dismal circumstances of a “state of meer nature” (ibid, 140), which is a condition of war “of every man, against every man” (ibid, 88). So, men are obliged to surrender their rights, seeing the necessity of doing so to secure themselves; they create the state, “a sovereign Leviathan,” an “Artificial Man” possessing just those moral rights and powers that have been transferred to it (Hobbes; Edmundson 2004: 23). But, the reliance on the sovereign for the sake of peaceful existence may result in authoritarianism.

In summary, in Hobbes we have natural rights, but more strictly speaking they are not rights at all because no one has any obligation to acknowledge or respect them. They are in fact powers and capacities, or natural inclinations. The fact that we have certain powers or liberties in nature is justification for their use. To have a faculty and the right to use it are one and the same thing. And, the notion of the transference of rights to a sovereign power and living in accord with the directions set by the Leviathan and obeying him for the sake of peace and security is simple authoritarian non-sense than theory of right (Boucher 2009: 143).

1.3.3 Locke’s Prescriptive Theory of Natural Rights

Unlike Hobbes who has presented what he calls natural rights in a very descriptive way, John Locke has observed the prescriptive version of natural rights within the state of nature. And, it is his conception of natural right that is usually taken more forcefully to underpin the natural right tradition. The basic of his theory of right is the idea that all human beings are naturally equal. As to him, although people are obviously different in dispositions and abilities, they are “created equal” in the moral sense that they are all creatures of supreme deity who gave no one natural sovereignty over anyone else. Locke wrote in his second treatise of government; that the state of nature is a condition of natural liberty. And this natural liberty of man, or freedom of nature is, therefore, to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule (Locke, 1669: 14). Thus, individuals are allowed to live in such a way that the law of nature and their nature commands. The state of nature is:

A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature (to share what is on earth), and the use of the same faculties (reason and senses), should also be equal one amongst another without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty (Locke, 1690: sec 4).

The above quotation shows that, Locke's state of nature is different from that of Hobbes. Because, according to Locke, the state of nature involved much greater moral and social complexity than Hobbes recognized. As shown above, "for Hobbes, the inhabitants of the state of nature had the right to do whatever they judged to be necessary for their individual survival. But, Locke's state of nature is different. It is a state of "reciprocal" liberty, "yet it is not a state of license" (Edmundson 2004: 28). He agreed with Hobbes that in a natural condition each man has a natural right to self preservation, but this is not a right to harm others in order to do so (except in self-defense against a violent attacker). Moreover, each has a natural right to private property which must be respected by others. Although God originally gave the earth to humankind in common, the "law of nature" permits each, without needing another's consent, to appropriate such lands, crops, herds, and game as he sees fit, by the simple expedient of "mixing labor" with it. So long as one leaves "enough and as good" in common for others to appropriate, and does not allow what one has taken to spoil, one has a natural right to such private property.

So, the difference between Hobbes and Locke is that, after establishing the natural equality of all humans, Locke goes on to say that there is natural law, dictated by reason, stating that equal beings should not harm one another. Since people are by nature equal and equal beings should not harm one another, Locke asserted that all people have a natural right not to be harmed, or in other words a right to be safe in their life, liberty, and property (Bedi 2009: 16). Thus, unlike Hobbes', Locke's state of nature is a social and moral condition, what he calls natural rights have moral and social content. He said that, even though men in natural condition are all equal and should follow the law of nature as a rule, there may be those who transgress the law of nature, who do not make the law of nature their rules, and try to exercise power over others without their consent and harm or kill others, enslave and take what belongs to others. In such cases, we will have the right to execute the natural law and punish those who transgress the law and deny others natural rights. And, every man has a right to punish the offender and be executioner of the law of nature (Locke 1690: sect.8).

Thus, each also has a natural right to compensation for injuries, and a “natural executive right” to punish anyone who violates the “law of nature”. But, how can one be a judge in his own case, and punish the other, because. “selflove will make men partial to themselves and their friends: and on the other side, that ill nature, passion and revenge will carry them too far in punishing others; and hence nothing but confusion and disorder will follow” (Locke 1690; sect 13). Thus, since the inconveniences of the state of nature, even though a social condition, bring people into conflict and puts lives at risk, (Simpson, 7) Locke argued for the need to found a better society based on transference of individuals’ power and rights to a common power that will be an impartial judge to the public at large. Individuals have to give up their natural executive right to the common power in a civil or political society for their own advantage or common good.

Therefore, liberty of man, in society, is to be under no other legislative power, but that established, by consent, in the commonwealth; nor under the dominion of any will, or restraint of any law, but what that legislative shall enact, according to the trust put in it (Locke, 1690: 16). We are each our own authorities and no one has the right to exercise authority over us without our own consent.... (Boucher 2009: 152). It is this precarious and dangerous state of affairs that necessitates government. However, government should be thought of as a contract that individuals enter in to in order better to protect the rights that they have independently of that contract (Simpson, 6). Establishing governments best fulfills our duty to God of self-preservation (ibid.). The purpose of government in Locke’s theory is the preservation of property which includes the person. So, the advent of government does not change, alter, or add to our rights. As individuals, we possess such rights in civil society as we did in the state of nature (Bedi 2009: 16). Government’s role is to protect our natural rights. And, “Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man: as freedom of nature is, to be under no other restraint but the law of nature” (Locke 1690: 14). So, we shouldn’t only violate law of nature, but if the government fails to protect our natural rights and deny our freedom we deserve, it ceases to have executive authority, and no longer has a claim to political obligation. In Locke, then, the theory of natural rights includes the right to resist against and over throw it (Boucher 2009: 151). He establishes the right to resist a ruler entirely in terms of the language of rights and natural rights, allowing the people as a body, and even individuals, to exercise this right.

Hence, only the law of nature stands as an eternal rule to all men, *legislators* as well as others (Boucher 2009: 152). And, in Locke's view natural rights are derivatives of the will of God and the natural law (Simpson, 7).

Despite its merit for being prescriptive, Locke's account of natural right can be criticized in two ways: one is that if the purpose of his project is to show that natural rights are existent before the establishment of a government, and its purpose is to make sure that those rights are not violated; he has to show what form of government is suitable. But, as Sonu Bedi, stated it Locke "offers no "necessary connection" between rights and the question of "who governs" us" (Bedi 2009: 16). Secondly, in Locke the rights a government must protect are conceptually specified prior to its creation. Locke maintained that "the law of nature stands as an eternal rule to all men, legislators as well as others" (Locke 1690; Boucher 2009: 152). By saying that Locke failed to permit the polity to have a substantive (though not complete) role in defining the normative obligations of its members, without which it can never be a common power working for common good. Most important, Locke's theory of natural right is questionable in that, how, on the basis of his empiricist theory of knowledge, it is possible to know the will of God and the natural law that he defines as the grounds to justify the claim that individuals have natural rights? (Simpson, 7).

1.4 A Contractarian 'Natural Right' Conception of Rousseau

The idea that contract or agreement is the base for a certain society to lead a good life enjoying justice within which the rights of individuals or groups is protected goes back to the time of Epicureans. "Justice, for Epicurus, has no existence in its own right—it is based on a social contract, or, as he put it, 'the agreement not to harm or be harmed'" (Epicurus; Sharples 1996: 116). But this does not mean that what is just and what is not is simply a matter of what agreements a particular society reaches. The existence of some agreement is a 'natural' part of the development of human societies (Lucretius; Sharples 1996: 116). And a particular agreement is only just if it benefits the members of the society who made it. If the circumstances of a society change, an agreement that was previously just can cease to be so, even if it is still agreed upon (*ibid.*). But contracts can be broken; some individuals fail to realize that it is in their best interest to abide by the agreement neither to do nor suffer harm; it is at this point that legal sanctions become necessary, and that political structures to enforce them have value (Sharples 1996: 116-7).

Though the same idea of contract or convention was, to some extent, raised by Hobbes, Puffendorf and Locke in their discussion about natural rights in a political community, it was Rousseau who has fairly developed a fulfilled contractarian conception of rights. But, his conception of rights is different from the subjective natural rights of Locke and Hobbes. His difference with these modern exponents of natural rights theory arose from the understanding of the state of nature, the nature of men in their primitive or natural condition and about the foundation of society. Thus, I prefer to consider his reflection on these issues in comparison with the thoughts of Hobbes, Locke and Puffendorf, whom he opposed in a certain way, so as to show his slightly different alternative theory of right.

The major difference between Rousseau's theory of right and his predecessors is that for him force or power can never be the foundation of right. Rather, it is the agreement of the two principles of 'a constant impulse to preserve oneself and compassion for the suffering of other members of the same species', which are prior to reason, that all the precepts and prohibitions of natural right appear to be derived (Rousseau; Wokler 2001: 54). As, I have mentioned it above, this difference between Rousseau and the exponents of modern natural law theorists about the origin of right is because of the difference in their understanding of the natural condition of man in a state of nature and how man came out of this condition and form society. According to his predecessors, particularly Locke and Hobbes, the state of nature is a state of liberty and equality of individuals in which every man serves his/her interest for self preservation and peace through power or force. And, it is this power for self-preservation and welfare that men have as a right by the virtue of law of nature. They, mean the natural law philosophers, have presented the natural condition of men as moral or social condition in which "men are fundamentally drawn together by a social disposition whose fulfillment was made possible by their faculty of reason" (Wokler 2001: 54).

Rousseau, however, rejects the Lockean and Hobbesian foundation of society based on natural law discoverable by reason, which is, for them unique attribute of humans making them different from other animals in a natural condition, because, as to him, in the state of nature, or in their natural condition, humans are just like other animals, incapable of reasoning. The state of nature is a condition in which individuals acknowledge no duties or other moral relations (Moore 1991: 74). They possess rights in the sense that Hobbes used the term, that is, as capacities or powers, but they possess no such developed faculty of reasoning that Hobbes attributes to his natural men (Wokler 2001: 177).

Rather, the only natural virtue for Rousseau is sympathy or compassion. Rousseau maintained that: 'pity is what takes us without reflection to the aid of those we see suffering. Pity is what, in the state of nature, takes the place of laws, mores, and virtue, with the advantage that no one is tempted to disobey its sweet voice' (Rousseau 1987; Boucher 2009: 174). The implication is that knowledge of a transcendental natural law is impossible in the state of nature, because we do not have the facility to apprehend it. It is the natural sentiments and not reason that make us averse to certain kinds of action (Boucher 2009: 174). Hence, for Rousseau, Natural law in the state of nature is related to natural sentiments which make us turn away from acts of cruelty.

Rousseau, however, did not deny that man in the state of nature has 'an unlimited right to everything that tempts him and that he can acquire' (Rousseau 1987; Boucher 2009: 173). But, this does not mean that there is a right to get whatever one desire (ibid, 169). Rather, it is a right to fulfill one's interest arose from self love in conformity with his instincts of pity or compassion to others. Thus, natural right is the ability of individuals to use their capacities in conformity with their instincts of self-love and pity, or compassion (ibid, 177). The only sense in which he has a conception of natural rights is in maintaining a general right or perhaps potential would be a better word; to self-realization. And it is the rationalization of these rights that will make them actual. And, this requires civil society.

Though men are relatively equal in the state of nature, and each is innocent and good. There were natural or physical inequalities, which are beyond our control. But these inequalities should not be transformed into moral or political inequalities as done by Locke and Hobbes, (Rousseau; Boucher 2009: 175) who gave legal recognition for the existence of moral inequalities. Furthermore, men are bad, selfish, violent, and aggressive and the like not in pre-societal condition, but societal. So, men's moral advancement only depends upon the actual choices which individuals must have made in adopting their various societal and political institutions (Wokler 2001: 62). That is why Rousseau emphasized on the need for the consent of the individuals or particular wills to get rid of the immorality and degradation. So as to create a good society devoted for the common good. Otherwise corrupted society which is cause for wars will be created (Boucher 2009: 176). This, however, does not mean that Rousseau denied that God is the source of all justice. For him, independently of conventions that which conforms to order is good. The problem is we are unable to receive justice from such an abstract source, it is therefore necessary for us to establish governments (Rousseau

1987; Boucher 2009: 177). And, on entering civil society, as to Rousseau, each is required to give up the rights of nature, and the property each has acquired, and has it returned by the community, or sovereign body, to each more equitably and legally protected. Each comes to identify his or her personal interest with that of the whole. There is certainly a significant change brought about in the individual as a consequence. Prior to constituting themselves into a sovereign body in which the general will is the expression of the real will of the whole, agreements may have been entered into and kept out for purely self-interested motives (Rousseau 1987; Boucher 2009: 179).

The *general will* was Rousseau's term for the exercise of popular sovereignty, which he employed for the first time in his *Discourse on Political Economy*, and defined it as the will of the body politic as a whole, serving as the source of its laws and its standard of justice (Wokler 2001: 86). While, in the *Social Contract*, he ascribes it both to the public interest or common good which the sovereign of every state ought to promote, and to the individual will of each citizen to achieve that good, often contrary to the same person's particular interest as a man or member of other associations within the state (ibid, 86). Thus it is this general will, not force, which is the foundation of our rights. Accordingly, while for Hobbes liberty is exchanged for authority in men's transfer of their natural rights to their ruler, for Rousseau, provided that subjects rule themselves, liberty is won within the state rather than protected against it (ibid, 79).

The difference between the subjective natural right theorists and Rousseau, though both invoke the idea of social contract, is remarkable. The former argued for "natural liberty limited only by force", whereas Rousseau is arguing for "civil liberty limited by the general will" (Rousseau 1987; Boucher 2009: 179). In other words, "the purpose of Rousseau's argument was to show that men's collective engagement in self-rule could immeasurably increase their freedom beyond that of the mere physical independence of savages in their original state" (ibid.). And, what is right, as to Rousseau, cannot spring from force, much as he had claimed earlier that our physical differences provide no warrant for our moral inequalities. If force were to create right, then what is right would be as transient as every change in the disposition of force, and disobedience would become legitimate as soon as sufficient power was acquired (ibid, 74). But that is not the case, for natural rights are unchangeable.

To summarize, Rousseau, in his contractual natural right theory, like his predecessors endorsed a naturalistic, or descriptive, conception of natural rights (Boucher 2009: 168). He has employed the typical device of natural rights theorists, that is, the idea of a social contract, on the understanding that it is merely a convenient fiction, and the purpose for which he uses it is not to show how preexisting natural rights are protected by government, but how instead inequalities that are a perversion of nature are consolidated in society by the more powerful who formulate in their own interests the terms of the contract and force them upon everyone else (Boucher 2009: 169). Thus, unlike Locke who has established individual natural rights from natural law, Rousseau declared that natural law conferred inalienable sovereignty on the citizens of a state as a whole. And rights derived from natural law dwelt within the people as a collectivity and could be identified by reference to the ‘general will’ (Davidson 1993: 28).

1.5 Kantian Rationalistic-Moral Theory of Natural Right

Kant has developed a rationalistic account of natural rights on the basis of his moral theory. He was against any attempt to lay down rights on empirical principles, for; he strongly believed that, experience can’t teach what is right and just in itself (Kant, 1891). In the first part of his metaphysics of morals, Kant wrote that “a merely empirical system that is void of rational principles is, like the wooden head in the fable of Phedrus, fine enough in appearance, but unfortunately it wants brain” (Kant 1887: 44). He maintained that if there be basis for rights, as we maintained now, it must be founded on the principles of reason. So he developed his ideas from a more general appreciation of the non-empirical natural law and natural rights tradition (Davidson 1993: 28).

