A JURISPRUDENTIAL QUAGMIRE ONDEFINITION OF 'RIGHTS'- HUMAN OR LEGAL, BOTH OR NEITHER? TO WHAT DIVINE AND CONSTRUCTIVE PURPOSE IN SOCIETY?

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Abstract

What constitute 'rights' raises several complexities, such as whether we connote natural right, human right, legal right or perhaps merely being right. Rights may also simultaneously invoke themes of liberty, immunity, power, priviledge. Some theorists suggest a classification based on the question of a correlative duty or enforceability. I suggest we understand rightsas a concept that carries with it an original meaning that we have to interpret in terms of its history and broadness. Rights could be analysed as a derivative of natural law, but also a creation of positive law- I argue however, whatever ascription we construct rights to be it has to be such that takes a perspective that prioritises the welfare and dignity of people, and recognises that certain rights to individuals are intrinsic and inalienable, and such to be protected, not deviated from.

Deconstructing the meaning of the word 'rights' using a phenomenological technique

The law and its implication could be understood in a wider sociological context or 'orientation'[2] as it relates to understanding the institutional structure within a society, social practices and processes,[3]considering the law evokes the phenomenon of rights and obligations. More generally, phenomenology specifically as a socio-legal methodology in qualitative research portends a strategy for clarifying meanings and enhancing deeper understandings of human interactions at varied levels.[4]I would implore its use to bring just conclusions, rather than allow for injustice under the guise of incurable indistinctness. Through phenomenology the conflict inherent in meanings is disinterred to an extent, as it examines the deviation in viewpoints.[5] It generates meaning by extrapolating a notion either by its historical developments or inherent traditions, philosophical underpinnings, recognising the interdisciplinary shape of constructs or theoretical foundations on which theories lie on.[6] Phenomenology allows for a form of dynamics which permits for 'critical consideration' of what a phenomenon represents, and creates a credible potential for human progress.[7] This relates in varied contexts, for example, understanding what the phenomenon of 'rights' entails in the context of scientific developments, or in an efficient health care delivery system, or as defined by a legislation or constitutional provision, by societal expectation (public opinion) or practice, is worth engaging with. Phenomenology aims to analyse 'lived

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[2] Brian Tamanaha, "Socio-legal Positivism and a General Jurisprudence" (2001) 21 (1) *Oxford Journal of Legal Studies* 1

[3] Helene Starks, SB Trinidad, "Choose your Method: A Comparison of Phenomenology, Discourse Analysis, and Grounded Theory" (2007) 17 *Qualitative Health Research* 1372.

[4]Carol McWilliam, "Phenomenology" in Ivy Bourgeault, Robert Dingwall, Ray de Vries (edrs), *The Sage Handbook of Qualitative Methods in Health Research* (Sage Publications 2010) 243.

[5]Kathy Miriam, "Toward a Phenomenology of Sex-Right: Reviving Radical Feminist Theory of Compulsory Heterosexuality" (2007) 22(1) *Hypatia* 210.

[6] McWilliam 243

[7] McWilliam 243

experiences' or 'events' in order to understand how meaning is generated through embodied perception.[8] This is done through analysing data collected from participants, it is however vital to highlight that what constitutes 'data' is not only structured interviews or observations, but also includes 'a close reading of extant texts'.[9] In a qualitative research process, to understand and interpret a phenomenon, textual analysis can 'greatly assist in making more explicit' perspectives.[10] Sonja Grover recognises that perspectives are usually distinct depending on an author's world-view, creating conflicting opinions. Where for instance in a court, legal arguments have been submitted, textual analysis of the documents could be used to discover 'emergent themes' relevant in the conversation.[11] Grover stated- "The themes generated from textual analysis in the context of qualitative research concerning a legal case reflect the contexts in which the litigants and interveners positioned the 'raw facts' to give the latter the 'spin' they desired. However, it is suggested that the 'legal spin' reflected in the arguments is not just a matter of legal strategy. Rather, the 'spin' also reflects, to a large extent, the differing phenomenological worlds of the parties."[12] To understand in-depth the concept of rights, the legal and non-legal meanings, the qualitative research using a phenomenological approach allows for critical analysis, as it considers the varied sense in which a word is utilised. This is done by examining the available legal texts, both primary and secondary, and non-legal source of what the phenomena- 'rights' represents. I endeavour to embody each author's arguments within the interpretative community, authentically, and then analyse the points of view.

