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HUMAN RIGHTS: A JURISPRUDENTIAL ANALYSIS OF THEORIES AND CONCEPTIONS

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ABSTRACT

This paper examined the different and conflicting theories of human rights and discussed their jurisprudential bases. Discovering that the theoretical conflicts are the result of diverse perspectives in outlook regarding religion, ideology, culture, gender, race, and so on, this paper analytically considered the attendant debates and drew a response by way of attempting a reconciliatory approach. The theoretical framework used is based on conflict theory. Fundamental features of human rights, however, were properly delineated in the light of the structural-functional role the respect and protection of human right should play in a human society. The methodology employed is critical analysis.

Keywords: Human Rights, Jurisprudence, Universal Laws, Natural Justice

1. INTRODUCTION

The question of the nature and meaning of human rights is a very complex one. It is fraught with a lot of controversies and as such does not present a monolith. Different and often conflicting theories abound as to the essence, content, and the foundation of human right. The diversities of opinion are often engendered by differences in religion, ideology, socio-economic belief, philosophical outlook, gender, race, ethical orientation, culture, and levels of international relation and co-operation.

There is no doubt that the global interest in the human rights issue has rendered human right to be, in the words of Heard (1997: n. p), almost a form of "religion in today's world". Within many nations, political debates rage over the denial or abuse of human rights. Again, public discourse is phrased in the rhetoric of rights, and human rights legal instruments have proliferated. In this study, it may be germane to review a number of conceptions that deal with the meaning of human rights. The aim is to investigate whether or not in the diverse views there is any common element that can describe the essence of human rights. The paper examines the naturalist, non-naturalist, and *via medium* approaches in pursuit of its task. This study is relevant to the extent that it considers and responds to the different arguments and foundations on which scholars base their discourse on human right that has today become a subject of global concern.

2. DISCUSSIONS

2.1 NATURALIST THEORIES

Peters (2002:4) argues that "the core of human rights discourse is that it is a right to which only human beings are entitled, which gives meaning to the essence of humanity, and without which humanity necessarily loses those special attributes that make it human". Ajomo (1993:1) had earlier defined human rights in similar terms *inter alia*: "….human rights are inherent in man; they arise from the very nature of man as a social animal. They are those rights which all human beings enjoy by virtue of their humanity, whether black, yellow, Malay or red, the deprivation of which would constitute a grave affront to one's natural sense of justice."

In the same vein, for Henkin in Umozurike (1995:11), "human rights are those liberties, immunities and benefits which, by accepted contemporary values, all human beings should be able to claim as of right in the society in which they live". Eze (1984:5) notes that "human rights represent demands or claims which individuals or groups make on society, some of which are protected by law and have become part of *lex lata* while others remain aspirations to be attained in the future".

The above views are unanimous in holding that human rights are inherent rights to be enjoyed by all human beings of the global village and not gifts to be withdrawn, withheld or granted at someone's whim or will (Ogbu, 1999:2). No wonder Nickel (2009:n.p) observes that "human rights are conceived in a universalist and egalitarian fashion". It is in this sense that human rights are said to be inalienable or imprescriptible. In this connection, Macdonald (1984) writes about human rights:

> If you remove them from any human being, he will become less than human. They are part of the very nature of a human being, and attach to all human beings everywhere in all societies, just as much as do his arms and legs (p. 27).

Ogbu (1999:2) maintains that "constitutions and other codes do not create human rights but declare and preserve existing rights". In the same vein, Ibidapo-Obe (1995:86) holds that "however human rights are described, inalienable, fundamental, God-given, or divine, the basic purport is that these rights are not a gift of any ruler, because a ruler cannot give that which does not belong to him. Hence, Nickel (2009:n.p) suggests that human rights "can exist as shared norms of actual human moralities, as justified moral norms or natural rights supported by strong reasons, or as legal rights either at a national level or within international law".

Ezejiofor (1964:3) adopts the universalist theory when he defines human rights "as moral rights which every human being everywhere at all times, ought to have, simply because of the fact that, in contradistinction with other beings, he is rational and moral". Thus, for Ezejiofor, it is on the human attributes of rationality and morality that the idea of human rights inures. Such as argument would no doubt meet with some difficulties when considering whether or not infants, the unborn, the moribund and the lunatics have human rights since the rational or moral germ is either not developed or is completely lacking in them. Be that as it may, Ibidapo-Obe (1995:86) similarly sees "human rights as the species of rights which are recognized as appertaining to man by the very nature of his humanity".