Like Grotius, Rousseau and some other natural law theorists Kant did not conceive the ‘natural law’, assumed to be justification for the claim that we have ‘natural rights’, as mere law of nature given by super natural being or other force external to human beings. Rather, he has attempted to draw this law from introspection of the very nature of human beings. And, the human nature, according to him, could be explained in two ways:

As phenomena (‘appearances to the senses, whether our own senses or others’) and as noumena (as “things-in-themselves,” nor given to us in any sense experience, even to introspection). As phenomena, we are determined to act as we act, and have no more freedom than any other physical object. But as noumena, we are not determined by physical law, but only by such laws as we give to ourselves (Edmundson 2004: 32).

Taking the phenomenal aspect of human nature, Kant argued that, in this sphere there is no “freedom to act in such a way that we will, rather our rights and duties are fixed by physical and psychological laws that pertain to us as creatures determined by physical forces, appetites, and sense perceptions” (ibid). But, these empirical principles and forces couldn’t be grounds/basis for rights, because experience at best informs us about facts, about the way things are. It teaches us contingent truths only (Kant 1873; Timmerman 2007: 6). Right and justice are not contingent truths. Hence, experience cannot teach what is right and just in itself. So, Kant rejected the attempt to investigate what rights are and their ground empirically, and was in favor of the formalistic approach.

Speaking from the formalistic approach, Kant has described human nature, noumenally, as “things in-themselves”, as determined to freely act, or exercise their will to act in accordance with certain laws, for everything in nature obeys certain laws. Thus, one: in so far as human beings are part of the natural world, they work in accordance with natural laws (Kant, Timmerman 2007: 59). And nature makes it possible for human beings to do that which they ought to do. However, as to Kant, man is not just a natural but also a rational creature. So, man does not do what he ought to merely on the grounds of his acknowledged obligation so to act. And nature does not set moral ends and rational prudence does not ground relations of right (ibid, 393). Rather, nature gave us practical reason for a purpose; and that purpose is by giving practical reason nature is intending us to perform morally good actions (ibid, 22). So, our freedom to act could not be fixed by natural laws that are external to us, rather we should look in to ourselves as we are and get some other laws that determine our freedom, will to choose and act on rational basis. And, as rational beings humans possess a capacity to observe objective principles: represent laws to themselves and then act accordingly. So, it is reason that is a faculty of principles because both in the practical and theoretical sphere drawing a conclusion is the task of reason (Timmerman 2007: 60). That is why Kant argued that the conception of freedom is the conception of pure reason (Kant 1887: 28).

Accordingly, Kant contends that freedom is not lawless, but our freedom is determined only by certain self-given laws- laws as we give to ourselves. This implies that, freedom is first known only as a negative property in us, as constituted by the fact of not being necessitated to act by sensible principles of determination (Kant 1887: 36). Wrote Kant, freedom is independence of the compulsory will of another; and in so far as it can co-exist with the freedom of all according to a universal law, it is the one sole original, inborn right (natural right) belonging to every man in virtue of his humanity (ibid, 56).

Kant, therefore, expresses the universal law of freedom (natural right) as, “thus: act externally in such a manner that the free exercise of thy will may be able to co-exist with the freedom of all others, according to a universal law” (Kant 1887: 46). And, this law is obligatory and lies in reason, which lays it down as a postulate which is not capable of further proof. However, as a rational being, man’s freedom, belonging to the world of intelligence, cannot be defined by reference merely to sensible appearances. For, sensible phenomena cannot make a supersensible object-such as free-will is-intelligible; nor can freedom ever be placed in the mere fact that the rational subject can make a choice in conflict with his own lawgiving reason, although experience may prove that it happens often enough, notwithstanding our inability to conceive how it is possible (ibid.). For this to be possible, Kant suggested that reason itself must be practical – otherwise morality, which presumes freedom, would be an illusion. It is our knowledge of moral law that in fact demonstrates that freedom for us is real. In practical cases, therefore, freedom may be demonstrated by certain practical principles which, as laws, prove a causality of the pure reason in the process of determining the activity of the will that is independent of all empirical and sensible conditions. And, thus, there is established the fact of a pure will existing in us as the source of all moral conceptions and laws (Kant, 28).

But what are these laws and how are they known? Kant’s answer is that they are known not by their content but by their form. The wills own law is, therefore, the purely formal moral law, and that the form of such laws is that of a *categorical imperative*: “so act that the maxim of your will can at the same time be a universal law” (Edmundson 2004: 32). This representation of an objective principle with a finite will is, therefore, a command and the corresponding formula is its ‘imperative’. Hence, the first categorical imperative of Kant as discussed above, which is a fundamental principle in his philosophy, is the principle of universalizability.

Thus, right, according to Kant, “comprehends the whole of the conditions under which the voluntary actions of any one person can be harmonized in reality with the voluntary actions of every other person, according to a universal law of freedom.” (Kant 1887: 45) The content of rights is tied to that of our duties as directed by the imperative. And the idea of right in its a priori sense refers to how free we are to act. And, humans by nature have the right, natural right, to ‘*freedom* (independence of constraint by another’s choice). But, this idea of freedom, Kant talking about, is not lawless. So, he said, there has to be a universal law of freedom because our freedom will be realized insofar as it can coexist with the freedom of every other

in accordance with a universal law'. And, this freedom is 'the only original right belonging to every man by virtue of his humanity' (Griffin 2009: 60).

More fully, a 'natural right', Kant says, 'is one derived from *a priori* principles for a civil constitution'. Of the several natural rights Kant derives from the one innate right, he mentions, among others, rights to procedural and distributive justice, to retributive justice (a right exercised on our behalf by the sovereign power), to grant clemency (also the sovereign's exercise), to have one's reputation defended against unjust charges even after one's death, to marriage if one's partner wishes to use one's 'sexual attributes', to help in dire need, etc. (Kant 1887, Griffin 2007: 60-61). But, in Kant there are not only natural right that rests upon pure rational principles *a priori*; there are also positive or statutory right, that is what proceeds from the will of a legislator (Kant 1887: 55). The question however is, as Hume, Burke, Bentham and Hegel pointed out, are Kant's abstract *apriori* principles capable of generating morally contented natural rights belonging to every man by virtue of his humanity? This question is addressed in the negative and broadly discussed in the next chapter.

Chapter Two

Arguments Against the Natural Right Theory

2.1 Major Critiques and other Alternative Theories of Right

The natural law and natural right tradition, extending from the naturalistic and divinely interpretation of law and right of Aristotle and Aquinas... to Kantian rationalistic moral account of natural rights, is useful background for the modern philosophical discourse on human rights. However, this tradition is not free of criticisms. Among the critics, for my purpose, I will consider Hume, Bentham, Mill, Burke, Hegel, and some of the 19th C British idealist political thinkers like Green, Bosanquet and others. They all challenge the metaphysical presuppositions in the arguments of classical natural right theorists.

2.1.1 Empirical Positivism and the Principle of Utility

The political and social thoughts of the enlightenment (ranging from 17th – 19th C.), which has began with the inspiration to solve the multi-faceted practical problems of humanity, had presented reason as solution for the betterment of human life. Getting its inspiration from the idea of early modern subjective natural rights theorists (Grotius, Hobbes, Locke...) that men are capable of reasoning that grant them some inalienable rights for self-preservation and makes them social and caring for the good of others, the enlightenment thinkers took this rationalist stance concerning the question of rights and morality. Kant, for instance, as discussed in chapter one, has maintained that rights, freedom and all other human goods could be achieved when we lead our lives in accordance with the guiding principles of practical reason- the a priori universal moral laws.

However, some other thinkers like Hume, Burke, Bentham and others have severely criticized and rejected the attempt to lay the foundations of rights on mere abstract metaphysical principles of reason or a priori divine principles of a super natural being. In contrast they suggested making empirical approach a philosophical alternative to examine the problems humanity faced with respect to characterization of what are real and the good, regarding ways of knowing, etc. Such philosophical thinking had begun with David Hume, who is known for his empirical critic of the natural law traditions. Therefore, discussing Hume's reasons for rejecting abstract moral principles of Kant and the theological divine laws, with his "attempt to place morality on a firm foundation of experience and observation" (Forbes 1975: Boucher

2009: 169), in combination with the utilitarian rejection of an a priori source of rights and their proposal to ground rights in the simple mechanistic principles would be emphasized here.

A. Humean Epistemological Criticism of Natural Rights

As introduced before, Hume is known for his empiricist philosophy that posits human intuition and senses as necessity to know all kind of mysteries of the universe. Based on his empiricist epistemology Hume goes to the claim that though the inquiry into the social phenomena could be divided in to two: the category of facts which could be proved to exist empirically- this was the 'is' and there was the category of morality which could not be proved to exist objectively and about which people might have legitimate differences of opinion- this was the 'ought' (Davidson 1993: 30). From the 'is', Hume contends; only the basis of scientific enquiry could be formed. This implies that he was critical of the natural right theorists, extending from the antiquity to the early modern prescriptive natural rights theorists; attempt to formulate the basis of rights on some metaphysical or moral principles developed in the court of judgment in which reason is taken as the only point of reference. In brief, "Hume's "demolition" of the natural rights traditions was two-pronged: the raising of the alleged "fact-value" dichotomy, thus debarring the inference of value from fact, and his view that reason is and can only be a slave to the passions" (Rothbard, 2007).

To elaborate, Hume's epistemological criticism of the naturalistic and moral formulations of rights is founded in his inspection of truths about morality. As discussed in the first chapter, the natural right theorists contend that there exist principal ground upon which the concepts of morality and right rests i.e- rational and a priori principles (Fagan, 2005). And those principles were formulated by them with the contention that the facts about humans that they have the desire to self preservation, they are sociable and the like, are "natural laws constituting a rational system of laws, duties, and imperatives which are commands of God" (Forbes 1975; Boucher 2009: 169) upon which rights were derived. However, the skeptic Hume denied the existence of a priori sources of morality and rights and the possibility of deriving normatively loaded principles from statements of fact. Most important, the prescriptive natural rights theorists have maintained that it was possible to derive statements of value or normative principles governing human relations guiding what is whose rights and duties from statements of fact describing what is in nature or human nature (Hume 1992; Boucher 2009: 169).

Moreover, he has questioned “the efficacy of the contentions of natural law and natural right thinkers that there are immutable standards of right and wrong that impose obligations, and maintain that morality, like truth, may be apprehended by reason” (Hume 1992; Boucher 2009: 170). As regards to this point, Hume has indicated that epistemologically speaking there are two kinds of perception: impressions (stronger perceptions like sensations and sentiments) and ideas (which are fainter impressions- reproduction of the stronger perceptions in imagination and memory) (Hume 1992; Boucher 2009: 170). He then contends that if moral distinctions or perception of virtue and vice (Capaldi 1966: 127), as suggested by natural law and natural rights thinkers, are objects of reason; since understanding is achieved by two different means: either by abstractly relating ideas, or by relating objects about which experience provides information (Boucher 2009: 170), moral distinction will be relation of ideas or inferring matters of fact (Capaldi 1966: 127). However, Hume said that reasoning could never be the point of reference to make moral distinctions in either of the realms and that it could not be a motive to any action of the will. Because, if reason is taken as a court of judgment the moral distinction will be relation of ideas, in so far as when we judge some ones action as vicious or virtuous, in any situation, the whole complicated object, of action and situation, must form certain relations, wherein the essence of vice or virtue consists (Capaldi 1966: 128). And, these relations are never specified so as to be intelligible or to exclude absurd cases such as animals or inanimate objects (ibid.). Hence, so long as the relation is independent of human perception it is also applicable to the behavior of animals (ibid.).

Moreover, if moral distinctions are taken to be made through reasoning about relating objects about which experience provide information and establishment of causes and effects- means connection between matters of fact (Ayer 1992; Boucher 2009: 170) there must be an impulse that make connections between objects. The role of reason is only detecting this connection. And what is detected based on reason by inferring from certain causes to effects, or vice versa- as acting in this way will result in so and so; is still subject to whether it is acceptable to human inclination or not (Sabine 2007: 600). Thus, “morality does not consist ‘*in any matter of fact*, which can be discovered by the understanding’” (Hume 1992; Boucher 2009: 172). Rather it consists in a matter of fact that lies in the subjective self rather than in the object, and a matter of feeling rather than reason (Boucher 2009: 172).

Accordingly, as to Hume, “Moral beliefs do not emanate from a correct determination of a rationally purposive will, or even gaining insight into the will of some divine being.

Rather, moral beliefs are fundamentally expressions of individuals' partial preferences, human inclinations, or propensity" (Fagan 2005). That is why he maintained that the passions can never be the slave of reason, but on the contrary, reason is the slave of the passions. Hume's passions, however, cannot in themselves be contrary to reason. As he has pointed out there are two kinds of passionate moral duties: those that arise from natural instincts which act on men independently of reason such as beneficence, clemency, and moderation, and duties required to sustain civil society such as what he identified as the three basic rules of justice: the stability of possession, ... its transference by consent, and the performance of promises" (Hume 1978; Aiken 1979: 70). Hume said that, it is impressions and sentiments that give rise to our concern for justice; if men were benevolent there would be no need for such rules to arise. It is therefore not natural to the minds of men but is the product of convention and artifice (Hume 1992; Boucher 2009: 172). Justice for him is concern for private and public interests that arises because of human selfishness and limited generosity in conditions of scarcity. It is not discovered by the exercise of right reason and its principles are not 'eternal, immutable, and universally obligatory' (ibid). But, they are necessary for without these rules of justice (security of property, its transference by agreement, and the keeping of promises) human society as we know it would be impossible (Hume 1992; Boucher 2009: 172).

What one can derive from his intuitionist conception of human nature and morality is that, for Hume, rights do make an appearance... basically as the result of utilitarian appeals, where institutions involving rights and duties have been devised by us to allow us to ensure that justice is done and property is transferred, but these institutional or conventional rights can in no way be construed to be natural rights that have a non-institutional, nonconventional grounding and setting (Frey 2006: 295-96). Thus, he is proposing some form of empirical positivism, without metaphysics or religion and without ethics that claims validity beyond the circumstances of society and the satisfaction of human needs, as alternative grounding of morality and rights (ibid, 605). And, in place of indefeasible rights or natural justice and liberty there remains utility, conceived in terms either of self interest or social stability, and issuing in certain conventional standards of conduct which on the whole serve human purposes. But, they are always contingent upon some state of the facts and upon the formulation of workable rules to give scope to these inclinations (Sabine 2007: 604). And it is from this Humean empirical philosophy that classical legal positivism emerged. And all the positivists Bentham, Mill, Austin, and Hart held that rights are only that would be determined by appealing to legal rules.

B. Utilitarianism and the Question of ‘Rights’

Getting its basis and inspiration from Hume’s criticism of naturalistic and metaphysical conceptions of morality and rights, Jeremy Bentham took the empirical positivist line and has attempted to discern the grounds of morality and right claims through examination of what he identified as the real human situation or empirical reality. He then labeled the natural law and natural rights theorists’ characterization of rights as some metaphysical inalienable attributes universalized as essential features of humanity. And, rejected the fundamentals of natural law and natural rights theories for being abstract and meaningless.