Rather than paint a glossy image of phenomenology, it is important to point out that even what amounts to 'true' phenomenology is fiercely debated and ambiguous.[13]This is challenging, and even 'confusing'.[14] Whilst attempting to define rights through phenomenology before delving into the legal dimension of arguments, the word phenomenology itself raises its own challenges. Also there are several forms of phenomenology, which quite with distinct approaches which furthers the complexity, they broadly include - transcendental constitutive phenomenology, naturalistic constitutive phenomenology, existential phenomenology, generative historicist phenomenology, genetic phenomenology, hermeneutical phenomenology, and realistic phenomenology.[15] However, for the purpose of this paper, I refer toHans-Georg Gadamer's Legal Hermeneutic Phenomenology which appeals more specifically to the dynamics being used here, and I think would be relevant in bringing clarity to what 'rights' really mean. Gadamer's has been one of the very influential scholars, on textual analysis for

[8] Starks 1375.
[9] Starks 1375.
[10] Sonja Grover, "Implicit Informal Qualitative Research Processes Embedded in Legal Proceedings: A case example" (2010) 19 (1) 26 *Journal of the Canadian Academy of Child and Adolescent Psychiatry* 3.
[11] Grover 12.
[12] Grover 10.
[13]Vicki Earle, "Phenomenology as research method or substantive metaphysics? An overview of phenomenology's uses in nursing" (2010)11 *Nursing Philosophy* 286,294
[14] Ibid.
[15] Stanford Encyclopaedia of Philosophy, "Phenomenology" http://plato.stanford.edu/entries/phenomenology/*First published Sun Nov 16, 2003; substantive revision Mon Dec 16, 2013* accessed on March 16, 2017.

understanding and interpretation.[16] His main concern through his work investigates- "how can a text be protected against misunderstanding from the start?"[17] He argues 'understanding' of a text is a 'genuine experience', 'an event' and an 'encounter with something that assert itself as truth',[18] and the art of coming into understanding is posited as a 'life-process'.[19] This idea of textual analysis evoking a life of its own is distinguishable from the notion of 'mere' phenomenology, as being a lived experience in reference to data collated from interviews. Despite the prejudice that an interpreter of a text is prone to have, for understanding, he or she must allow the text to 'tell him something'- that is deliberately requiring an 'openness' to the meaning rather than coining arbitrarily 'meanings'.[20]He canvasses thus- that "someone who is seeking to understand the correct meaning of a law must first know the original one. Thus he must think in terms of legal history- but here historical understanding serves merely as a means to an end."[21] Though he sees his theory as applicable when a judge adjudicating a matter ensures legal certainty by weighing wholly the law which he is subject to like every other member of the society- in same vein, he argues that a lawyer or member of the interpretative community should be able to reach a consistent understanding by recognising what is of 'fundamental' significance in deducing meanings.[22] That interpreter who seeks to understand a text has developed a 'decisive' point of view or 'horizon' but must be seen as an opinion willing to be put at risk in the 'common' space to aid understanding, achieved through the instrument of language.[23] He speaks then of the 'fusion of horizons'.[24] He more explicitly puts forward that to 'acquire a horizon of interpretation requires a fusion of horizons',[25] and the only way understanding a text is possible. So, what does a text say? Would members of an interpretative community be able to come to similar conclusions that a text is saying what everyone thinks its fundamentally saying? Gadamer's construction I do not think is absolute, however it raises the issue of genuineness of interpretation. I should think that where an ordinary person has an understanding in an area, of law, or some other field, without any interest attached would be able to give some agreeable interpretation as to the honest meaning of a document, especially if they are well abreast with the conceptualisations used and history associated with the meanings. So where in court lawyers give persuasive arguments about meanings that could be read differently it shouldn't divorce from the original meaning. Again, has the original meaning being misconstrued? Then we can refer to what it was objectively

[16] Poscher, Ralf, "Hermeneutics, Jurisprudence and Law" in Jeff Malpas and Hans-Helmuth Gander (eds.), Routledge Companion to Philosophical Hermeneutics (Forthcoming). Available at SSRN: http://ssrn.com/abstract=2394503 (February 12, 2014).
[17] Hans-Georg Gadamer, *Truth and Method* (Bloomsbury Publishing 2004)
[18] Gadamer 320, 504.
[19] Gadamer 462.
[20] Gadamer 281, 282, 283
[21] Gadamer 335.
[22] Gadamer 339, 322. Hence, he argues "the model of legal hermeneutics was, in fact, a useful one. When a judge regards himself as entitled to supplement the original meaning of the text of a law, he is doing exactly what takes place in all other understanding" 320.
[23] Gadamer 406.
[24] Gadamer 385- 386.
[25] Gadamer 415.

supposed to represent, agreeably as an understanding community, in some cases with minor variations.