Certainly, the above universalist understanding of human right stems from the naturalistic perception of ancient and medieval humanism. The earliest direct precursor to human rights is found in the notions of `natural right' developed by classical Greek

philosophers such as Aristotle. This concept was nonetheless more fully developed by Aquinas in his *Summa Theologia*. For several centuries, Aquinas' conception held sway: there were goods or behaviours that were naturally right (or wrong) because God ordained them so. What was naturally right could be ascertained by humans by `right reason', that is, thinking properly (Aquinas, 1969). Grotius (1997) further expands this notion arguing on the immutability of what is naturally right and wrong:

> Now the Law of Nature is so unalterable, that it cannot be changed even by God himself. For although the power of God is infinite, yet there are some things, to which it does not extend. ...Thus two and two must make four, nor is it possible otherwise; nor, again, can what is really evil not be evil.

The moral authority of natural right was assured because it had divine authorship. In effect, God decided what limits should be placed on the human political activity. But the long-term difficulty for this train of political thought lay precisely in its religious foundations. As the reformation caught on and ecclesiastical authority was shaken and challenged by rationalism, political philosophers argued for new bases of natural right. Hobbes posed the first major assault in 1651 on the divine basis of natural right by describing a State of Nature in which God did not seem to play any role. Perhaps more importantly, however, Hobbes also made a crucial leap from `natural right' to `a natural right'. In other words, there was no longer just a list of behaviour that was naturally right or wrong; Hobbes added that there could be some claim or entitlement which was derived from nature. In Hobbes' view, this natural right was one of self-preservation (Hobbes, 1968).

Further reinforcement of natural rights theory came with Immanuel Kant's writings later in the 17th century that reacted to Hobbes' work. In his view, the congregation of humans into a state-structured society resulted from a rational need for protection from each other's violence that would be found in a state of nature. However, the fundamental requirements of morality required that each treat another according to universal principles. Kant's political doctrine was derived from his moral philosophy, and as such he argued that a state had to be organized through the imposition of, and obedience to, laws that applied universally. Nevertheless, these laws should respect the equality, freedom, and autonomy of the citizens. In this way Kant, prescribed that basic rights were necessary for civil society. He postulated that a true system of politics cannot therefore take a single step without first paying tribute to morality. ...The rights of man must be held sacred, however great a sacrifice the ruling power must make (Kant, 1991). However, the divine basis of natural right was still pursued for more than a century after Hobbes published his *Leviathan*. Locke wrote a strong defence of natural rights in the late 17th century with the publication of his *Two Treatises on Government*, but his arguments were filled with references to what God had ordained or given to mankind. Locke had a lasting influence on political discourse that was reflected in both the American Declaration of Independence and France's Declaration of the Rights of Man and the Citizen, passed by the Republican Assembly after the revolution in 1789. The French declaration proclaimed 17 rights as "the natural, inalienable and sacred rights of man"(Locke, 1960).

The French Declaration of Rights immediately galvanized political writers in England and provoked two scathing attacks on its notion of natural rights. Bentham's (1987:69) clause-by-clause critique of the Declaration argues that there can be no natural rights, since rights are created by the law of a society:

> *Right*, the substantive *right*, is the child of law: from *real* laws come *real* rights; but from laws of nature, fancied and invented by poets, theoreticians, and dealers in moral and intellectual poisons come *imaginary* rights, a bastard brood of monsters, `gorgons and chimeras dire'.

Bentham (1987:53) holds that *"Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, - nonsense upon stilts". Burke also wrote a stinging attack on the French Declaration's assertion of natural rights, in which he argued that rights were those benefits won within each society (Burke, 1997). The rights held by the English and French were different, since they were the product of different political struggles through history. Be that as it may, Paine wrote a defence of the conception of natural rights and their connection to the rights of a particular society. Paine (1985:68) made a distinction between *natural* rights and *civil* rights, but he continued to see a necessary connection:

> Natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. Civil rights are those which appertain to man in right of being a member of society. Every civil right has for its foundation, some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection.

This passage reflects another, earlier inspiration for human rights from the social contract views of writers such as Jean-Jacques Rousseau, who argued that people agree to live in common if society protects them. Indeed, the purpose of the state is to protect those rights that individuals cannot defend on their own. Rousseau had set the ground for Paine decades earlier with his *Social Contract*, in which he hasn't only lambasted the attempts to tie religion to the foundations of political order but disentangled the rights of a society from natural rights. In Rousseau's (1968:50) view, the rights in a civil society are hallowed: "But the social order is right which serves as a basis for other rights. And as it is not a natural right, it must be one founded on covenants." Rousseau then elaborated a number of rights of citizens and limits on the sovereign's power.