Bentham, like Hume, contends that concepts like right and morality with their principal rules, which are perceived to be indicators of the fulfillment of the good in a society including the members’ interest and social sustainability should be found in the empirical reality. He argued that “natural rights theories entailed abstractions, discovered by introspection, and universalized as essential features of humanity” (Boucher 2009: 219). Take Aquinas, Locke or Kant, all of them argued that human kinds possess some divine rights or certain ways of acting when relating to each other that are defined by a divine law of nature or God discoverable by the exercise of reason. Bentham, however, maintained that it is not possible to talk of divine law giving rise to divine rights for the simple reason that such a law is perfectly abstract, intangible and can’t be proved. It is, therefore, nothing less than useless (Waldron 1987; Boucher 2009: 220).

He has maintained that their claim for the good of a society in which the rights and wants of its members get preserved require affirmation of the supposition all have inalienable natural rights grounding themselves upon the divine law of nature or God, is no more than like wishing to have a loaf of bread in time of hunger. However, the mere claim that “reason exists for wishing that 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 1795: 6). Therefore, according to him, natural law and natural rights theorists are talking about non-existent things, he then declares that “*natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense--nonsense upon stilts” (ibid, 6).

To elaborate, Bentham has rejected natural rights on the following basis: one, since natural law is abstract and intangible to claim that there are such rights is like saying there is ‘a son that never had a father’. So, they are “imaginary rights derived from imaginary laws, laws of

nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons” (Weatherley 1999: 32). Second of all, they are threats to social sustainability and solidarity for they were unduly preoccupied with the interests and pursuits of the individual. (ibid, 31). And, the concept- natural rights, by itself is a potentially dangerous and destabilising concept, especially in that it repudiated the legitimacy of any legal right which violated the so-called law of nature and that it undermined the authority of state law, encouraged civil disobedience or even rebellion... (ibid, 31). In general, as empirical positivist, Bentham, has rejected the natural rights theories as inadequate and scientifically unverifiable conceptions and groundings of rights.

What is valuable to humanity in general and socially sustainable, according to Bentham, is to be achieved by grounding morality and rights in empirical reality. Rights, for him, may be correctly conceived and situated only through consideration of the real human kind condition. And, he contends that, examination of what is going on in actual case shows that “nature has put mankind under the governance of two masters, pain and pleasure” (Bentham 1781: 14). Every human kind has the desire for the happening of the good and avoidance of the evil. The question, however, is what the criterion is for distinguishing that could be identified as the good from that is not, or is otherwise.

As far as Bentham is concerned the parameter should be detected in relation to how much pleasure is gained and how much of pain is minimized. And, the measure of pleasure and pain is “utility, which is property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness ... or to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual” (ibid, 15). Thus, “the initial postulates, in Bentham’s theory of rights, are not the possession of inalienable natural rights, but the identification of indubitable inclinations – the propensity to pursue pleasure and avoid pain” (Bentham 1988: 3). Here, one may raise a question about what should be chosen when there is conflict of interest among individuals or between individuals’ interest and their community.

In Bentham we will not find individuals running for the pursuit of different kind of happiness or pleasure and struggling for elimination of different kinds of pain. There is an artificial creature called community, which is composed of individuals. And what is desirable in a community is that preserve the sum interest of members. If so, the public good or the good of

a community could be reduced to the experiences of pleasure and pain of each individual, but not in the sense of their selfish interest. Therefore, analogically speaking, in the case of society, what should be counted in the measurement of an action is the amount of pleasure or happiness enjoyed by the members than it diminishes. Whatever is, therefore, right and desirable in as much as it contributes greatest amount of pleasure, or happiness to the greatest number. In other words what is right is simply what is advantageous to society. Moreover,

in proportion as it is right or proper, i.e. advantageous to the society in question, that this or that right--a right to this or that effect--should be established and maintained, in that same proportion it is wrong that it should be abrogated: but that as there is no right, which ought not to be maintained so long as it is upon the whole advantageous to the society that it should be maintained, so there is no right which, when the abolition of it is advantageous to society, should not be abolished (Bentham 1795: 7).

Hence, it is appropriate to abolish that which is painful or against the advantage of the society. And to know and specifically describe what should be maintained or abolished for the advantage of society, the time and circumstances must be given (ibid.). Therefore, as to Bentham, there is “nothing imprescriptible- when advantage ceases, right ceases also” (ibid). The term, right, should not therefore, “be jumbled with an undistinguishable heap of others, under any such vague general terms as property, liberty, security, and the like (Edmundson 2006: 54). In the “Anarchical Fallacies”, where he examine the French declaration on rights of man, he wrote that “in proportion to the want of happiness resulting from the want of rights, a reason exists for wishing that there were such things as rights” (Bentham 1795: 6). By this he mean, as interpreted in Bedau, “if person ‘A’ lacks happiness because ‘A’ lacks a right, ‘R’, to do ‘X’, and then the lack of ‘R’ gives ‘A’ good reason for wanting enactment of a law establishing ‘R’ (Bedau 2000: 270). If it is the lack of a certain right causing lack of happiness, and that pursuit of maximum amount of happiness or pleasure is what we all are naturally interested in, then it follows that the lack of happiness provides a reason for wanting the right in question (ibid.). However, isn’t Bentham’s claim that there is a natural desire for happiness, equivalent to saying that there is a natural right for the pursuit of happiness?

According to Bentham, in talking about pursuit of happiness what we should note is that as a right it ought not to be perceived as natural to be pursued by the stronger as he wishes by detriment of the less powerful. This is not a right, in its appropriate sense. Because the way the pursuit of happiness conducted is what is fundamental in a theory of ‘rights’, in which the advantage of a society is taken as principal rule in determining the right to be established or abolished. And, the way it is conducted would only be judged by referring to the “positive law

enacted, decreed, and enforced by legitimate government of the society or state in question” (ibid.). It is based on this law that anyone’s rights could be conferred. Thus, according to him, an individual has a certain right in society to perform an action in his strive for pursuit of his happiness only if the codes of conduct or law of his society allow him to do so. Since such a law is absent without government, “there are no such things as . . . rights anterior to the establishment of government—no such things as natural rights opposed to, in contradistinction to, legal. . .” (Bentham; Bedau 2000: 270). And, those legal rights and duties of an individual are determined by laws that do satisfy the utilitarian criterion, means by the lawmaker’s judgment as to whether it is more or less advantageous to society as a whole (Bedau 2000: 272).

The direct or act utilitarian conception and justification of rights and law of Bentham, that is characterized for being calculationist and the preference it gave for the majority, was further developed by indirect or rule utilitarians including Mill and Austin with some modifications and qualifications made by them. What is different in Mill is that he does not deny the existence of moral rights. In Mill, in the first place there is the right to liberty including liberty of consciousness, liberty of tastes and pursuits, and the freedom to unite for any purpose not involving harm to others, that lies in the principle of utility. As to him the individuals rights of liberty are things that are not concerns of others. In his/her own case individuals have the right to choose what he/she make sense out of it. It is independence, to be master of ones own destiny that is an absolute right (Mill 1859; Edmundson 2006: 68). And, this right is “consistent with – is even derivable from – the principle of utility, “the ultimate appeal on all ethical questions” (Mill 1859; Edmundson 2006: 68). Because, the absolute rights of the individual to liberty also ought to be defended by the society. And the reason for this is nothing, but utility. Mill, like Bentham, has therefore maintained that “when we call anything a person’s right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion” (Mill 1869; Campbell, 2001).

Generally, working with Humean spirit, the utilitarian legal positivists- Bentham, Mill, Austin and others have rejected any attempt to discern and articulate an idea of law, morality or rights transcending the empirical realities of existing legal systems. And they contend that “the source of rights is found only in the enactments of a system of law with sanctions attached to it” (Shestack, 2010).

The natural rights idea was also criticized by Edmund Burke. Like Bentham and other positivists, Burke has dismissed the idea of natural rights as meaningless abstractions. His 'evolutionary and conservative' conception of rights and law could be seen with his critique of the enlightenment project, particularly in their confidence in "the ability of right reason 'to discern the rights of nature' and discover the true principles upon which to base our laws, rights and institutions" (Boucher 2009: 184). Burke has mainly criticized the naturalists and rationalists formulations of rights for overlooking at the historicalness of human existence. And, for him, any attempt to formulate the bases of laws and rights without regard for historical precedent is mere metaphysical abstraction. Such a formulation of rights as being derived from a priori universal principles of God, nature or right reason may appear to be true and abstractly perfect. However, in actual case no man could presume to 'direct his affairs by abstractions and universals' (Burke 1907; Boucher 2009: 184). Therefore, they (natural rights) are incomprehensible and pretend rights. Because, that is not how we have been leading our life. According to him, therefore, "the rights of man are not to be found in a pre-societal state of nature, or the abstract speculations of metaphysicians, but 'in a sort of *middle*, incapable of definition but not impossible to be discerned' (Kirk 1951: 445). The implication is that principles and rules which guide conduct are immanent in the historical process itself, in which our individual and national characters are formed (Boucher 2009: 185). In every established civil society there are conventions indicating the rights and duties of the members, which have been transferred through generations with slight revisions. This is because, first: it is a fact that "human beings are interdependent within the context of specific societies.... And the social relationships into which they enter have implicated in them certain degrees of responsibility for one's conduct. So, the conventions and constraints which modify our behavior arise out of our social relations" (Boucher 2009: 185). Secondly, it is "the *situations* in which men relatively stand produce the rules and principles of that responsibility, and afford directions to prudence in exacting it' (Burke 1907; Boucher 2009: 185). Thus, for him a member of such a society- 'civil social man' and his right is the product of his/their own making in history and of circumstance (ibid). Burke, then, argues that "it's impossible to talk about the rights of man, but the rights of Englishmen, or *German or Ethiopian* who enjoy them as an inheritance from their forefathers to which they are entitled 'without any reference whatever to any other more general or prior right'" (Burke 1907; Boucher 2009: 185). Burke's emphasis on history in his analysis of rights and law is used in Hegel's philosophy of right as discussed below.

2.1.2 Hegel on Natural Law and Natural Rights

Hegel has attempted to formulate a new understanding of the idea of right and its logical basis through a thorough analysis and examination of the natural law and natural right theorizing by dividing in to two: empirical or naturalistic, and formal or universalistic method of enquiry (Boucher, 2009: 24). These two approaches are summarized in Hegel as follows: “natural law has been treated scientifically by two inauthentic ways- empirically and formally. The principle of the first consists of relation and mixtures of empirical intuition with the universal, while the latter is absolute opposition and absolute universality (concept)” (Dickey, and Nisbet 1991: 106). In other words, Hegel has presented and analyzed the natural right traditions by classifying as abstract idealist conception and justification of right and the empirical naturalistic conception and grounding of right. Proponents of the first approach like Kant, Cicero and Aquinas have laid the foundation of right on mere formal/abstract/ideal principles- of the categorical imperative and the divine law of God respectively. The later could be represented by Hobbes, Locke, and Grotius and others who have appealed for empirical conditonalties like the selfish or sociable, and rational nature of humankind for grounding rights. Moreover, the two approaches could be seen as extreme positions simplifying the conceptual and justificatory questions of rights into mere transcendental idealism and empiricism. However, according to Hegel both approaches in themself are deficient and could not give us the full picture of the nature of righs and their justifiability. So, Hegel has attempted to show the deficiencies of the two extremes and provide an alternative through historicist synthesization of the two.

The formal universalistic approach is exemplified in Hegel more specifically by Kant, who derives rights from abstract moral principles. As we have seen in the first chapter Kant's doctrine of rights laid its foundation in his moral criterion of universalizability, and it did not purport to derive from experience, but instead imposed itself on it (Norman 1976; Boucher 2009: 225). Such thinking, according to Hegel, degenerate morality into empty formalism and into a preaching of duty for duty's sake; when morality and whatever kind of duties or rights can only be defined in the context of an ethical community. So, only by making the transition from what Hegel calls "morality" to the "ethical life" do human beings know what their duties or rights are (Mertens 1995: 666-667). Therefore, the problem with Kant is that, as discussed in Hegel, he adheres to this "moral point of view" without making the transition to the conception of the "ethical life."

Hegel, however, is not denying the universalizability of rational activity. He is rejecting that which has become formal, abstract, and hypothetical. Because, according to Hegel, the criterion of universality can only ensure the consistency of actions, not their morality. And morality is not the result of conscientious reflection by an autonomous human being, but of the political, social and cultural development within such a community (ibid, 670-671). Thus, Hegel was for genuine universality, which must be actualized and manifested in the laws and customs of the state. And it is, therefore, inadequate to put forward as a moral criterion the principles of universalizability and non-contradiction (non-contradiction in itself is, for Hegel, a formal principle that annihilates itself from the existing condition), because they are merely formal criteria with no content. For instance, if we adopt the universal maxim that we must help the poor, eventually there would be no poor and the maxim would be cancelled. If in order to fulfill our duty of helping the poor we adopt measures to ensure that poverty persist we in fact prevent the duty being discharged (Hegel 1975: 80). The point that Hegel wants to make is, therefore, for the formal principles to be contented contradiction has to contradict something, and it is that something (i.e. the 'what is') which has to be presupposed (Boucher 2009: 225). Formalism, for Hegel, has to be an advance on empiricism (ibid, 225).

As regards to the empirical way of treating 'natural law', Hegel points out that, "empiricism contains within itself the crucial principle of freedom; 'namely, that what ought to count in our human knowing, we ought to see *for ourselves*, and to know *ourselves* as *present* in it" (Hegel 1991a; Boucher 2009: 225). That means, for Hegel, identifying the fundamental principles of freedom requires examination of what is, not what ought to be (Hegel 1975; Boucher 2009: 225). This, however, does not mean that the fundamental principles should be reduced to mere empirical or intuitive conditions. Empiricism, particularly as employed in Hobbes and Locke, is criticized in Hegel as deficient for at least it is an attempt to elevate aspects of experience and intuition to the status of fundamental principles to explain or justify an existing condition (Smith 1989: 17). According to Hegel, Hobbes and Locke are confused in their very approach to the rights issue. Because, as shown above though as empiricists their epistemological assumptions commit them to saying that they only know what is in experience, they also seem to believe that immediate experience is not sufficient, for it gave us only what is contingent. So, they propose to "peel away" the layers of society, ... leaving aside everything contingent until, finally, one comes by analysis to the abstraction called natural man. (Hinchman 1984: 16) In this regard, Hegel agrees with them that experience is not sufficient and therefore we should leave aside what is contingent. However, he has a

problem with the claim that the true nature of something so supremely complex, ramified and highly developed as society should be sought in such abstract and simple categories as "natural man" or "matter in motion." This is mere reduction of what is developed and complex to its simple elements for mere purpose of cognition (ibid, 17).

In sum, Hegel's problem with these two methods of inquiry about the nature and justification of natural law and rights, in brief, is that both methods "lack a criterion for distinguishing the accidental from the necessary features of existence" (Boucher 2009: 224). He characterizes proponents of both empirical and formal approaches as deriving their conceptions and justifications of right from accidental features of human existence. And the major problems in their attempt are: one; they are proposing an 'atomistic' conception of the self as denuded of all cultural traits and characteristics. All Natural rights theorists from Hobbes to Kant typically claim to discover the most universal features of human beings by means of a kind of thought experiment, hypothetically stripping or peeling away everything we have acquired through the influence of custom, history, and tradition in order to discover the pre-political state of nature and the natural man lurking behind it. And this makes their theories of right static, lacking any sense of the dynamics of human history and the developmental character of the moral personality. The self as Hegel understands it is not something "given" once and for all but is a being in the making, that is, a creature with a history (Smith 1989: 3-4). So, without consideration of this feature of human existence (history) the theorizing about their rights or duties would be narrow and inadequate.