Ascribing proper meaning, and understanding the nature of rights?

In tackling the rights discourse, there is the need to engage with viewpoints or several horizons in an authentic manner, with openness to each text, and to interpret with the right language to give a helpful meaning- not a distorted one.[26]

i. *The conundrum of rights language and conceptualisation:*

An awareness of the incongruence in the rights discourse is crucial, to stimulate the requisite sense of the need to formulate a proper phenomenology and language in addressing concerns in this thesis, and avert a flaw or distraction in the trajectory of my conceptualisation. The word 'right(s)' has a history of been conceptualised in varied contexts because of the ambiguity of language, and legal minds have had to tackle the obstacle it engenders;[27] there is perhaps vitality in the plea to take rights more seriously'.[28] There is the scepticism that rights is being manipulatively used as a means of realising political objectives rather than an end in itself- 'rights are treated as contingent resources which impact on public policy indirectly', therefore a myth.[29] Apart from making a caricature of the notion as non-existent, the narrative could in some sense be seen in the substantive, or adjectival sense- the later ascribed the meaning of being 'in accordance with what ought to be'.[30] John Gray argues the need to distinguish between a mere right and a 'legal right', and the correlative 'duty'.[31] In his view, while it may be our duty to be loving towards our neighbour, he has no right to demand our love, 'the utmost to which our neighbour has a right is that we should treat him as if we love him'.[32] Yet this context of right he contends, is different from the idea of a 'legal right', which is contemplated in terms of an organised society acting through its legislative or judicial organs, usually purporting to act in accordance to morality- which may not always be the case.[33] Gray opines- "The full definition of human legal rights is this: that power which he has to make a person or persons to do or refrain from doing a certain act or acts, so far as the power arises from the society imposing a legal duty upon a person or persons."[34] Here rights for a human, is of a legal nature when synonymous with power to influence an individual's action, and a derivative from the society; this is not as straightforward as it appears especially when put side by side with the notion of rights by other scholars. As there is a difference between 'having a right and doing the right thing',[35] or being in a position that gives one a right. The grammar of rights is often plagued with frequent

[26] Gadamer 485.
[27] JC Gray, *The Nature and Sources of the Law* (2nd edn, Macmillan 1924) 8.
[28] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 204.
[29] SA Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (2nd edn, UMP 1974) 63, 148.
[30] Gray 8.
[31] Gray 9.
[32] Gray 9.
[33] Gray 9.
[34] Gray 18 (emphasis mine).
[35] Dworkin 203.

misunderstandings.[36] John Finnis also an expert of Law and Legal Philosophy, prefers to use the phrase 'human rights' as interchangeable for 'natural rights' given the fundamental nature;[37] this also is not without controversy. The rights discourse has been talked about as the 'grand conversation of legal philosophy in the twentieth century'.[38]This talk in some way has filtered into one of the issues in the twenty-first century, as how a neighbour is treated may arise from a perspective of rights, but does rights mean right, and is to be right (or rights) mean might? There still exists fierce arguments as to the origins of human rights as known in modern times, if it can be rightly described as a derivative of natural law or natural rights itself.[39] Locke's theory as propounded by John Locke (1632-1704)[40] is reckoned to have orchestrated a fundamental and indispensable part in the historical development of the theoretical concept of rights.[41] Jonathan Wolff, agrees with the idea of human right been 'closely related' with the notion of natural rights, he cites John Locke as one of 'its most powerful philosophical advocates'. Locke's insight to rights will later be discussed alongside other prominent scholars. The concern however, is if rights could be understood as natural rights, does it become legal or ought to be legal by virtue of its fundamental nature as a derivative of the law of nature, as well as realising its status of being 'inalienable'? Do human rights connote legal rights *stricto sensu*? Or is there no such thing as natural right but rights which are 'purely' legal because of laws made by society or a legal institution (for example judge's law made out of principle)? Again, how do we ascertain the source or society's moral standing to make law and govern rights? How does the several ambiguities, affect our notion of what is a right? These are delicate issues and the manner one sees them, informs certain concomitant actions- legal scholars have plied several pathways in the web of conceptualising rights. Samuel Donnelly in his work *The Language and Uses of Rights*, critically emphasise thoughtfulness in analysing the rights discourse as there is the danger of 'oversimplification',[42] rather than constructing a model for enriching understanding which is 'complex' and 'set more formally'.[43] He argues rights in the traditional legal milieu is too narrow when defined in terms of conclusions drawn from 'a system of rules', which is a system of an existing legal system or of moral rules.[44] This way there is discrepancy of viewing rights as abstract and an 'embodiments of the interests of the dominant and oppressing class which controls the legal system'.[45] Rights, for Donnelly cannot be properly understood without definite reference to the 'horizon' and point of view from which it is constructed, which in his opinion is essential in unlocking why a particular interpretation of rights has been given.[46] In this case, he