The debate in the late eighteenth century has left telling traces. Controversy continues to swirl over the question whether the rights are creations of particular societies or independent of them. Modern theorists have developed a notion of natural rights that does not draw its source or inspiration from a divine ordering. The groundwork for this secular natural right trend was laid by Paine and even Rousseau. In its place has arisen a variety of theories that are humanist and rationalist whereby the `natural' element is determined from the prerequisites of human society which are said to be rationally ascertainable. Thus there are constant criteria which can be identified for peaceful governance and the development of human society. But problems can develop for this school of thought when notions of a social contract are said to underlie the society from which rights are deduced.

Contemporary notions of human rights draw very deeply from this natural rights tradition. In a further extension of the natural rights tradition, human rights are now often viewed as arising essentially from the nature of humankind itself. The idea that all humans

possess human rights simply by existing and that these rights cannot be taken away from them are direct descendants of natural rights.

However, a persistent opposition to this view builds on the criticisms of Burke and Bentham, and even from the contractarian views of Rousseau's image of civil society. In this perspective rights do not exist independently of human endeavour; they can only be created by human action. Rights are viewed as the product a particular society and its legal system. However, the present resurgence of natural rights theories is mainly though arguably due to the seminal study carried out by Nozick (cf Machan, 1982: 61; Brown, 1986:87 -110; Kymlicka, 1990; Mori, 2010:n. p). Nozick (1974:5) "makes of the inviolable freedom of the individuals and of the absolute control of property in the self and its possessions the natural rights which constitute the foundation of a libertarian and well ordered society". The heart of Nozick's theory lies in the opening sentence of his work: "individuals have right" (1974:5) which expresses their separate existence in line with the Kantian principle by which individuals are ends and not simply means. However that may be, Mori (2010:n.p) observes that the theory of human right based on naturalism is not without some problems of justification. These problems are succinctly articulated thus:

> …any naturalistic theory, that is to say any theory which takes completely the field of morality from the empirical reality of human life, must explain at least three points: whether and in what way these natural rights are inalienable, prescriptible, forfeitable, defensible or self evident, what the source of these rights is and, last, what it means to assign them to people. For this reason, often the philosophers of natural rights do not agree on the question whether what makes a right is natural.

This epistemological difficulty has according to Mori (2010: n.p) led to three kinds of arguments which characterize the naturalistic ethical theories of human rights:

> First, the human right theories which refer to modern jusnaturalism; second, the theories which go back to the aristotelic-thomistic tradition; and last those naturalistic theories which try to find a scientific basis of the ethics of human rights without any reference to the law of nature, but appealing exclusively to empirical ascertainable data.

Mori (2010:n.p) further states that "these arguments make use of three different meanings of the term 'natural', namely, one which explains ethics through the same metaphysical and ontological principles employed to explain reality, the other which establishes that what is natural is a synonym of what is rational; and a third one, which refers to the term natural as meaning empirically verifiable". In spite of these arguments, Griffin (1978:138) notes that since it is general conviction that "if there are such things as human rights, then there are rights we have independently of laws, conventions or special moral relations, then it is easy to see them as universal and inalienable deriving as it were from the law of nature".

Nevertheless, the above theory of sourcing natural rights from natural law does not amuse Hart for whom natural rights can be affirmed independently of the natural law. Hence, Hart (1978:77) defines the subject of rights as "any adult human being capable of choice" and affirms that "if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free". Therefore, Hart tries to defend the

existence of traditional natural rights, but refusing any appeal to a law of nature or to a higher order and stating, as it were, the natural value (that is, intrinsic to human nature) of individual liberty. Hart takes the right to liberty as a natural right because it is possessed by all men as human beings and because it is not created or granted by the voluntary action of man. Hart (1978:78) however holds that this right is not absolute or incontrovertible:

> My thesis is not as ambitious as the traditional theories of natural rights; for, although on any view all men are equally entitled to be free…, no man has an absolute or unconditional right to do or not to do any particular thing or to be treated in any particular way.

Even though Hart takes the escapist route of avoiding the adoption of the idea of natural law, there remains the problem of justifying the meaning and source of the alleged natural liberty. It is to obviate this problem that Minogue (1978:30) defends the traditional idea of natural rights by actually adopting only the form and changing the content. He writes that "the natural rights doctrine is a vindication of the space people need to play the game of life". According to him, "what seems to have been less recognized is the significance of natural rights in opening spaces within which people who felt themselves suffocated by the repetitive purposiveness of their lives might be allowed to play a part in the wider same of life" (Minogue, 1978:30).