Hegel's Alternative

To fill this gap, in his philosophy of right, Hegel proposed to make rights claims part of a long and arduous historical process leading men gradually but inexorably toward an awareness of their own freedom (Smith 1989: 4). So, according to him, actual freedom is not natural but artificial: a human creation, a hard won achievement, created out of natural materials through the development of abstract right, morality and ethical life (Schroeder 2004: 37). And, since what he calls freedom is a substantiated will of the person, the progress from formal right to ethical life is representation of the development from an abstract, incomplete, and undeveloped will of the subject to that of a concrete, complete, and developed will (Dyde 1894: 656). To use his own words, according to Hegel, "the basis of right is, in general, mind; its precise place and point of origin is the will. The will is free, so that freedom is both the substance of right and its goal, while the system of right is the realm of freedom made actual,

the world of mind brought forth out of itself like a second nature” (Hegel 1967: 20). This quotation clearly shows us his conception of right. That, according to him, it originated from the will, which is free. The will is both universal will of human kind to get what is in nature as desired, and particular will of what is in nature, but chosen by the conscience. The unity of these abstract components of the will resulted in the absolute, which is the realization of the desirable conceived in thought in the external world. Therefore, for him, real right is the subjective freedom of the individual in the ethical life or order that is also part and constituent of the universal laws of the state. In brief, as mentioned above, Hegel has presented right as actual freedom of a subject created out of natural materials through the development of abstract right (founded in indeterminate universal will), morality of the determined will of the ego, and then to the ethical life or order- realized only through the unification of both the particular and universal.

To elaborate, in Hegel, first there is undeveloped will or a mere will that a person has and enable him to do whatever he wishes. And it is this will to be free and do what is desired from nature that grounds abstract rights. In the realm of abstract right, there is only the universal will of the people to freedom. The will that is immediate and its actions are influenced by nothing but a simple rule of reciprocity (Hegel 1967; Knackstedt 1994: 3). So, in this sphere, one is free to do whatever he/she wishes provided that the same right of others is not compromised. But, this is an incomplete formulation of freedom, according to Hegel. Because acting in accordance with abstract right may protect one from external compulsion, in this sense the person is free. Hegel’s exposition of abstract rights is, therefore, where he made his criticisms of previous formulations of rights, specifically that of natural rights theories for being narrow and inadequate. As shown above such formulations of rights based in mere conception of the person as it is in its natural/original condition and holding arbitrary free will and a right to do whatever they wish is erroneous in as much as it does not deal with man but mere abstraction from man. The higher stage of personhood, according to Hegel, is not its natural condition, rather the story of the development of human consciousness, which is, according to Hegel, the struggle of man to free himself from and overcome his natural limitations. “Hence the personality of the will stands in opposition to nature as subjective. . . . Personality is that which acts to overcome this limitation and to give itself reality” (Schroeder 2004: 37). And, willing should not be an arbitrary activity but already implies some minimal notion of a meaningful way of life within which willing and choosing can take place (Stillman

1974:1087). This is what Hegel labels as morality, in which there is a moralization of the individuals will.

In morality, the will becomes embodied, not in external objects like it is in abstract rights, but in itself (ibid, 3). So, as indicated above, the point of departure for morality is a will which is moved by conscious self-reflection (Hegel 1967; Knackstedt 1994: 3). And the passage from formal right to morality, therefore, involves the incomplete differentiation and concretization of the abstract subject. At this stage, the person stands before the world and becomes aware of her or his freedom and, gradually, the bare universality of legal personality and formal right develop into individual subjectivity. The person now realizes that not only she is free to act on the world through her rights but that freedom is her essence. The recognition emerges when, in relating to herself as the bearer of universalizable rights, she discovers an inner space of freedom and moral responsibility (Douzinas 2002: 382). Accordingly, the individual becomes primarily interested in setting up "oughts" for himself and others, without dependence on external circumstances. And this is experience of self-determination considered to be an aspect of freedom (Kainz 1974: 25).

However, since willing is never an isolated activity but always takes place within the context of a plurality of wills. It is the irreducible plurality of the human condition that makes willing a transaction between subjects, between an "I" and a "we" ..." (Hegel 1966, 227). Morality fosters only an incomplete kind of freedom. Because, though there is self-awareness, it is incapable of bonding society together and allowing it to fulfill universal ends (Hegel 1967; Knackstedt 1994: 3). Self-righteous morality provides no basis for an enduring social bond, it lacks universality and objectivity. Hegel, then, introduces his notion of ethical life as the unification of the abstract good of objective will and moral will. The ethical order, according to him, is characterized by the realization and actualization of freedom. The objective freedom and subjective freedom of undetermined universal will and determined particular will were constituents of this real freedom originated from the absolute will, which is the unity of both wills. The subject of rights is, then, the "rational will", which Hegel characterizes as "self-determining universality" (Hegel 1972; Smith 1989: 7). And the objectivity of the ethical order is an expression of the individual's own subjectivity. That means, that the individual and universal interests present in the community converges such that their content is identical (Smith 1989: 4).

In the ethical order, therefore, freedom is neither unmediated impulsiveness nor negation, but action according to consciously accepted universal norms and laws i.e. the ethical substance of the state. Hence, there is no longer any distinction between right and duty. In an ethical order, a man has rights in so far as he has duties and duties in so far as he has rights. Ethical life integrates the universal and the particular, makes freedom concrete, unites subject and object, is and ought, content and form (Douzinas 2002: 382-383). It is the unity of the particular and universal will that is presented by Hegel as the condition in which freedom comes into its supreme right. And the real right, in which freedom is both its content and purpose, is grounded in the principles of ethical community.

Hegel's formulation of right, however, is questionable in that from the very beginning it bases itself on the supposition 'there is real will that is free'. This begs the question how is that the will is free? And others criticized him for being advocate of state or societal dictatorship, assuming the impossibility of constructing ethos of the state other than its laws. Leaving those criticisms aside, the British Hegelians or idealists including Green, Ritche and Bosanquet develop "a theory of rights that bridges the gap between traditional conceptions of natural rights and modern conceptions of human rights" (Boucher 2009: 286). And this turn is discussed after careful consideration and examination of some counter arguments against legal positivists and utilitarians complete rejection of natural rights.

2.2. Anti-Utilitarianism and Positivism and Reformulation of Natural Rights

The positivists and utilitarians, being the major critiques of natural law and natural right theories, have completely dismissed the attempt to conceive the concept of right and justification of right claims on the basis of assumed laws governing the whole natural order or humanely creatures like the divine laws of God or rational moral laws. They have judged those theories as meaningless metaphysical speculations and abstractions, and argued for making human made laws or legal rules the only basis upon which right claims could be justified. As to them the concept right may only make sense in relation to the legal rules found in the legal system under which certain community had been governing itself. Others, however, characterize their judgement of natural law and rights as unfair, and criticize the positivist alternative account of rights conceived as grounded in the community's law.

Most of the critics against utilitarianism and legal positivism centered in their conception of the law. And, the question is what is at stake in classical utilitarian or modern legal

positivism? First, what should be noted here is that defending classical natural law or natural right theories is not my intention. But to show that the newly developed idea of 'human rights' has got its substantive elements and formulation from the powerful spirit and insightful ideas of the natural law and natural right thinkers of different times. Getting back to the question, I shall use some historical and ontological facts that can show how scholars start to question the different positivistic stances. In this case, the total dismissal and rejection of natural right from the philosophical discourse about law and rights could be seen in relation to the development of positivist natural sciences. The two events as a matter of fact happened almost at the same interval of time, in between early eighteenth and nineteenth centuries. And, we have the Baconian inductive method with its positivist legacies being the tool for the scientific progress. It's these facts that caused the cultivation of same kind of inclination towards Baconian approach in different scholars dealing with social and other problems of humanity. Some social and political philosophers, in particular, have reduced the fundamental question that- from what kind of intrinsically obligatory laws are rights and duties determined?- as simple puzzle to be solved by applying legal rules. Finally, discrediting the natural right arguments advanced by philosophers of different times.

However, as Husserl became aware of the very reason for the crisis of European sciences- being void of reason and stable ground/foundation; and the serious difficulties, different in kind, that humanity faced during the world wars and other problems people lost their trust in the positive sciences and the same happened to positive law theory. That is how and why thinkers were obliged to resurrect the discredited idea of natural right in a slightly different manner. So, despite the decline of natural law and natural rights, after World War II natural rights triumphed and re-emerged as human rights.

Furthermore, the positivists overlooked the fact about how and why the natural law and natural right theories came into existence. It's not the Utilitarians or legal positivists like Bentham, Austin, Hart or others, who had initiated the idea that the betterment of human life requires legal rules. This goes back to the time of the establishment of Greek city states in which the people at large, particularly the elites, became aware of the need for customary and other laws to govern and settle not only their internal affairs including matters arising in their relations at individual and community level, but also external- like when they go in to war with their neighbours. The unfair and partial nature of the laws, the case of Socrates as discussed in Plato's *Crito*, for instance, with the challenges emanating from the erroneous

application of the laws are reasons from which the idea about the need for ‘a supreme law’ prohibiting any action, like killing, done against what is priorly given. In other words, thinkers maintaining that betterment of human condition first require ‘preservation of what is human and the human conditon’ renounce the unjust man made laws of their time as contradictory and unacceptable preferring ‘the law of the creator or nature’ providing rationally detectable principles. For this reason the philosophers “search for a philosophy underpinning law is not surprising” (Honroe 2002: 78). As Honroe pointed out following the intellectuals’ dissatisfaction “with the view that whatever is traditional or customary in a society is automatically right, they were looking in both politics and religion for something more universal, rational, and philosophical” (ibid.).

The other counter argument against positivism came from Sergio Cotta, who has explicitly stated that positivism denied the long histoty of the theories and practice of law. To put it in his words, Writes Cotta:

from a historical point of view there are enough proofs that the natural law idea was born in times when the traditional customs and rules of one culture (that is, the existing positive law), being confronted by other cultural and legal systems, ceased to be perceived as the only existing or possible law. At this point, the notion of natural law was developed as the Ought-system (be it legal or ethical it makes here little difference) having the function of directing and modifying the factual reality of local legal systems (Cotta 1983: 267).

Thus, the positivists’ characterzation of natural law and natural right as metaphysical and meaningless expressions is founded in misunderstanding of the ontological and historical nature and status of human kind with its ways or directions of leading better life. The thing that they labled as practically unenforceable and useless metaphysical abstraction, the natural law, is not actually as such. Regarding this point Sergio Cotta again said that,

for centuries a law called natural? that is to say neither statutory, nor merely customary, nor of national character? has been to some extent followed by men and enforced by courts beyond the boundaries of ius civile, and is still applied by the ecclesiastical courts of the Catholic Church. And this is a clear proof that it was not considered a pure abstraction or simply an ought-statement of moral nature. To limit therefore the concept of law to positive law would mean to deny it to something that has been considered law not only in the world of theory but also in the world of practice (ibid, 270-71).

And natural law is best understood in relation to what positivists themselves call ‘positive law’ as the what ought to be... of the what is (apparent, established, factually performed, etc.). (ibid, 268) This is because the ‘what is’ by itself, and the positive conception of right as

derivations from legal rules is void of normativity. And such grounding of rights on what is very far from the principles and societal values dictating what is normal to follow would never be complete.

Dworkin has also criticized legal positivism in a slightly different manner. He has done his critique of classical and modern legal positivism by disclosing their misconception of 'the law'. As he stated it in his book, *taking rights seriously*, positivists have maintained that-

the law of a community is "a set of special rules" used...for the purpose of determining which behavior will be punished or coerced by the public power. These special rules can be identified and distinguished by specific criteria, by tests having to do not with their content but with their pedigree . . . These tests of pedigree can be used to distinguish valid legal rules from spurious legal rules and also from other sorts of social rules (as moral rules). If a certain case is not clearly covered by such a rule, it must be decided by some official, like a judge, exercising his discretion (Dworkin 1978: 17).

However, Dworkin has rejected the tenets of positivism (that there is a 'specific criteria' for determining what should be in the law of special rules, and that what is rightfully one's right and obligation is determined by the judge on the basis of the special rules of law; if the rule does not cover the matter in question, it will be the judge's discretion to make a decision) as a fallacious conception of law and rights. According to him, in the first place, "law consists not merely of rules...but includes what he calls non-rule standards. He said when a court has to decide a hard case it will draw on these (moral or political) standards – principles and policies – in order to reach a decision" (Raymond 2006: 43). In other words the task of identifying the existence and content of law is inherently controversial, and that judges must therefore engage in moral and political reasoning when deciding hard cases at law (Spaak 2003: 477). And the claim that there is a distinguishing criterion, like John Austin's claim the command of the sovereign is the sole criterion, or Hart's rule of recognition distinguishing legal rules from others, does not exist (Dworkin 1978: 18). Because, in hard cases we can't detect what is right and obligatory simply by applying rules. Rules are 'applicable in an all-or-nothing fashion'; it's principles and policies, which have 'the dimension of weight or importance'. Principles provide reason for deciding the case in a particular way, but it is not conclusive reason: it will have to be weighed against other principles in the system (Raymond 2006: 46). So, deciding what the law is depends inescapably on moral-political considerations" (ibid: 43). There is not only what the positivists call distinguishing criterion separating legal rules from other ways of permission and prohibition, but also such a thing called 'The ultimate positive law'. For the legal rule is inseparable from other social and moral directions. With no consideration of such

directions “the positivists ‘law’ lacks obligatory juridical norms/rules per se (intrinsically). There is a need for an enforcer/political authority. The juridical nature of positive law is derived from some thing external to it” (Cotta 1983: 277). The lawgiver's authority establishes the binding character of the norms only in a presumptive way...since the ruling ability may fade and disappear and the citizens' trust vanish; authority therefore can offer only a presumption of the binding nature of norms. Only if the normative propositions look coherent and functional with respect to their end will such a presumption hold. Otherwise the presumption will fail and the norms, being based only upon their sanction, will soon be perceived as imposed rather than obligatory (ibid, 277).

Dworkin's attack on legal positivism is crucially founded on his concern that the law ought to ‘take rights seriously’. He argued that speaking from the positivist perspective, since one's ‘legal obligation’ is “that falls under a valid legal rule that requires him/her to do or to forbear from doing something” (Dworkin 1978: 17) and his/her legal right is that is implied in “others actual or hypothetical legal obligations to act or not to act in certain ways touching him” (ibid, 17). Then, in the absence of valid legal rule there is no legal obligation, and the decision made by the judge through exercising his discretion could not enforce legal right. (Ibid) So, “individual rights are seriously compromised if, as Hart claims, the result of a hard case depends on the judge's personal opinion, intuition, or the exercise of his strong discretion. My rights may then simply be subordinated to the interests of the community” (Raymond 2006: 44). However, the law should be intrinsically obligatory and enforce rights. As to Dworkin, law conceived as legal rules distinguished from other social rules lacks such a force. Only including principles and moral and political reasoning make a law all inclusive. While there are policies indicating the community goals and the publicly good, principles describe rights. So, according to Dworkin rights are trumps. They have a ‘threshold weight’ against community goals. They should not be squashed by a competing community goal (ibid, 46). Rights trump other considerations such as community welfare. Accordingly, he contends that my rights should be recognized as *part of the law* (ibid, 44). Moreover, without such moral contents and principles the rules of law could not only be accepted, but also justified. And, there would not be reasonably acceptable rights and duties, which grounded in such rules alien to mores that are essential aspects of human life. This and other fundaments of Dworkin's theory of right were important elements of moral constructivists' characterization of human rights.