[36] J M Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 198.
[37] Finnis 198.
[38] SJM Donnelly, *The Language and Uses of Rights: A Biopsy of American Jurisprudence in the Twentieth Century* (1st edn, UPA 1994) 11.
[39] WJ Brown, "Re-analysis of a theory of Rights" (1925) 34(7) *The Yale Law Journal* 765; Brian Tierney, "Response to S. Adam Seagrave's "How old are Modern Rights? On the Lockean Roots of Contemporary Human Rights Discourse" (2011) 72(3) *Journal of History of Ideas* 461.
[40] University of Oxford- faculty of Philosophy, "History of Philosophy at Oxford" < http://www.philosophy.ox.ac.uk/the_faculty/history_of_philosophy?SQ_DESIGN_NAME=print> accessed July 10, 2017.
[41] Jonathan Wolff,*The Human Right to Health* (WWNorton 2012)18.
[42] Donnelly 11.
[43] Donnelly 58.
[44] Donnelly 7.
[45] Donnelly 7.
[46]Donnelly 58.

proposes a deep and higher understanding, where interpretations of rights draws a nexus between philosophical academic legal exegesis and the 'game of life' with respect to human relations; rights then for instance forces a judge to abandon his abstract purview of rights where necessary to transcend and cross horizon in order to fulfil his obligation to humanity.[47] Joseph Bingham suggests that whatever definition one ascribes to right, must be one based on intelligent reasoning, evaluated by human judgement as meeting 'a test with relation to some end or adjustment',[48] he also puts forward a list of criteria the human judgement must be weighed against- "pertinent customs, habits, prevailing ideas and beliefs, social utility, individual liberty, harmful or beneficial effects, the personal idiosyncrasies and physiological limitations of the persons concerned, and the extent of their pertinent knowledge, and to considerations, superstitions, or prejudices of any other sorts, or we may be impelled to our decisions, wholly or partly, by analogous instinctive motives".[49] Despite this detailed criteria, he acknowledges that one cannot be certain of the 'right method' most effective, but rather one which 'evolution of events may solve'. The uncertainty and layers of definition of what a right portend is complex to unravel.

In 1651, Hobbes canvassed right as *'jus'* by distinguishing it from law- *'lex'*; right being liberty to do or forbear, but law determines and binds to one of them- "so that law and right differ as much as obligation and liberty, which in one and the same matter are inconsistent".[50] Hobbes' 'jus naturale' is therefore liberty an individual has to use his power as he wills to preserve his own nature- 'his own life'.[51] Also, Locke formulates his idea on rights by reference to natural law- "This law, denoted by these appellations, ought to be distinguished from natural rights: for right is grounded in the fact that we have the free use of a thing."[52] The 'law' Locke speaks of here, is in the context of natural law, a law which he argues is guided and given by God, and capable of comprehension by 'right reason'- which is not a question of understanding but rather 'certain definite principles of action from which spring all virtues and whatever is necessary for the proper moulding of morals'. Locke also clarifies his position with positivism, as legal rules ought to derive its binding authority from natural law which protects the fundamental and intrinsic right of the individual.[53] Like Hobbes he distinguishes 'right' from law. His evaluation of a right, is in the power or liberty to use whatever we have, without interference- 'the free use of a thing'. Professor Simmons on Locke's theory argues it does not explicitly define a right, but suggest he expands the conversation, as several kinds of rights could be inferred from his work- a 'liberty right' which implies 'more precisely X has a liberty to do A while X has no

[47] Donnelly 81-115.
[48] JW Bingham "The Nature of Legal Rights and Duties" (1973) 11(1) *Michigan Law Review* 2.
[49] Ibid
[50] Thomas Hobbes, *Hobbes's Leviathan* (First Published in 1651, Claredon Press 1909) 99-100
[51] Hobbes 99.
[52] John Locke, *Essays on the Law of Nature: The Latin Text with a Translation, Introduction and Notes, together with Transcripts of Locke's Shorthand in his Journal for 1676* (WV Leyden ed, Clarendon Press 1954) 111; He cites Pufendorf and Hobbes (Thomas Hobbes, *Leviathan* (Pogson Smith ed) 99, pt I, ch.14; Pufendorf, *Elementa Jurisprudentiae Universalis*, (First published 1660) lib I, def. xiii, par. 3.) to support this claim for the definition of a right, as granting the 'free use of a thing' but also as a natural right, which is to be distinguished from natural law from which it is derived from.
[53] Locke 113, 205.