2.2 NON-NATURALIST THEORIES

Certainly, the above merely reluctant, tangential, superficial or skin-deep romance with the natural rights origin of human rights is only a preparation for the outright repudiation of the naturalist view. Hence, the empirical naturalistic theories completely refuse any appeal to tradition, both of the natural law and natural rights. These theories of human rights are instead based either on empirical ascertainable elements like goods or needs, or on rationality that is founded on a scientific but not a metaphysical view of the ability of human beings to understand reality. According to the needs theory, for instance, human rights are "norms that regulate actions by the norm receiver relative to other human beings in general and their need satisfaction in particular" (Galtung and Wirac, 1977:252). In this sense, human rights are "statements of basic needs and interests" (Benn, 1967:280) which everybody has simply because he is human. However, in spite of the attraction to and the plausibility of this theory, it still meets with some difficulties when closely examined. One major difficulty is that of the justification of the needs-rights link. If X is a need for human beings, does it necessarily mean that human beings have a right to X? Mori (2010:n.p) articulates this problem thus:

> Needs theorists seem to fail to justify the need-rights link: if the needs referred to are only the primary ones, then they are inadequate as the source of human rights, since they concern the maintenance of life rather than its quality; but if we refer also to the secondary needs, more abstract and general, then their empirical status is no longer scientifically ascertainable as instead this kind of theory claims.

On the other hand, the naturalistic thesis based on the notion of rationality rejects the reductionism of contemporary thought and affirms that natural right theory does not depend on the view that the nature of man, for example, consists of some timeless, intrinsic essence

found in everyone. These theories while rejecting the metaphysical view of nature tend to defend the epistemological view whereby what human nature is may be demonstrated from what we know about reality (Machan, 1982:65). No doubt, this epistemological approach is not devoid of some problems. For one thing, it is cognitivist and claims to determine the ethical universe on the basis of empirical knowledge, thereby posing to derive values from facts. But this is also reductionistic.

There is no gainsaying that naturalists generally insist on conceiving human rights as the unification of some traits inherent in human nature be it metaphysical, epistemological or otherwise, and which alone would be insufficient to define the source of human rights. Some scholars like Vlastos (1962) and Feinberg (1973) have tried to sidestep the problem by proposing a non-reductionist naturalistic theory in which the concept of human rights would be neutral as to the issues of ontology and moral epistemology. According to them, human rights would be based on the human value whose attribution to individuals does not involve the assignation of any property, but the expression of a disposition to respect towards the humanity of persons. But this raises the problem of the precise meaning of human value.

However that may be, one common denominator of naturalist theory is the universalization of human rights. Yet several competing views have been asserted for universal human rights. For instance, many have argued that human rights exist in order to protect the basic dignity of human life. Indeed, the United Nations Declaration on Human Rights embodies this goal by declaring that human rights flow from "the inherent dignity of the human person". Strong arguments have been made, especially by Western liberals, that human rights must be directed to protecting and promoting human dignity. As Donnelly (1989:17) has written, "We have human rights not to the requisites for health but to those things `needed' for a life of dignity, for a life worthy of a human being, a life that cannot be enjoyed without these rights". This view is perhaps the most pervasively held, especially among human rights activists. Surely, the rhetoric of human-rights disputes most frequently invoke this notion of striving for the dignity that makes human life worth living. The idea of promoting human dignity has considerable appeal, since human life is given a distinctive weight over other animals in most societies precisely because we are capable of cultivating the quality of our lives. For Donnelly (1989:17) “human rights represent a social choice of a particular moral vision of human potentiality, which rests on a particular substantive account of the minimum requirements of a life of dignity”.

An alternative basis for human rights draws from the requisites for human well-being. One advocate of this approach is Gewirth. Gewirth (1985:235) argues that "agency or action is the common subject of all morality and practice". Human rights are not just a product of morality but protect the basic freedom and well-being necessary for human agency. Gewirth distinguished between three types of rights that address different levels of well-being. Basic rights safeguard one's subsistence or basic well-being. Nonsubtractive rights maintain the capacity for fulfilling purposive agency, while additive rights provide the requisites for developing one's capabilities - such as education. Gewirth differentiates between these rights because he accepts that humans vary tremendously in their capacity for purposive agency. Through what he calls the principle of proportionality, humans are entitled to those rights that are proportionate to their capacity for agency. Thus, individuals who are comatose only have basic rights to subsistence, since they are incapable of any purposive action.

Gewirth's approach, however, has been strongly criticized by those who argue that human rights cannot be universal if they are derived from one's capacity for agency. Husak has used Gewirth's theories to argue that there can be no rights that extend to all human beings (Husak, 1984:125-141). Husak makes the crucial distinction between humans and persons, and he points out that some humans may be considered non-persons because they

are incapable of ever performing any purposive agency. Even if one accepts Gewirth's rebuttal that all humans are entitled to at least basic rights because they are either prospective or former purposive agents, there still remains in his theory the notion some will find unsettling: not all humans possess all human rights to the same degree (or at all).