The aforementioned points manifest that, the mechanistic legal positivism and economic utilitarianism of Bentham recognizable for its contribution in the formulation of modern jurisprudence could be questioned and criticized as incomplete analysis of the phenomena-law, right and duty. And, these and some other reasons lead thinkers to further inquiry. Among those some, including Hegelian and constructive theorists of right, have become aware of the incompleteness of previous formulations of legal theory, started to question and attempt to reformulate it. It's those attempts that lead to the revival of the old fashioned idea of natural right in a slightly different manner as human rights. This turn from the traditional discourse on natural rights to the newly emerged idea of human right, therefore, could be seen through careful examination of modern moral and political philosophers' response to the traditional naturalism/foundationalism and positivism. Those thinkers don't completely dismiss foundationalism and positivism. Some contemporary moral philosophers, working with the naturalistic spirit, discredit legal positivism and have tried to reformulate rights of human kind as grounded in universally applicable absolute moral principles. While others reject moral foundationalism emphasizing on historico-social conditions in their justification of rights.

Chapter Three

The Modern Human Rights Discourse

3.1 The Turn from ‘Natural’ Rights to ‘Human’ Rights

The counter arguments against mere positivistic critique of natural law and natural rights as discussed above shows the normativity of law upon which rights of people were justified facilitated the chance to re-formulate natural rights. Most important, despite the decline of natural law and natural rights that have failed under the pressure of utilitarianism of Bentham and ‘conservative historicism’ and relativism of Burke, after World War II natural rights triumphed and re-emerged as human rights. This is mainly because humanity has lost its trust in positivism. The newly developed idea of human right, though different from what is defined as natural right by classical, medieval and early modern time scholars, both could be seen as part of the same historical process by which the one develops into the other (Boucher 2009: 245). In talking about this historical process and re-formulation of the philosophically discredited idea of natural right, the re-emergence of natural rights was first observed in the British idealists (like Green, Bosanquet and Ritchie) pronouncement of the natural rights as basic or fundamental to society without which social life would be intolerable or impossible (ibid, 226). The idea of those thinkers being the benchmark for the turn from the old-fashioned idea of ‘natural’ right to the newly emerging concept of ‘human’ right, I would like to show how their idealist social philosophy contributed in this important historical process.

The British idealists, unlike the positivists (Bentham) and conservative historicists (Burke), don’t completely reject the idea of natural rights. Like Hegel they were critical of traditional conceptions of natural rights, but nevertheless argued that there were some rights so fundamental to particular societies that they functioned as, or may just as well be called, natural rights (Boucher 2009: 218). They mainly rejected natural rights in the traditional understanding of the term associated with a state of nature- as justifiable by higher essence of a person independently of society and its norms. But, they all maintained that “in so far as there are fundamental rights necessary for the life of a community and which could be justified as contributing to the common good, they could legitimately be termed ‘natural rights’ providing they were not attributed to an abstract individual independent of communities” (ibid, 227). And this idealist position is precisely presented in Green as: ‘without society, no persons’ (Green 1899; Boucher 2009: 227). The same position was held

by others like Ritchie, who argues, that “personality is a conception meaningless apart from society” (ibid.) and Bosanquet, who was “intended to be an extended critique of social atomism and an affirmation of the view that self-realization was only possible within society” (Boucher 2009: 227). Bosanquet further argued that “the common or moral self has greater reality than the so-called individual” (ibid.).

As to the British Hegelians, therefore, people have natural rights in so far as they are members of the ethical community. Green, in particular, has defined these rights as “those powers of an individual that are recognized by others as being necessary for the attainment or achievement of a good in which they all share” (Boucher 2009: 227). So, “possession of such powers, or capabilities, guaranteed by society, and those that society exercises over the individual, are justifiable only on the grounds that they are a necessary prerequisite to fulfilling ‘man’s vocation as a moral being’” (Green 1917; Boucher 2009: 227). This being the case, the foundation of rights...is not that they are natural, but that the individual has a capacity to conceive of a good that is common, the same for himself, or herself, as for others, and of being moved to act by that conception. This social and normative conception of rights of the idealists’ entails correlative obligations. In their formulation the British Hegelians emphasized on the historical dimension in the emergence of fundamental rights, but continue to employ a strong foundationalism in embedding the rights in a conception of universal reason, and self-realization (ibid, 243). Hence, modern moral philosophers like Griffin and Gewirth took the idealists line of strong foundationalism, while some other legal and political theorists have retained the conventionalism, or communitarianism, sometimes called constitutive theory, and jettisoned the metaphysics. “The Idealists, then, stand in an intermediary position between natural rights and the modern human rights culture, and have contributed significantly to modern ideas on the moral community and how conceptions of human rights have to be conceived in terms different from the natural rights tradition” (ibid, 246).

Before I proceed to my discussion of the modern human rights discourse, some of the assumptions that the British Idealists share with the modern constitutive theorists of human rights in particular, and that make them quite different from the traditional natural rights theorists are: - “first there is a widespread assumption that the rights we have, moral or legal, depend upon a moral community, and that we do not have them independently of that community” (ibid, 286). This shows the replacement of, what is natural, in nature or Divine and ultimate, posited by traditional theorists with the modern idea of what is humanely and in

human nature. So, the humanization of rights naturalized by classical, medieval and early-modern philosophers was observed in the works of British idealists. The British idealists and modern constitutive human right theorists therefore have followed an approach that humanizes the whole process in the formulation of the 'right' concept and its contents. This is also found in the moral absolutists. "Second, it is widely believed that the rights we have, moral or legal, are constitutive of the self. We may have them independently of political society or governments, but we do not have them independently of society" (ibid.). By invoking the Hegelian critique of atomism, they have made 'the social man' an emphasis in their discussion of rights; discrediting the old idea of man as individual being. Then, they have attempted to show how the 'natural' element of rights is determined from the pre-requisites of human society which are said to be rationally ascertainable. From which the claim that "we are what we are because of the rights and duties our communities extend to us, whether that community is a global society, or a more localized polity" (ibid), is fundamental one. The fact that their characterization of rights as based in interrogation of human nature marked the turn from natural rights to human rights.

3.2 The Modern Human Right Theories

Discussion of the modern theories of human right could easily be understand in relation to the two different conceptions of right of the ancients. As we have seen in the first two parts of this paper there are the naturalistic objective conception of right as universal and inalienable, and the historicist subjective conception of right as cultural and contextual. The influence of the the two, natural right tradition and the critiques, was observed in the foundationalistic and constructive theories of human rights, respectively, of the modern time.

Most important, contemporary notions of human rights draw very deeply from the secular natural rights tradition. Among which the idea that we have these rights simply by existing and they can't be taken away from us manifests that they are direct descendants of natural rights. The only difference is that human rights are viewed by most as arising essentially from being the nature of humankind itself, not what is external- nature or other force (Heard, 1997). However, what is called human nature is understood differently by different theorists. And, this difference leads to the emergence of different foundationalistic theories of human rights.

However, some others have stood in opposition to the foundationalistic views. They strongly disagree with the foundationalists' conception of human right as grounded in absolute principles based in the assumption that individuals are rational. They have used Burke's and Bentham's criticism of the natural right tradition and the contractarian view of Rousseau's image of civil society so as to show the defects of the moral and rational foundationalistic theories of human right (ibid.). According to them human rights are constructions good for a community of the globe or particular polity.

3.2.1 Foundationalist Theories of Human Rights

The development of the foundationalistic theories of human rights is related to "the aftermath of World War II that brought about a revival of natural rights theory. Certainly, this was due in part to the revulsion against Nazism and the horrors that could emanate from a positivist system in which the individual counted for nothing. It was not surprising that a renewed search for immutable principles to protect humanity against such brutality emerged" (Shestack 1998: 215). Leaving aside the metaphysical assumptions of the traditional natural right theorists and "the early expounders of the Rights of Man most of the modern human right theorists adopt what may be called a qualified natural law approach in that they try to identify the values that have an eternal and universal aspect (ibid.). And the common theme emerging from a huge family of theories is that a minimum absolute or core postulate of any just and universal system of rights must include some recognition of the value of individual freedom or autonomy (Shestack 1998: 215). They can be viewed as saying that if one adopts certain human rights as norms (e.g., freedom of thought, equality), one can produce (ibid., 216) a certain kind of society; and if one finds that kind of society desirable, one should adopt the norms and call them absolute principles (ibid., 217). So, they have argued for some normative absolute principles that are grounds for what they identify as fundamental rights of human kind.

Some of these people have attempted the project to formulation of human rights as norms based on introspection of the rational nature of the human being. Among them: "Allan Gewirth develops a theory of rights based on what any human agent must will and combines this with the concept of consistency (Gewirth 1996; O'Connell 2005: 487). And, James Griffin has proposed "two grounds for human rights: personhood and practicalities. The existence conditions for a human right would, then, be these. One establishes the existence of

such a right by showing, first, that it protects an essential feature of human standing and, second, that its determinate content results from the sorts of practical considerations” (Griffin 2008: 44).

A. Allan Gewirth: ‘Human agency’ and the ‘PGC’

The attempt to formulate some absolute principles to be ground for human rights, in so far as humanity should be protected from brutal activities like what happened in the World Wars and done by the Nazi’s, is an approach followed by Allan Gewirth. In his different articles Gewirth has argued that human rights are drawn in essence from human kind’s moral nature (Heard, 1997). By doing so he has made human rights the object of moral philosophy. And, as to him, it’s agency or action, which is the common subject of morality and practice (ibid). Thus, the justification of human rights, as to him, “grounded in what he presents as the distinguishing characteristic of human beings generally: the capacity for rationally purposive agency” (Fagan, 2003).

Gewirth-

states that the recognition of the validity of human rights is a logical corollary of recognizing oneself as a rationally purposive agent since the possession of rights are the necessary means for rationally purposive action. That is why he grounds his argument in the claim that all human action is rationally purposive. Every human action is done for some reason, irrespective of whether it be a good or a bad reason (ibid).

He then asks, what is required to be a rationally purposive agent in the first place? Here comes his first thesis that “every agent logically must claim or accept that he has rights to freedom and well-being because they are the necessary conditions of his action and successful action in general” (Gewirth 1985: 742). So, according to him, freedom and well-being are the two necessary conditions for rationally purposive action. Freedom and well-being are the necessary means to acting in a rationally purposive fashion. They are essential prerequisites for being human, where to be human is to possess the capacity for rationally purposive action. As essential prerequisites, each individual is entitled to have access to them” (Fagan, 2003).

To use his own words, Gewirth has proved his first thesis, by saying that

since freedom and well-being are the necessary conditions of action and successful action in general, no agent can act to achieve any of his purposes without having these conditions. Hence, every agent has to accept (1) "I must have freedom and well-being." This 'must' is practical-prescriptive in that it signifies the agent's advocacy of his having what he needs in order to act. Now by virtue of accepting (1), he also has to accept (2) "I have rights to freedom and well-being." For if he denies (2), then, because of the correlativity of claim-rights

and strict 'oughts', he also has to deny (3) "All other persons ought at least to refrain from removing or interfering with my freedom and well-being." By denying (3), he has to accept (4) "Other persons may (i.e., It is permissible that other persons) remove or interfere with my freedom and well-being." And by accepting (4), he has to accept (5) "I may not (i.e., It is permissible that I not) have freedom and well being." But (5) contradicts (1). Since every agent must accept (1), he must reject (5). And since (5) follows from the denial of (2), every agent must reject that denial, so that he must accept (2) "I have rights to freedom and well-being." I call them generic rights, because they are rights to the generic features of action and successful action in general. Thus the argument for the first main thesis has established that every agent, on pain of self-contradiction, must hold or accept that he has rights to freedom and well-being (Gewirth 1985: 744).

The above long quotation has shown that Gewirth's major thesis is formulated "on the point that if any agent denies that he has these rights, then he is in the position of holding that he need not have what, as an agent, he has to hold that he must have" (ibid). Therefore, "each individual cannot simply will their own enjoyment of these prerequisites, freedom and well-being, for rational agency without due concern for others" (Fagan, 2003). One's "claim to the the basic means for rationally purposive action is based upon an appeal to a general, rather than, specific attribute of all relevant agents. I cannot logically will my own claims to basic human rights without simultaneously accepting the equal claims of all rationally purposive agents to the same basic attributes" (ibid). This lead us to his second thesis that "each agent logically must admit that all other agents have the same rights he claims for himself, so that in this way the existence of universal and equal moral rights, and hence of human rights, must be accepted within the whole context of action or practice" (Gewirth, 1985: 743). As he himself stated it, "the upshot of this latter argument is that the existence of human rights logically must be granted by every agent, and with it the PGC- Principle of Generic Consistency" (ibid, 744). Gewirth has formulated what he call the 'Principle of Generic Consistency' (PGC), he writes, "from these two theses, there follows a supreme moral principle that every agent logically must accept. I call it the Principle of Generic Consistency (PGC), and its main precept, addressed to every actual or prospective agent, is: Act in accord with the generic rights of your recipients as well as of yourself" (ibid.).

The generic rights are rights to have one's behavior characterized by the generic features of action and successful action in general: freedom (consisting in control of one's behavior by one's unforced choice while having knowledge of relevant circumstances) and well-being (consisting in having the general abilities and conditions needed for achieving one's purposes). According to the PGC, then, it is incumbent on every actual or prospective agent to act- with favorable consideration for the freedom and well-being of other persons as well as of himself or herself; and such action is a matter of the rights of the persons concerned. My general line of argument has undertaken to prove that any agent

who rejects the PGC contradicts himself, so that in this way the PGC, as the supreme principle of morality, is given the rational justification... (Gewirth 1988: 245) of generic rights.

These generic rights are also human rights, since every human being is an actual, prospective, or potential agent (Gewirth 1982; Freeman 1994: 39). Accordingly, “it can be seen why he hold that the concept of human rights is central to moral philosophy.” According to him, “human rights are personally oriented, normatively necessary moral requirements, in at least two senses of ‘requirement’: they are justified demands for or claims to certain kinds of guaranteed conduct on the part of other persons, and their objects, what they are rights to, are the necessary conditions of action and successful action in general as having to be equally possessed by every actual or prospective agent” (ibid, 743). Supposing that Gewirth succeeds in establishing a conclusion that there are generic human rights to freedom and well-being, specific rights could be derived from them. “For example, from the generic right to freedom we can derive freedom of religion or assembly. And from the generic right to well-being we can derive the right to education. Gewirth believes that he can derive as moral rights most of the rights in UDHR, including economic and social rights” (Gewirth 1983; Nickel, and Reidy, 15). He has also maintained that human right may be overridden only by another human right when the object of the later is more necessary than the object of the former. However, says Gewirth, “a right is absolute when it cannot be overridden in any circumstances, so that it can never be justifiably infringed and it must be fulfilled without any exceptions” (Gewirth 1981: 2). As paraphrased in Fagan, according to Gewirth, “there exists an absolute right to life possessed separately and equally by all of us. In so claiming, Gewirth echoes Dworkin’s concept of rights as trumps, but ultimately goes further than Dworkin is prepared to do by arguing that the right to life is absolute and cannot, therefore, be overridden under any circumstances” (Fagan, 2003).

Some of the critics, however, said that Gewirth’s case for necessary universal human right is weakened by the possibility of trade-offs between freedom and wellbeing, none of which is necessary (Freeman 1994: 511). Therefore, they have rejected his thesis that “human beings are purposive agents and as such they require at least minimal levels of physical and psychological well-being and freedom as descriptive anthropological axiom and a stipulated interpretation of what it means to be human” (Freeman 1994: 513). Most important, as Ari Kohn has identified, one major problem in Gewirth’s theory

is that an agent can quite clearly sidestep rational inconsistency by believing that his victim is somehow less of an agent...than he is himself. The agent, here, might recognize that his victim is a PPA, but other factors (being an infidel, a queer, a woman, or an untouchable) have far greater resonance and preclude her having the same rights as the agent. He might also recognize his victim as a potential PPA, but not one in the fullest sense of that term or one who has actually achieved that status; as Gewirth himself notes, 'there are degrees of approach to being prospective purposive agents' (Kohn 2007: 56-57).

The other problem is that as pointed out by Rorty- “it is overly academic and insufficiently pragmatic” (Kohn 2007: 56). Because Gewirth’s “fifteen steps might be logically compelling to those in a philosophy department, but not to those who are actually making these decisions on inclusion and exclusion” (ibid.). As indicated by Rorty this is not simply “because they are insufficiently rational....Rather, It’s because they live in a world in which it would be just too risky ... to let one’s sense of moral community stretch beyond one’s family, clan, or tribe” (ibid.).

B. James Griffin: ‘Personhood’ and ‘Practicalities’

The other recent thinker who has proposed a moral foundationalistic conception of human rights is James Griffin. In his book, *On Human Rights*, he has clearly indicated his proposal to “see human rights as protections of our normative agency” (Griffin 2008: 4). He has briefly explained his proposal as “the best substantive account, of human rights” (ibid) on the basis of the tradition that disclose the unique nature of human kind. In this tradition “Human life is, *viewed as*, different from the life of other animals. We human beings have a conception of ourselves and of our past and future. We reflect and assess. We form pictures of what a good life would be... and try to realize these pictures. This is what we mean by a distinctively *human* existence—distinctive so far as we know” (Griffin 2008: 32). This being the case, Griffin argues for the possibility to “value our status as human beings especially highly, often more highly than even our happiness. This status centres on our being agents- deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves” (ibid, 32). Human rights, for him, are therefore protection of this status, that is they can be seen as protections of our agency — what one might call our personhood (Griffin 2008; Liao 2010: 15).

Nevertheless, by this Griffin is not for “a *derivation* of human rights from normative agency; it is a *proposal* based on a hunch that this way of remedying the indeterminateness of the term will best suit its role in ethics” (Griffin 2008: 4). He said that, his project is different from those who have attempted to using the same tradition viewing human beings as normative agents to ground human rights. For example, he said, Gewirth too makes human agency central to his project (ibid, 4). As I have tried to show above, in Gewirth’s project we will see two step procedure: “his first step is to derive rights from agency in the prudential case: every agent, even the purely self-interested, must accept, on pain of contradiction, that ‘I have rights to the proximate necessary conditions of my action’” (ibid.). Then, “from the prudential case to the universal: the agent must accept, because of the logical principle of universalizability, and again on pain of contradiction, that ‘all other agents equally have these rights’, thus establishing them as human rights” (ibid.). Griffin completely rejects Gewirth’s logical Principle of Generic Necessity. He argues, “I claim no logical necessity for my proposal that we see human rights as protections of normative agency” (ibid, 34.) .

Griffin’s notion of personhood, as understood by Beitz, “is an interpretation of the idea of human dignity” (Beitz 2009: 60), identified, in Griffin, as normative agency. This could lead us to his claim that-

One can break down the notion of personhood into clearer components by breaking down the notion of agency. To be an agent, in the fullest sense of which we are capable, one must (first) choose one’s own path through life—that is, not be dominated or controlled by someone or something else (call it ‘autonomy’). And (second) one’s choice must be real; one must have at least a certain minimum education and information. And having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes (call all of this ‘minimum provision’). And none of this is any good if someone then blocks one; so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this ‘liberty’). Because we attach such high value to our individual personhood, we see its domain of exercise as privileged and protected” (Griffin 2008: 33). So, for him human rights are primarily grounded in personhood. Out of the notion of personhood we can generate most of the conventional list of human rights (ibid, 34).

However, Griffin said that personhood couldn’t be the only ground needed for human rights (ibid, 37). Because, he said, “grounding human rights in personhood imposes an obvious constraint on their content: they are rights not to anything that promotes human *good* or *flourishing*, but merely to what is needed for human *status*. They are protections of that somewhat austere state, a characteristically human life, not of a good or happy or perfected or

flourishing human life” (ibid, 34). In brief, “it leaves many human rights still too indeterminate.” (ibid, 37) For example,

personhood tells us that each of us has a right to security of person. But that just raises the question that I asked earlier about a supposed right to determine what happens in and to our bodies.... Does my right to security of person not protect me against, say, the health authority that wants one of my kidneys? After all, the few weeks that it would take me to recover from a kidney extraction would not prevent me from living a recognizably human life either. Where is the line to be drawn? What is clear is that, on its own, the personhood consideration is often not up to fixing anything approaching a determinate enough line for practice (ibid.).

So, Griffin suggested that “substantive accounts, which grounds human rights...directly in a central range of substantive values, the values of personhood, can go further” (ibid, 34). Because, “human rights are supposed to have a certain kind of social existence. A human right is “an effective, socially manageable, claim on others.” We need some way of determining when it is reasonable to protect the values of “personhood” by conferring on individuals the power to make such a claim and what form the claim should take” (Beitz 2009: 61). To resolve these questions Griffin turns to a second category of considerations he calls “practicalities.” And, argued that, “for that I suggest to introduce features of human nature and of the nature of human societies as a second ground. Those features are ‘practicalities’, as I am using the term (Griffin 2008: 38). And these features are “universal” facts, “not tied to particular times and places” (ibid, 39). Practicalities, therefore, refer to general facts, neither historically nor geographically relative about the human condition nor human societies. And their role as a second justificatory foundation for human rights is to make possible, without appealing to positive acts of legislation or adjudication, to move from the good of normative agency to a more fine grained specification of human rights” (Nickel, and Reidy, 16).

Finally, Griffin concludes that there are “...only two grounds for human rights: personhood and practicalities. The existence conditions for a human right would, then, be these. One establishes the existence of such a right by showing, first, that it protects an essential feature of human standing and, second, that its determinate content results from the sorts of practical considerations... (ibid, 44). Nevertheless, Griffin’s theory of human rights based in his moral idea of ‘personhood’ and universal ‘practicalities’ could also be questioned from the perspective of moral relativism and historicism.

3.2.2 Neo-Hegelian and Communitarian Constructivist Understanding of Human Rights

Like the moral and logical foundationalist theorists of human right, constructive theorists including the neo-Hegelians' and modern variants of communitarians' have attempted to get firm ground for human rights. Both have rejected the naturalistic thesis and tried to erect rights on examination of what is human and in human nature. The constructivists, however, do not agree with the foundationalists atomistic conception of human nature and their claim "for eternal foundations as the basis of human rights" (Boucher 2009: 288). According to them this approach overlooked at "the contingency of human condition," (ibid, 271) and the fact that the self or human nature, as Collingwood understands Hegel, "is in constant flux, a process of creating itself and its world" (Collingwood 1923; Boucher 2009: 271). On this basis they have rejected the atomistic conception of rights favoring their social conception of human nature from which they draw alternative understanding of human rights. Most important, they use Benthamite and Burkean idea of "social practice and beliefs", Rousseau's conception of civil society, with Hegelian dialectical understanding of history and human nature in their attempt to show the justifiability of the human right idea. And, as Ken Booth is paraphrased in Boucher, they all are for the idea that "we should have human rights not because we are human, but to make us human" (Boucher 2009: 288).

Thus, philosophers (such as Michael Walzer, Charles Taylor, Jeremy Waldron, Rex Martin, Richard Rorty, John Rawls, and Jack Donnelly) and political theorists (including R. J. Vincent, Mervyn Frost, Janna Thompson, Alexander Wendt, Emanuel Adler, Stephen Krasner, and others) (ibid, 287) have rejected "the suggestion that human rights are possessed by humans by the mere fact of being human, or that they in any way predate political society because they have some Divine or natural origin" (ibid, 287). In other words, they have denied "foundational arguments of human rights based on an omnipotent creator, or on a universal human nature...preferring the practical and pragmatic idea of consensus or moral constructivism" (Boucher 2009: 287). Most important they are indebted to Charles Taylor's idea that those foundationalist liberals overemphasis on the value of freedom of choice and other kinds of the individuals "neglecting the social conditions of freedom" (Taylor 1985; Kymlicka 2004: 226).

Though they all share the view that human rights are “goods “constituted or ‘constructed’ by and through interaction with one another, some go further and argue for internalization of human rights “as norms and act in accordance with them because they understand them to be correct or appropriate” (Totaro 2008: 728). Thus, some of the various conventionalist or constructivists including those who are indebted to the Hegelian tradition and communitarian are discussed below. Most of the communitarians are “concerned with the questions of self-knowledge and understanding of others through historically sensitive perspectives. They are not disinterested historical undertakings, but have the explicit purpose of facilitating the expansion of the moral community in order to become more and more inclusive of those we regard as other” (Boucher 2009: 298).

Jeremy Waldron, for example, has attempted to justify human rights as grounding in moral norms shared by different society with different history and culture. He has stated that the “increasing skepticism about objective values and principles in moral philosophy has not terminated moral argument or justification. Moral justification may no longer be characterized by the search for ultimate truths irresistible to rational beings, but it is concerned to determine the shared foundations, sympathies, and considerations that underpin claims about taking rights seriously” (Waldron 1987; Boucher 2009: 294). Waldron, therefore, has changed the object of moral philosophy from “the search for ultimate truths irresistible to rational beings” to determining the shared foundations indicating the necessity for “taking rights seriously” (ibid.). He agrees with the foundationalists in rejecting ‘natural law’, but intends to preserve positive law as grounds for justifying universal human rights. However, he wants to go beyond other positivists holding “the command and sanctions theory of law” (ibid.). Because, such conception of law overlooked the fact that “law may also contain customs and practices that grow out of and constitute the social order and which express our mutual sense that relations with each other are constrained by norms, most of which may be unenforceable” (Waldron 2006; Boucher 2009: 294). As a Constructive positivist Waldron argued that “the mundane growth of repeated contact between humans and different human groups can lay the foundation for the emergence of cosmopolitan norms, in a way that does not necessarily presuppose a formal juridical apparatus” (ibid, 295). And those norms could be ground for justifying universal human rights.

Michael Walzer and Charles Taylor also “acknowledge the possibility and desirability of reaching a consensus on universal principles while at the same time maintaining that they necessarily emanate from and rest upon different cultures and traditions” (Boucher 2009: 295). Walzer on his part argues the establishment of such universal principle is possible in so far as we can project “a thin universalism from the thick morality of a community” (Beitz 2009: 75). What he calls thick morality refers to “a set of standards to which all societies can be held—negative injunctions, most likely, rules against murder, deceit, torture, oppression, and tyranny” (ibid.). For him these types of morality embedded in different societies and social practices, what he calls maximal morality, precedes universal minimal morality, which is in fact abstracted from the former (Walzer 1994: 13). As to him “the thin universalism is the result of an historical process which has given rise to a moral minimum...that settled norms” (Boucher 2009: 295). Thus, he has suggested that there is a minimal code of universal morality constituting cross-cultural requirements of justice, such as the expectation not to be deceived, treated with gross cruelty or murdered (Walzer 1992: 22). Acting accordingly with “this reiterative universalism”...means “affirming a ‘(partial) communality’ which does not extend to a full endorsement of the values of another culture, but merely to this thin shared communality” (Walzer 1992; Boucher 2009: 295). Therefore, there is an international society which is grounded, not on a natural or hypothetical contract in a Rawlsian original position, but on norms that have become commonly acknowledged by leaders of states and their citizens (Boucher 2009: 296).

Walzer, however, does not use his idea of universal moral norms based in “overlapping consensus” to justify or advocate human rights. Rather, it’s writers like Vincent, as pointed out by Beitz, who have seen “the connection, this idea lends itself to a conception of human rights.” (Beitz 2009: 75) For example, “R. J. Vincent writes, on such a view human rights would constitute a ‘core of basic rights that is common to all cultures despite their apparently divergent theories’; they would be a ‘lowest common denominator’” (Vincent 1986; Beitz 2009: 75). The Walzerean moral constructivist theory of human right that “relies excessively on the metaphor of a “core” of rights which are common to the world’s main conventional moralities” (Beitz 2009: 75), however couldn’t be inclusive of rights that generate duties. In other words, this theory “would have the normative consequence of excluding a substantial part of the content of contemporary human rights doctrine” (ibid.).

Charles Taylor working within the same paradigm has pointed out what he thinks are the social conditions of freedom neglected by foundationalist liberals (Taylor 1985; *Kymlicka* 2004: 226). He has rejected the idea the mere fact that individuals are whatever; rational, moral or purposive, agents deserving freedom and equal consideration. Because this argument does not consider the complexity of historico-social conditions within which we have been going. Most important, seen from non-Western cultures perspective the idea of human rights sanctifies an individual over the community and that human rights by default stress rights over duties and responsibilities” (Osiatynski 2009: 151). And this is because they have norms valuing what is communal and harmonious than the liberty and freedom of the individuals. For example, “some Africans have argued that they have a complex structure of communal entitlements and obligations grouped around what one might call four “r’s”: not ‘rights’ but respect, restraint, responsibility, and reciprocity” (Tharoor 1999; Osiatynski 2009: 151). Taylor, therefore, argued that affirmation or denial of human rights and freedom; and their justifiability require external conditions. To fill this gap Taylor has “taken up Rawls’s idea of an unforced overlapping consensus” (Boucher 2009: 88) to support his assertion that arriving at ‘convergence’ on human rights norms is possible though not yet achieved. Most important, such a consensus doesn’t exist at present, even... not... “there” to be discovered (Beitz 2009: 88) because “in order for there to be such a consensus there would have to be agreement on fundamental norms of behavior” (Boucher 2009: 296).

Taylor then suggested examining why norms are valued so as to show the possible ways of arriving at consensus. For him “norms may be valued for very different and incompatible reasons from our own which are anchored in quite different background views of theology, metaphysics, and human nature” (Boucher 2009: 296). That is why different traditions have been rejecting each other and consensus on human rights norms impossible. This is manifested in non-Western people’s like “Lee Kwan Yew of Singapore and Fidel Castro of Cuba” objection against the Western rights tradition” (ibid.). So, “a consensus formulated in terms of rights, or some other universal value such as human dignity or wellbeing is impossible” (ibid.). Taylor argues, in typical Collingwoodian terms, that “only if we in the West can recapture a more adequate view of our own history, can we learn to understand better the spiritual ideas that have interwoven in our development and hence be prepared to understand sympathetically the spiritual paths of others towards the converging goal” (ibid.). This could not happen.