Another basis for human rights has been put forward by O'Manique that is based on evolution and human development. O'Manique was motivated by the desire to find a truly universal basis for human rights theories that are not as susceptible, as is the dignity, to controversial interpretations or denial by others. Thus, human rights should be founded upon something inherent to humans rather than some moral vision that is created by human action. O'Manique (1990:473) argues that a satisfactory basis may lie in the following set of propositions:

P1 I ought to survive
P2 X is necessary for my survival
P3 Therefore, I ought to do/have X.

The real hurdle in this set of propositions lies in finding agreement in P1. The requisites for survival are, fairly easily ascertained by scientific inquiry. Thus if there is concordance on the notion *I ought to survive*, then the logical construction of this model produces the conclusion that one ought to have X if it is necessary for survival. O'Manique is on fairly firm ground when he asserts that, "The belief that survival is good is virtually universal"(1990:473). He does concede that there are religious beliefs that hold that a person's life can be sacrificed, but usually this sacrifice is done to further the survival of others. So O'Manique (1990:473) determines, "The exceptions do not `prove' the rule, but they do point to the strong probability that the belief that survival is good is found, explicitly or implicitly, in almost all human beings". One might add that some value in human survival may be found in any society, since no culture comes to mind that has tolerated unrestricted, recreational homicide. O'Manique also draws from theories of evolution to establish that the goal of humans has to be the survival of the species. So, there would be universal agreement with the statement, "Humans ought to survive". But survival of the group, community, or human species are very different from the survival of each and every particular individual.

O'Manique develops his theory much beyond the notion of survival. Indeed, he explicitly dismisses the idea that the source of human rights lies in the needs for human subsistence. O'Manique wishes to propel human rights into a further plane, by basing human survival upon the full development of human potential. The initial proposition P1 in the model above really becomes "I ought to develop". As O'Manique (1990:475) says, "Human aspirations are not to the maintenance of existence but to the fulfilment of life... If we believe that one ought to survive, it is because we believe that one ought to develop". In O'Manique's vision, human rights would include rights to things needed for subsistence but also go on to cover all aspects of intellectual and emotional development. He tries to limit in some way the range by insisting that the needs for development can be ascertained through research. However, O'Manique (1990:476) also reveals the broad sweep of matters that could be included when he addresses this issue: "The existence of such needs for human development - the need for association with other human beings, for self expression, for some control over one's destiny, and even the need for love and for beauty - can be observed and even empirically confirmed within the social sciences and psychology".

A fundamental difficulty with using the fulfillment of human development as a basis for human rights is that it can have a meaning that is relative to each culture and individual. This relativism even creeps into O'Manique's (1990:481) discussion when he concludes, "A community and its members will develop to the extent that the members of the community support the development needs of others in the community, *in ways that are*

appropriate to that community" (emphasis mine). Just what is needed for fulfillment in expression, love, or autonomy will be given profoundly different interpretations in different societies. O'Manique tries to address this aspect of his theory by conceding that the specific entitlements necessary to human development may vary over space and time, but the general grounds for those claims will remain constant.

The final alternative basis for human rights would provide the needs for human existence (Galtung, 1994:2). Human rights may be limited to providing all humans with the needs for their physical subsistence. But, this subsistence would involve a certain degree of minimal comfort beyond merely keeping one's organs working, because human subsistence also consists of being able to function. Advocates of the other approaches to human rights have dismissed needs to subsistence as too narrow a foundation.

These four approaches to human rights reflect quite different inspirations and ultimate goals, but there is common ground among them. Theories of human rights based on dignity, well-being, or development all are motivated by a desire to protect and cultivate some quality of life; because one is alive, one should lead a life filled with dignity, well-being, or continuing development. A view of human rights based on subsistence is ultimately concerned with simply preserving life itself. But this distinction should not ignore an overlap, as a common ground among all theories of human rights is the assumption that human rights include subsistence rights. Approaches based on dignity, well-being, and development add protections for these qualities of life onto the rights to existence, although subsistence rights often seem to be forgotten.

These discussions illustrate that the foundation for human rights may be neither self-evident nor universally accepted. One chooses, explicitly or implicitly a particular justification or basis for human rights, and that choice will have important consequences upon the range of benefits that fall within human rights. Choice pervades human rights from their conception to their delivery, and those choices may well undermine the very foundation of human rights' moral authority.