Taylor argues, different traditions valuing their norms for different reasons may agree and reach on consensus if they understand each other that they have aimed at achieving same goal. So, for Taylor “world convergence will not come through a loss or denial of traditions all around, but rather by creative re-immersions of different groups, each in their own spiritual heritage, traveling different routes to the same goal” (ibid, 297). “Taylor gives the example of reform Theravada Buddhism in Thailand with its commitment to norms of ahimsa (nonviolence) and local control” (Taylor 2001; Beitz 2009: 88-89) that promotes human rights protection. This, for him, implies those different norms may be linked in their final end. He then “maintains that it should be possible to gain an overlapping consensus on norms of conduct while at the same time having to accept that each culture (Boucher 2009: 297) would have its own way of justifying them in relation to its ‘profound background conception’ (Taylor 1999: 124) In short, what “Taylor is suggesting...is that bare consensus must develop into what Gadamer calls a fusion of horizons” (Boucher 2009: 298).

Taylor’s account, however, is questioned by Boucher for two major reasons. One is that, writes Boucher, such a consensus at international level “does not take place...on a whole range of other values, which may in their different spheres be equally fundamental, and which may at present be seen to complement or even conflict with the norms of conduct we call human rights” (ibid.). For example, “the norms of sovereignty are almost wholly accepted and firmly embodied in the whole legal, normative, and institutional ethos of the United Nations and in the conduct of states towards each other, to the extent that humanitarian intervention is nearly completely outlawed unless civil society has broken down and the government no longer appears to be in control” (ibid.). In addition Boucher maintains that “it is all very well achieving a consensus on norms, but we must assume a developmental consensus in which the process is never complete” (ibid). Because, there will be “variations over the implementation of norms in practice and the different priority of ranking given to such norms, in so far as the traditions vary in their background theories” (ibid.). And, “negotiation and compromise require mutual understanding... and resolution of particular disagreements requires mutual respect.” But still “it is not always the case that convergence comes first, and mutual understanding and respect follow. In some cases convergence may depend upon prior attainment of mutual understanding” (Boucher 2009: 298).

Leaving those criticisms aside, Rex Martin arguing in the same line with the moral constructivists agrees with the idea of ‘human rights norms’ consisting of valid moral claims. Since these “valid moral claims do not only refer to ways of acting or what one can do, but also covers what others can do” (ibid.). In his book, *A System of Rights*, Martin argues that “a right...is an accredited or established way of acting. The ground of this establishment is...something variously described as social recognition or acknowledgement or common acceptance” (Martin 1997: 27). So, he “denies that we are capable of possessing human rights prior to and independently of legal systems.” Because, unlike Feinberg and others, for Martin Human rights are more than valid moral claims or norms...in that arguments justifying human rights must resonate with the actual moral beliefs and practices of a community” (Boucher 2009: 300). He then “argues that we cannot understand what it is possible to have a human right unless we accommodate the practices of recognition, promotion, and maintenance of such rights. The absolute difference between morally valid claims and human rights, then, is that rights do, and claims do not, include such practices within their concept’ (Martin 1993; Boucher 2009: 301). However, there would be problems of prioritization in cases where there is conflict between the valid moral claims, and how the disagreement could be resolved by consensus through mutual understanding. As to Martin these problems would no longer exist since agreement is supposed to be on a limited and thin list of fundamental human rights about “basic human interests, acknowledgements of diversity and distinctive values, and the basic requirement of reciprocity” (Martin 2006b; Boucher 2009: 298). And this in turn will result in arriving “at a thicker interpretation of the list of human rights that may differ from one location to another depending upon comprehensive doctrines and even parochial values” (ibid.). Martin, therefore, “presents us with an ideal characterization of an organized society with the capacity to convert morally valid claims into human rights by means of recognizing and maintaining them with the backing of law” (ibid, 301).

Rawls’s Law of Peoples

Rawls’s “Law of Peoples” containing human rights as its important elements could be seen as what Martin referred as a legal system in which recognition and maintenance of morally valid claims is realized. “John Rawls raises the problem of the universal, juridical and political validity of human rights in a conference, “The Law of Peoples”, delivered at Oxford in 1993” (Perez-Estevez, 2009). In his presentation Rawls mentioned the insufficiency of his *theory of justice* to establish-

a firm ground that justifies the universal validity of human rights. This is because in his theory of justice there was only a political conception of justice based in the ideals of liberal democracy; and may not be applicable in some other cultures alien to liberalism. Rawls admitted that it is “illogical to apply such theory of justice out of this sociopolitical frame in order to build up a foundation for the universal validity of human rights (Estevez, 2009).

However, he “realizes that whereas the natural world may be a mystery to everyone save its creator, we are the authors of our social world and we are everywhere at home in it because we are capable of changing it and ourselves through manipulating institutional arrangements by means of reasonable agreements” (Boucher, 2009: 305). As a result he proposed “the law of peoples, that is, the theory of International Justice, in order to establish universal norms so that these norms can rule the reciprocal conduct of many states and nations and can promote the construction of a Society of Nations” (ibid.). How can this be possible?

According to Rawls, this is possible in that first the liberals are those that act in accord with the two fundamental principles of justice as discussed in his Theory of Justice for domestic society. As we all know in his Theory of Justice Rawls used the original position to refer to a unanimous agreement persons enter in to as a matter of rational choice. And the concern is identifying the principles rational and informed persons, who don't know their natural abilities or initial place in society will be, can formulate for the advancement of their basic interests through social cooperation (Nickel, and Reidy, 20). When it comes to liberal peoples there comes his second original position argument that asks what principles just societies, moved only by their interests, but made impartial could unanimously accept to govern their interaction on the global stage (ibid.). And this may help to identify principles of cooperation that treat each and all of them fairly as full and equal members of the international order (ibid.). Finally, Rawls, proposes the eight principles that would be reasonably and unanimously accepted by liberal peoples, among which honoring human rights is one (ibid.).

And among the non-liberal peoples there are what he call “decent peoples” (Rawls 1999a; Graham 2007: 157). According to him, “decent peoples are distinguished, in part, by having a conception of justice which, although not liberal, embodies an idea of the common good and a procedure of consultation for legislation which, although not democratic, affords opportunities for all adult members of society to make their voices heard” (Rawls 1999; Beitz 2007: 96-97). Therefore, for him, the ‘Law of Peoples’, which refer to the principles that regulate mutual political relations among peoples” (Rawls 1999; Boucher 2009: 304) are also

acceptable by hierarchical decent peoples. Which means the Law of Peoples regulates the Society of Peoples, which comprises both liberal and ‘decent’ peoples. (ibid, 305) Rawls, therefore,

Presents a view of human rights as one element of a larger conception of public reason worked out for an international society of liberal democratic and “decent” peoples organized politically as states. Liberal and decent peoples together constitute a “Society of Peoples” whose affairs are regulated by a “Law of Peoples” that defines the content of this society’s public reason and serves as a common basis of justification for international political action (Rawls 1999; Beitz 2007: 96).

However, human rights may not be compatible with the moral beliefs prevailing in peoples of ‘outlaw states’ that are neither liberal nor decent. But, in so far as “human rights are “a special class of urgent rights” whose violation is “equally condemned by both reasonable liberal peoples and decent hierarchical peoples” (ibid, 97) their “political (moral) force extends to all societies, and they are binding on all peoples and societies, including outlaw states” (ibid, 98). Moreover, these are “rights that have come to be recognized as essential for social cooperation, and for promoting the common good” (Rawls 1999; Boucher 2009: 307). Therefore, they are also universal in that not only decent peoples, both liberal and non-liberal, but also outlaw peoples are bound by them. Human rights are extremely important in the theory because they constrain the sovereignty of governments in what they may do to their own peoples. And, the violation of those rights is the only justification in addition to self-defense for military intervention once diplomatic and economic sanctions have proved unsuccessful (ibid.). This implies that “a society’s adherence to human rights is necessary to qualify it as a member ‘in good standing in a reasonably just Society of Peoples’ and “sufficient to exclude justified and forceful intervention by other peoples” (Rawls 1999; Beitz 2007: 98).

Rawls’s Law of Peoples is a good example of the theoretical backgrounds in which these different world wide documents, including the UDHR, containing lists of so called human rights, based in. And with this I would like to proceed to my short discussion about the conceivability of the human right idea in relation to the universalism and relativism debate, and the problem of ‘human rights’, philosophically justified and legally enforceable, being masks for political or some other interests.

The above presentation has shown that there are different thinkers, who have suggested their own views about the conceptual and justificatory questions of human rights from foundationalist and consensual or constructivist vantage points. Human right, therefore, is conceptualized and justified as standards based in moral consideration of human nature. The difference lies in their understanding of humanity or human nature. The liberal political and moral philosophers were observed trying to formulate and conceptualize the human rights concept giving more emphasis to the question of private autonomy. While cosmopolitans and contractualists favored public autonomy. Though the human right concept is understood as morally founded in the need to protect individual humanely creatures and develop cooperation to achieve intra and inter community goals, there is still an on going debate on their justifiability and practice at global, regional and state level. Because, at all levels the legalization and politicization of human rights make them instruments for accomplishment of political, economic and other interests.

3.3. The Contest over ‘Justification’ and ‘Practice’ of Human Rights

Now a days the philosophical discourse on human rights centeres in different theoretical and practical problems challenging the conceivability of the human rights idea. As I have tried to briefly show above the western rights tradition- extending from the ancient Greeks and Romans to the British Utilitarian’s, and German rationalists and idealists up until to the modern time moralists and contractualists, could be recognized for approaching questions of justice and right, which are concerns of humanity and nature as a whole from holistic and atomistic, or universalistic and particularistic, or individualistic and communal consideration of what the goods are for. This ends in formulations of some different reasons for taking human rights seriously. Nevertheless, those attempts which could be alleged as formulations of the grounds for human rights do not make the concept (human rights) theoretically uncontestable and easily conceivable, and practically enforceable. The inconceivability of human rights as founded in the established discourse therefore could be seen at two level analysis. One; the universalizability thesis found in those philosophies makes their justification questionable or doubtfull. Second, the skepticism on ‘universality’ finally made the applicability or practicing of the ideal in real life situations unthinkable. Most important the gap between the real and the ideal, or the gap between proposed human right lists and reasons given for them would be an issue of interest in discussing the obstacles affecting the practicing of human rights- legalized and politicized as they are now.

At theoretical level the fundamental problem making the human rights idea blurred and not conceivable is the difference in particularistic and universalistic approaches and conceptualization of 'humanity'. The moral absolutists claim that humanely creatures as morally purposive agents deserve the rights to be protected from actions that are against their dignity and wellbeing, and therefore are guaranteed the things that will promote what is humanely as their rights entails that human rights are based in absolute moral principles working for all human kind. This assertion of the absolutists however could be questioned from historicist and moral particularistic view point in that it lies itself in wrong characterization of human nature by reducing it to individualism. What makes a man 'what it is' isn't only the fact that it's born as it's, but that its nature is cultivated in the community to whom it belongs. As regards to this David Little pointed out that "it is widely accepted that there are no defensible philosophical reasons for affirming tradition-independent moral standards" (Little 1999: 157). This belief is well formulated in Hegel's response to Kantian moral philosophy. Nino strengthened the Hegelian philosophical ethics by saying that "morality should be conceived of as the interest of a historically conditioned community and not as a set of universal abstract principles establishing rights..." (Nino 1991; Little 1999: 157). From this it can be concluded that the foundationalist theses is refutable.

If we assume that it could be theoretically defended in that the foundation of human rights should be on some thing that can guarantee protection of what is human. It would obviously be presumptive to say that people will accept what are set as universal standards. This is because as communitarians and moral particularists indicate-

people loyal to religious and other kinds of cultural tradition would naturally resist tradition-independent standards and would only be satisfied by warrants specifically validated within their own tradition. Accordingly, so the argument goes, it is virtually impossible to motivate large groups of religious believers to comply with human rights protocols without appealing to the doctrines and symbols of their particular traditions (Little 1999: 158).

This idea is first raised by the American Anthropological Association one year "before the Universal Declaration was officially adopted in 1948" (ibid, 153). The association expressed it's worry that "the declaration would be perceived as "a statement of rights conceived only in terms of the values prevalent in Western Europe and America" (AAA 1947; Little 1999: 153). The reason for this, according to the American Anthropologists, is that "standards and values are relative to the culture from which they derive so that any attempt to formulate postulates

that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole” (Winston 1989; Osiatynski 2009: 147). Moreover, “what is held to be a human right in one society may be regarded as anti-social by another people” (AAA 1947; Little 1999: 153).

This historicist and constructionist criticism of absolutist conception of morality upon which foundationalists lay the grounds for human rights shows the theoretical inadequacy of the latter's formulations of rights that finally puts in coma the practicability of the human rights protocols and norms. On this basis the neo-Hegelian historicist moral particularists and communitarians preferred to lay the foundations of human rights in philosophical introspection of the necessary and sufficient conditions for the existence of human condition. They suggested to not separate the nature of mankind as it's in and by itself from the community and conditions which have gone through. So, man morally considered is not an individual like the indivisible unit atom. And its rights and duties are not as such derived from those principles based in human nature individualized, essentialized and dignified. Rather they argued the morally considerable is the social man. And the rights and duties extended to it are based in the values and historical, economic and social conditions of the group to whom it belongs. So, human rights are justified in as much as individual members of a community (global or political polity) deserve to lead their lives as they are recognized being the causes for realizing the common good. At universal level, therefore, the justifiability and practicability of human rights all depends on values and principles recognized for the common good. Accordingly, for the constructivists, human rights perceived as justifiable for the public reason that we need goods that are common require identifying shared values and consensus. And they have maintained that there are ideals embedded in different societies and social practices that could be common denominators implying the standards for the justification of fundamental rights. However, for the claim that the basics of human rights (like the rights to life, not to be discriminated, not to be tortured, not to be enslaved etc.) are all justified for the common goal, but different reasons; and are shared by different communities of the world to be a good justifying reason promoting universally applicable standards, agreement or consensus is a must. In other words as Twiss quotes Gutman though constitutive theorists like Taylor, Vincent, Gutman have maintained that “regime of human rights . . . should . . . rely on many foundational arguments. A human rights regime that welcomes an overlapping consensus is more compatible with moral pluralism . . . the evidence has only increased on the side of the idea that many cultures can converge in support

of human rights” (Gutman 2001; Twiss 2004: 62). Most important, as David Little pointed out, the ‘overlapping agreement’ argument matters more in “real life terms” and is “of the greatest practical importance” (Little 1999: 159). This argument of Little is also shared by the UNESCO philosophers (group of philosophers such as Maritain, McKeon, Lewis, Hessen, and others who have made scholarly researches and reflection on human rights based on the invitation of Professor E.H Carr who was a chair of the UNESCO committee for theoretical bases of human rights established in 1947), who have endorsed a common idea that “even people who seem to be far apart in theory can agree that certain things are so terrible in practice that no one will publicly approve them and certain things are so good in practice that no one will publicly oppose them” (Glendon 2001; Osiatynski 2009: 148). It is therefore argued that “basic human rights rest on ‘common convictions... stated in terms of different philosophic principles and on the background of divergent political and economic systems” (ibid.).