It is perhaps this chain of endless difficulties that prompted some philosophers to propose a denaturalized concept of human rights. Such a concept is based on the recognition of the strictly political content of human rights and on the awareness of their fundamental dependence on social institutions. In this sense, Kamenka (1978:12) holds that “the doctrine of human rights would be a proposal concerning the morally appropriate way of dealing with men and of organizing society”. Yet another strong opposition to the natural theory is presented by Marx. Marx (1978:43) criticized the Declaration of the Rights of Man and of the Citizen as bourgeois ideology:

> …We note the fact that the so-called rights of man, the droits de I’homme as distinct from the *droit du citoyen* are nothing but the rights of a member of civil society – i.e., the rights of egoistic man, of man separated from other men and from the community… according to the Declaration of the Rights of man of 1791: “liberty consists in being able to do everything which does not harm others”.

Liberty is therefore the right to do everything that harms no one else. The limits within which anyone can act without harming someone else are defined by law, just as the boundary between the two fields is determined by a boundary post. Thus, in his critique, Marx does not identify any difference between the rights of man as man and the rights of citizens. He therefore argues that it is the state and the law rather than nature that endow man with the rights. He disagrees with the idea of the universality and inalienability of

human rights. Furthermore, Marx maintains that liberal rights and ideas of justice are premised on the notion that each of us needs protection from other human beings. Therefore liberal rights are rights of separation, designed to protect us from such perceived threats. Freedom on such a view is freedom from interference. But according to Marx, the above view denies the possibility that real freedom is to be found positively in our relations with other people. It is to be found in human community, not in isolation, so that insisting on a regime of rights encourages men to view each other in ways which undermine the possibility of the real freedom that is found in human participation.

Gye-Wado (1990:188) while analyzing further the Marxist thesis which holds that the economic infrastructure is the determinant of the superstructure and hence the notion of human rights submits:

> It is the concrete material conditions of the society which give rise to the sort of rights that can be enjoyed. Therefore, there can never be rights with divine content derived from the natural law synthesis. From this point of view, what are considered human rights in bourgeois society is the liberty allowed for either the exploitation of the working class and peasantry by the dominant class. The very fact of inequitable social relations constitutes a bottleneck in the enjoyment of human rights.

Zizek (2010:n.p) following the above Marx's critique of the liberalists' theory, argues along similar terms as follows:

> Liberal attitudes towards the other are characterized both by respect for otherness, openness to it, and an obsessive fear of harassment. In short, the other is welcomed insofar as its presence is not intrusive, insofar as it is not really the other. Tolerance thus coincides with its opposite. My duty to be tolerant towards the other effectively means that I should not get too close to him or her, not intrude into his space – in short, that I should respect his intolerance towards my over-proximity. This is increasingly emerging as the central human right of advanced capitalist society: the right not to be 'harassed', that is, to be kept at a safe distance from others, and universal human rights are effectively the right of white, male property-owners to exchange freely on the market, exploit workers and women, and exert political domination.

There is no doubt that the above Marxist arguments emanate from the socialist bias of the theorists against capitalism and the West. The views are therefore coterminous with the socialist credo in which the state is placed over and against the individual and in which the community rights enjoy prominence over those of individuals. Hence, both Marx and Zizek do not only see individual human rights as negative but also as donated merely rather than guaranteed by the almighty state or community.

Recently, Blattberg (2007:4) argues that "rights talk, being abstract, demotivates people from upholding the values that rights are meant to assert". Blattberg does not deny the value of human rights. He only holds that the mode of presentation of the idea of these rights is abstract, recondite and metaphysical. It is rather Maclntyre that imputes meaninglessness and valuelessness to the entire idea of human rights as universal. He claims that the concept that all human beings have certain rights simply by virtue of being human is

illogical. Hence, Maclntyre (1981:69) states thus – "the best reason for asserting so bluntly that there are no such rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and the best reason which we possess for asserting that there are no unicorns: every attempt to give good reasons for believing there are such rights has failed."

Another, philosopher who holds that society and morality play a crucial role in determining how human rights are to be structured is Bobbio. Bobbio (1990: xiii-xvi) writes that: "Human rights, however fundamental they are, are historical rights, that is, born in certain circumstances…. To talk about natural rights or fundamental inalienable or inviolable ones, means using expressions of persuasive language which have no theoretical value. According to this opinion, human rights are not independent of institutions. They are not connected by the idea of natural law, or generally, of nature, but to the ethical historical reality. Human rights are now explained as a mixture of requests, indications of liberty, power and immunity by people (Mori, 2010:n. p). No wonder, Wellmann (1978:48) affirms that "human rights….are those moral rights that individuals have in front of the state, and which they share with one another by means of institutions. Thus, human rights are regarded as products of human and cultural efforts. The basic problem with this view is that as public relations are given absolute priority, the single individuals and the various forms of private relations are excluded as addressees of human rights.

Furthermore, in his attempt to delineate the features of a just society, Rawls (1971:505-506) conceives of rights as belonging to citizens rather than to human beings. This is because he regards his theory of justice as constructed "for a body of people who form a political society rather than for the human society" that forms a moral community. This does not fail to raise some problems with regard to the relations between human rights and the hypothetical contract. These difficulties in Rawls' theory have been articulated by Martin (1985:22):

> If rights are antecedent to the contract, in accordance to the veil of ignorance they should be thought of as entirely formal categories which have yet to be given content by the contracting parties; if rights are included in the list of primary goods, they are not grounded on the contract, they do not issue from the original position, as Rawls maintains.

3. ATTEMPTS AT RECONCILING THE THEORIES

In the light of the above respective problems bugging both the naturalist universalist theories and the non-naturalist views of human rights, attempts have been made to evolve a *via medium* approach that may circumvent the difficulties. Such efforts attempt to respond to the question of the meaning and content of human rights without being compelled to choose between nature and history. These attempts are constituted by those theories of human rights that appeal to human possibilities, to the ability to make choices, and to the value of the person's dignity (Melden, 1977; Gooden, 1981; Adams 1982). Hence human rights would primarily deal with what individuals can be and not with what they are. By virtue of this, human rights would have to do with the moral person and not the natural person, but without excluding a part of humanity from the world of rights (Mori, 2000:3-4). In this sense, human nature that grounds human rights would be essentially a moral account of human possibilities (Donnelly, 1985:31). Under this dispensation, human rights would show, first of all which opportunities are to be guaranteed, what a life worth of value that completely realized the human being is like. Thus, human nature definitely ceases to be an

ontological structure and appears as a project. This is perhaps why Donnelly (1985:32) asserts that "human right aim to establish and guarantee the conditions necessary for the development of the human person envisioned in the underlying moral theory of human nature". More still, Martin and Nickel (1980:173) have used the expression, '*prima facie'*, to relate this mediational posture. These learned authors demonstrate their use of the term:

> To say that a right is prima facie means exactly that it is not absolute and that, only case by case can we give a definite account of its weight. The notion of prima facie compared to that of being absolute seems to allow a more plausible conception of the universality that rights at any rate claim to the world. All individuals, in this perspective, can claim to have, prima facie, a universal right, because the indefinite weight of the notion ensures that all rights will be taken into consideration in the different circumstances and that their application will depend on the comparison and not on the opposition. Rights become relative and defensible; this however does not establish their weakness but their opposition.

Mackie (1985:186) corroborates this view by stating that, "the fact that most of the basic rights are only *prima facie* ones, capable of being overridden in particular cases, does not mean that they are, like the rights that would be recognized in many utilitarian systems, merely derived principles whose rationale lies in their tendency to promote something else, say the general happiness. The suggested rights are basic, though defensible…and the conflicts are to be resolved by balancing these prima facie rights themselves against one another, not by weighing their merits in terms of some different ultimate standard of value, such as utility."

Be that as it may, we hold that the gist of all these mediational or reconciliatory attempts is only slightly different from the postulations of non-naturalistic theories. Insofar as the articulation of the definition and content of human rights is subjected to human measurement and evaluation, whether based on circumstances or opportunities, then it is still unfortunately susceptible to socio-political fluctuation.

But even if there were agreement upon a foundation for human rights, there remains another fundamental question: who can possess human rights? One may simply assert that all humans hold all human rights; after all, human rights are said to be those benefits to which we are entitled simply by being human. But what is meant by being `human' is vague since the life cycle of homo sapiens ranges from conception to death and decay. There is profound controversy over how and when a human acquires and then loses human rights between those two periods. Even before conception, sperm and eggs exist that contain human genetic material. One may decide easily that these are human cells but not `human beings', because they contain incomplete sets of human genes. After conception, however, controversies arise about the status of the developing foetus. From a mass of undifferentiated cells, the embryo quickly grows into a recognizably human entity. Many distinguish foetuses from babies that have emerged from their mothers and say that separate human life only begins with `birth'. This can be an arbitrary distinction since a very premature baby is at much the same stage of development whether inside or outside the womb; the differences centre on how a baby receives nutrition and oxygen. One can specify an arbitrary point for the acquisition of rights, such as conception, neural development, viability, or emergence from the womb. But this approach is bound to erupt in controversy, because not everyone

will agree on a given point. Abortion is such a divisive issue precisely because various groups hold different beliefs about when human life starts.

Alternatively, one can argue that there is some special quality of human life that provides a basis for possessing rights; when that quality is acquired, so are rights. This approach is favoured by many, since it allows for the distinction between humans and other animals. Human rights are rights particular to human beings, thus the basis of the claim to rights should be something that differentiates humans from other animals. With a sharing of an enormous proportion of genetic material between humans and primates, the distinction is usually drawn on the basis of some quality of human life not shared by other animals rather than physiological characteristics. Specifically human qualities are usually identified from our capacity for intellectual, moral, or spiritual development.