Nevertheless, Little said, “an ‘overlapping consensus’ makes urgently good sense and must devoutly be encouraged” (Little 1999: 159) only for practical reasons. This same idea of Little also found in Jaques Maritan who is quoted in Kohen for saying that “if there are some things so terrible in practice that virtually no one will publicly approve them, and some things so good in practice that virtually no one will oppose them, a common project can move forward without agreement on the reasons for those positions (Glendon 2001; Kohen 2007: 151). Kohen, then, goes further and argues that “while we might not all agree on the reason behind the reason, at bottom, we have all agreed that human beings possess dignity and that, by virtue of this fact, they are inviolable.... In constructing this consensus, then, we have succeeded in establishing a practical non-religious foundation upon which the idea of human rights can rest” (Kohen 2007: 151).

However, Little contends that if the ‘overlapping consensus’ argument is taken to be

a theoretical justification for human rights... that suggestion continues to face certain difficulties.... At first blush, the fact that several different religious or philosophical positions converge in supporting a given behavioral prescription...does not prove anything about the rightness or wrongness of that prescription. It simply proves that at a given time ‘x’ number of positions do, in fact, approve of a given prescription. In order to move from "the is to the ought," an additional argument would have to be supplied showing in what way shared beliefs are justified beliefs (ibid.).

For Little, unlike the UNESCO Philosophers, the claim that “the fact that moral convictions are shared somehow justifies those convictions” (ibid.) does not make sense for various

reasons. One; it's because "such claims seriously distort the actual character of moral experience" (ibid.). In any case actions like massacre, torture or killing innocents "are not wrong because there is common agreement about them, but there is common agreement about them (to the degree there is) because they are wrong" (ibid, 159-160). So moral constructivist argument of the communitarians and contractualists "places the cart before the horse" (ibid., 160). Secondly, the appeal to consensus ideal, as presented in Sumner Twiss, that "shared reasons for accepting human rights norms for example similar views of human moral capacity, common vulnerabilities to suffering and oppression, analogous moral principles, rules, and virtues, and the like. . . . This view begins to discern a possible consensus all the way down, so to speak, with regard to justifying human rights norms" (Twiss 1998; Little 1999: 160) is objectionable. This is because the fact that beliefs are shared add nothing to the authority of those beliefs (ibid.). "Unless adherents explicitly accept and defend an additional premise, namely (again), that shared beliefs are justified beliefs, it is not clear how convergence itself provides an independent warrant for the moral approval of human rights" (ibid.). In general, according to Little, "why and in what sense this added premise about the special validity of shared beliefs is true is what begs for extended attention and defense from the proponents of the overlapping consensus view" (ibid, 160).

On the basis of Little's arguments explicating the theoretical inadequacy of the consensual or contractualist argument for justifying human rights we can also question whether the 'overlapping consensus' thesis is really applicable and of greatest practical importance. Because if "consensus on generalized standards and abstract affirmations" (Campbell 1999: 13) could not be a reason for justifying human rights, how can the mere consensus provide adequate "basis for recommending any particular mechanism for the articulation and realization of human rights..." (ibid.). Moreover, "the epistemological and ontological deficits of human rights not only undermine superficial arguments in favour of this or that method of institutionalizing rights, but are manifest in the increasing controversiality of judicial decisions in the human rights field" (ibid., 14.). So, in the human rights question "the philosophical problems...explain the practical difficulties encountered in the attempts of courts and governments to reach evidently correct and widely accepted interpretations of fundamental rights" (ibid, 14). Campbell's point strengthen the suspicion that obstacles may arise in the practice of human rights, understood and justified based on the contractualists/conventionalists idea of shared value principles or absolute moral principles of the foundationalists- that are assumed to be universally applicable. And this is mainly because

of the political and legal nature of the concern. Examination of the debate on what are listed in the UDHR as fundamental rights can be useful to see whether the modern human rights idea is both theoretically and in practice - meaningful or naive.

As we all are familiar with it the Universal Declaration emphasized in different fundamental humanitarian rights like the right to life, freedom from torture, etc. Nevertheless, the contents of the declaration have been questioned and contested for various reasons. One stance, taken by American and European scholars, lawyers and politicians, is that the covenant is about rights that are good things for protection of the human guaranteeing fundamental humanitarian rights like the right to life, freedom from torture, etc. and therefore should be obeyed by all world states and governments and violation of those rights shall not be compromised. They also say that after all these ideals were also found and justifiable from different perspectives- individualistic or communitarian. And therefore World governments should take actions and bring the case of violators to an international court.

However, others have questioned the adequacy and legitimacy of the declaration for various political and legal reasons implied in the philosophical problems. The theoretical controversy about human rights, philosophically considered, is also found in practice. One; as indicated in Campbell “the epistemological and ontological deficits of human rights undermine superficial arguments in favour of this or that method of institutionalizing rights” (ibid.). Because, “though positivization of abstract human rights greatly assists their implementation, the very act of concretizing rights undermines their moral authority and reduces their capacity to provide a basis for external assessments of the workings of legal and political systems” (ibid.). In brief, “the power of the concept (human rights) to provide a source of morally imperious critiques of ordinary laws and legal systems” (ibid, 15) would be undermined if human rights are positivized and institutionalized as observed in the Universal Declaration. Moreover, the philosophical problems were also “manifest in the increasing controversiality of judicial decisions in the human rights field” (ibid, 14).

Furthermore, because of the political nature of the question- human rights, “as positivized in conventions, codes or bills, have the potential to be used for or against the particular very different ideals treasured by all those who are prepared to sign up to some highly generalized commitments to human liberty, equality, and well-being” (ibid, 15). This is clearly outlined in Boucher’s observation that “much of the discontent about human rights...centers on the

charge of hypocrisy and cynicism; the disjuncture between its rhetoric and its practice” (Boucher 2009: 369). And that is the reason why some non-Western governments including Asians, Africans and Islamic republics have refused to accept the western idea of human rights materialized in the UDHR and oppose the Westerners action against their sovereignty in the name of defending human rights. This is because they (non-Westerners) and some other scholars see the declaration as a proposal of Westerner’s and America to achieve their hegemonic and imperialist interests. For instance, if we look at the West’s response to non-Western societies criticisms of “the Western idea of human rights and its elements such as freedom of speech, freedom of worship and other variety of social and political rights on the basis of values more highly valued by non-Western societies, such as order, deference, and stability”; those values are often regarded by the West as of traditional and hierarchical regimes (Boucher, 2009: 368). And this could be seen as the first step in which the West’s desire for cultural imperialism and hegemony manifest itself. So,

a development of the criticism of human rights reflecting Western conceptions of the individual, and the charge of cultural imperialism is the introduction of the issues of power and politics into a debate largely conducted in the languages of law and philosophy, with the former focusing upon the legislative protections and judicial processes of redress, and the latter examining the source and justifications of human rights claims (ibid., 369).

Since I have said more about the philosophical problems about the origin and justifications of human rights I would like to focus on the politico-legal views about practical difficulties. First, the non-Western identification of the human right idea propounded in the UDHR as grounded in Western individualism and other values also entails that human rights could be failed under the pressure of power politics. Politically speaking the content of the Universal Declaration could be suspected for being a cover for Westerners and America to pursue their hegemonic interest. The idea of hegemony here refers to “the attempt by one culture to become dominant” (ibid, 372), and as Gramsci pointed out hegemonic interest is “the need for powerful nations to achieve legitimacy for exercise of power and claims to intellectual and moral leadership... by influencing external behavior with a series of rewards and punishments, and secondly molding opinions, values, and personal beliefs in conformity with prevailing interests” (Boucher 2009: 372). And this has been observed in the contention that “America has developed and exploited the idea of human rights in the furtherance of its hegemonic world aspirations to convince its own people that post-war reconstruction was not merely a philanthropic gesture, but a matter of securing world freedom, the freedom

embedded in its own traditions and constitution” (ibid.). Bourdieu and Wacquant have further maintained that “hegemonic or the imperial process of global asymmetry, should lead us to abandon the euphemism of an ‘international community’, which implies dialogue and mutual respect among equals, in favor of the stark reality of Western powers using international organizations as instruments for advancing geopolitical interests” (ibid, 373). Even theoretically what is done by the constructivists is not far from the hegemonic influence in that “by diffusing multicultural values as concomitants of human rights” (ibid, 373) they open the door for imperialism to permeate the globe (ibid, 373).

Legally speaking, “many international lawyers expose the cynicism with which politicians and the United Nations itself have more often than not sought to gain political capital rather than genuinely promote the cause of human rights by agreeing to support various conventions and covenants, in the expectation that they could never be enforced” (ibid.). They argued in this way because they are “skeptical of taking the power of enforcing human rights out of the hands of sovereign governments that are elected and accountable for their actions. By implication the belief is that the apparatus and instruments of human rights are open to political abuse, and that international bodies are further removed from democratic control than domestic courts” (ibid, 371). This is because the “political character of human rights is exposed by the fact that the universal norms are flexible and manipulated by the more powerful nations” (ibid.). Regarding this Laughland mentioned one important example that though it’s agreed to outlaw aerial bombardment of military and civilian targets in different international protocols and conventions, “but the widespread use of such military tactics has led to its convenient suppression in texts on humanitarian law.... Indeed, with the aerial bombardment of the former Yugoslavia by NATO, and of Iraq by the allied forces in the name of upholding human rights, there appears to be a complete reversal” (Laughland 2002; Boucher 2009: 370). This clearly shows “the political way in which allegedly universal norms have been applied.” On this basis Laughland argues that, “without any mechanisms of accountability,” application of universal norms and “attempts to replace domestic with international jurisdiction can only lead to greater arbitrary rule” (Laughland 2002; Boucher 2009: 371) undermining the humanely. So, as recognized in Ignatieff “human rights are not above politics, and that to imagine a globalized world that somehow supersedes state sovereignty is not only utopian but dangerous” (Ignatieff 2001; Boucher 2009: 369). This is because a law targeting to bring international order may be misused, just as wrong and bad

things have been done on the bases of some covering reasons. Nevertheless, this would be, at least theoretically, the case only if the normative concept of human rights is positivized.

Conclusion

Throughout the discussion of the notion of human rights, theoretical as well as practical, a dozen of questions come into the fora. Do we really need a universal, objective criterion for the justification of human rights? Does the relativization of human rights mean the relativization of humanity? Should human rights simply be reduced to legality? Are the lists of human rights enshrined in legal documents objectives to be achieved or are they entities that objectively prevail in human beings? Is the notion of human rights simply an illusion for the justification of power politics? These and some other questions have shown us how problematic the human right idea is, at least theoretically, if philosophically considered. But, first of all what is philosophy all for? Isn't it about problematizing so as to make things better understandable and resolvable? If so some success stories about the philosophic discourse on human rights could be told in that only the problematization part is done well. Even in that case, still the philosophical problems about the justification of the human rights idea have made its conceivability doubtful. If it's assumed to have objective ground upon which human rights could be getting erected, then it should not be a shaky foundation. As observed in my discussion above, an unshakable foundation has never been formulated. But, here the question: do we really need such a foundation must be raised. What if it's multi-foundational? Those "philosophical problems also best explain the practical difficulties encountered in the attempts of courts and governments to reach evidently correct and widely accepted interpretations of fundamental rights" (Campbell 1999: 14).

Here the point is, therefore, how are human rights be best understood philosophically so as they could be enforced. Are they simply a non-sense abstractions or artifacts with no possibility to be philosophically discerned and justified? Or what? As far as I am concerned, they couldn't be as such mythical non-sense, for the reason that the mere fact that the notion is not well conceived and justified does not imply that it's void. After all, there are also other ideals and things that we couldn't say more about them philosophically. My suggestion here is that, since the concept "human rights" is normative philosophical appeals to objective criterion should be summarily abandoned, at least in the formulation stage. The concept is normative in that its background principles aren't determinable by empirical tests or exercises.

This rather is to follow after philosophical formulation of the ontology and epistemology of the concept so as to make it understandable and conceivable. The ontology and epistemology of the idea, 'human right', should be done by examining the constituents- the "human" and "rights". The ontology would be, therefore, about interrogation of the being of 'human' and 'right'; and the epistemology about comprehension and reconstruction of what is ontologically formulated so as to have clear conception of, and justificatory reasons for- the phenomena- 'human' and 'rights' or the phenomenon- "human rights". In fact, for the most part, this is what the author has observed in different philosophies of 'right' that could also be extended to human rights.

Most importantly, the ancient, medieval and early-modern philosophers' work have shown that the idea of right, both morally and politically conceived, should be about discerning the conditions for empowering humanity. Within that, the 'human' and 'rights' are ontologically essentialized as referring to the being of humanity', and of its potency or power vested in the agent and is condition for its actuality, respectively. In that case, rights could be conceptualized and justified on the basis of background principles philosophically determined through analysis of what are assumed to be constituents of 'human potency', yet humans considered as part of a whole- nature.

This is also what we could observe in contemporary philosophers' formulation of 'human rights'. They all have tried to make sense of the concept (right) in relation to the Platonic philosophical idea of 'The Good'. But, since the ideal is supposed to be of humans, it's humanized. And most of them have conceived 'human rights' as empowering the autonomy of the individual or the public in their relations by way of setting principles determining what is allowed and disallowed. In doing so, some conceptualized and justified human rights based on the principles that they think will serve the individuals good such as his/her will, choice, well being; while others formulated determining principles that engender the public interest, common good and social cooperation. Politically considered the conceptual and justificatory questions of human rights are addressed in relation to the same idea of power conditions for the actualization of the humanely. Accordingly, the transition from 'natural' rights to 'human' rights could easily be identified as a move from naturalism to humanism of rights whereby the appropriation approach is completely replaced by interrogation of human nature.

Philosophers holding the view that humans have universal nature arrived at a conclusion asserting universally applicable absolute moral principles while the relativists establish human rights as grounded in shared beliefs. They, both moral absolutists and moral particularists, have formulated those background principles for the preservation of human condition considered to be conditioned by constituents of human nature. The human condition, for the Universalists, is assumed to be determined in the morally purposive nature of individual, acting agents' i.e. human agency, individual interest, or will. The moral particularists, however, maintained that it's also historically, culturally, and socially conditioned. Furthermore, both groups have accepted the list of human rights positivized and presented in the UDHR ignoring the suspicion that, if positivized the notion of human right would lose its moral content and authority. Those theorists effort could not also be seen more than as attempts to develop theories conforming to the Universal Declaration, not to formulate unshakable foundation of human rights. This manifests that, the major contemporary human right theories are flawed and refutable. Finally, I propose not to look at human rights as adopted in positive laws formulated on the basis of morality, metaphysics or religion that is for the purpose of preserving humanity conditioned by its nature, nature itself or its creator. Hence, human rights should be seen as protection of the unconditioned human condition from being diffused with any conditionality that are rampant in what Jürgen Habermas calls 'the systemic world' of our time. Since law is one of the systemic tools for evading that condition, human rights as presented and discussed in the UDHR would not make sense to be interpreted as conceivable and enforceable.

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