The difficulty with trying to assign rights on the basis of some quality of human life is that not all human beings may possess such an attribute. Husak has written a poignant critique of the notion of *human* rights based on his objection that some human beings merely exist. Some mentally-ill patients lack any basis for purposive agency; they are seemingly unaware of their surroundings, incapable of rationale thought, or unable to distinguish right from wrong. But, his most telling arguments arise from comatose patients, notably those with no known chance for recovery. Husak distinguishes between humans and persons, and he points out that some humans, such as the comatose, are non-persons. Persons are human beings with capacities beyond mere existence that produce a quality of life. Non-persons simply lack the qualities of life that one wishes either to protect or use as the key to acquiring rights. The distinction between humans and persons is often used to justify aborting foetuses, because the human foetus is not considered by many to be a person. In the end, Husak argues that the phenomena called human rights are really rights of persons: "There are no *human* rights" (Husak, 1984:125-141).

This debate over the qualification of a human creature to possess human rights is fundamental to a number of topics. The rights of children and the mentally ill may depend greatly upon what foundation one adopts for the possession of rights. Similarly, the existence of rights to life in abortion, infanticide, and euthanasia are directly related to what status one accords to undeveloped foetuses, mutant newborns, or terminally-comatose adults.

If human rights are justified on some characteristics of the human species, can those rights be held by individual humans who lack these species traits? Some answer this question by distinguishing between possessing rights and exercising them. Thus a healthy child may possess the full range of human rights, but be unable to exercise them, particularly rights of an intellectual nature. Others may find this distinction too convenient an answer and contest the very existence of rights that cannot by exercised by their holders.

Another controversy over the possession of human rights relates to whether they are benefits intended for individual humans, or whether they can also be collective benefits for groups of humans. Some scholars, such as Donnelly, argue that human rights are properly held by only individuals (Donnelley, 1989:143 -151). Others contend that human lives are lived within group settings and the full enjoyment of human life can only be realized when those groups are able to flourish. Whether human rights can include collective rights is a particularly crucial issue in analyzing whether the human rights regime protects a group's culture and language, or a group's right to self-determination.

4. CONCLUSION

Fagothey (1985:229) argues that "a right involves a system of relations in which there are three terms and a basis or foundation on which the relations are grounded". He illustrates this with the example of a workman having a right to his wages:

> We may separate four elements, or components: the workman who has earned the wages, the employer who is bound to pay the wages, the wages the workman has earned, and the work done whereby the workman has earned the wages.

Accordingly, there are identified four basic components of a right, namely, subject, term, matter, and title (1985:229-230). For Fagothey, the subject of a right can only be a person. Rights exist for that person because he is obliged to guard the moral value of his being and fulfill himself by voluntary observance of the moral law and thus reach his last end. Surely, for this kind of action, rights are essential, because if one must guide himself by use of his inner freedom, he must be guaranteed immunity from hindrance in his choice of the necessary means. The subject of right as person is not limited to physical or natural person but extends to juridical person such as society, firm, corporation or government. Again, the term of a right must also be a person. The term is thus the person or persons morally obliged to respect or fulfill the rights of another. Emphatically, however, it is noted that the matter of a right can never be another person "since in the exercise of any right the subject always subordinates the matter to himself or herself and uses it as a means to his or her own end". Hence, a person cannot be subordinated to the interest of another to be used and consumed as a mere means for another's benefit.

While this view is in accord with Kant's theory in which man is always an end and can never be used as a means (Kant, 1985), it is in conflict with Marxist theory which places the interest of the state as paramount even if while trampling on the rights of individuals. Fagothey (1985:230) is however quick to assert that his position "does not mean that one person can never do a service for another". It is further argued that "when we hire people to work for us, we buy their labor not their persons, and labor can be the matter of right". Fagothey finally refers to the title of a right as the reason for which a particular concrete right exists. According to him, title establishes a connection between the subject and the matter of a right. Fagothey (1985:230) illustrates this thus:

A person has a right to own property in general, but this right is abstract, not specifying any particular piece of property. Something is necessary to give this particular person rather than someone else the right to this particular piece of property to change the abstract into a concrete right. The contract of sale does so, and this fact is the person's title.

In addition, it is observed that in relation to titles, rights can be congenital, that is, by the fact of existence as a human being, or acquired, that is, by way of some contingent historical fact such as purchase, inheritance, or arriving at the age of majority. Such as the above is the controversy that attends to the meaning of human rights. Hence, there is no unanimity of views.

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