obligation not to do A'. Also 'moral power' is inferred as a moral ability to impose change on other people's rights or duties, such as making a property in specific goods, and excluding others share to it. Also, an aspect of 'claim rights' which suggest correlative duties of others. In fact, in Simmons' view- "a doctrine of duty-right correlation is clearly implied in most discussions of duties and rights in the *Treatises*… although Locke never stated such a doctrine explicitly".[54]

An American Jurist, Wesley Newcomb Hohfeld's work,*Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, is also very commendable for insights into rights, as he builds on and classifies different possible legal interpretations through his schema.[55] The aim was to solve the inherent ambiguities. Aspects of his definitions cover the work of both Locke, Hobbes and several legal scholars' opinion on right. Hohfeld argues that the term right, has been used indiscriminately to cover what in essence may be a 'priviledge', a 'power', or an 'immunity' rather than a right in the strictest sense of the word.[56] He contemplates it as a 'looseness of usage', that is dangerous and could operate to confusion or blurring of ideas.[57] He argues then that to curb this tide the most promising line of procedure is to construct a scheme that is illustrated in 'jural opposites' and 'jural correlatives'. Jural Correlative presuppose that a right is measured against a corresponding duty, where a priviledge exists then there is a 'no-right' situation, power gives rise to liabilities and immunity to disability. So, a priviledge is the opposite of a duty and the correlative of a no-right.[58] Walter Wheeler Cook, in analysing Hohfeld's hypothesis comments that the manner of classification is vital for the purpose of conviction that our logic uses a terminology that is consistent and adequately expresses the necessary distinction.[59] Hohfeld's theory would be relevant to help formulate clearly the trajectory of my conceptualisation of rights. I would explain the relevance using this scenario, say where R claims to have a legal right to professional medical treatment against K- the doctor, and against G- the State, so that he has a right of hearing in a court of law and a recognition to these rights bythe varied legal provisions in national law that guarantees its applicability; the correlative therefore must be that K owes a duty to R to fulfil R's claim.The same is true for G's obligation.It has to be that K and G owe a correlative duty in law. Gray agrees with Hohfeld that right is a correlative of a duty, and where there is no duty there can be no right, but points out however that there could duties without rights. He suggests the word 'legal obligation' is best to explain the nature of legal duties, as it is more embracing and expresses ownership.[60]John Smith in his book, *Legal Obligation*, also seem to share this view that right is 'not always' a correlative of duty, the terminology 'obligation'

[54] AJ Simmons, *The Lockean Theory of Rights* (Princeton University Press 1992) 71.
[55]WN Hohfeld,*Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays,* (WW Cook (ed), New Haven: Yale University Press 1923
[56] The eight schema can be reduced to this: Jural correlatives (Right-duty, Priviledge-'no-right', Power-liabilities, Immunity-disability), Jural opposites (Right-'no-right', Priviledge-duty, Power-disability, Immunity-liability).
[57] Hohfeld 40.
[58] Hohfeld 36-38.
[59] Hohfeld 6.
[60] Gray 9, 16.

could be 'conceived as a right as well as a duty'.[61]Further queries of Hohfeld, is that though he analysed it as 'fundamental legal concepts', it had no concept of law therefore raising doubts as the 'legal character' of his work.[62]Paul Vinogradoff, a jurist, in his paper the *Foundations of a Theory of Rights* distinguished his approach from that adopted by Hohfeld as he sought to understand rights from the background of individual-claims and societal interests as opposed to classification of rights and duties.[63] Professor Freeman, in consensus with Smith and Gray affirm non-correlative duties, and "by his failure to analyse 'duty' Hohfeld misses the point that duties are not all of one type". He canvassed that duties as established in the law of negligence relate to liabilities, and Hohfeld do not draw that connection; though Hohfeld sets out to demystify rights phenomenology, he also created additional concepts that need further interpretation, such as 'power', 'claim' to explain rights. Freeman, agrees however, that Hohfeld's schema 'remains a starting point for much contemporary rights analysis.'

More recently some scholars have sought more still to explain rights in context of the 'Interest theory' and 'Will theory'.[64] The Will theory connotes those rights that can objectively be held to be enforceable, Interest theory is summed up in a situation where X can hold power of right without legal enforceability of the duty, both theories agree on the enforceability of the rights in question.[65] The interest theory has been put forward as the better option as it recognises the complexities of legal rights more meticulously, and situations where rights may exist but unenforceable, and might not be claimed as unentitled.[66] Disagreement abound as to the viability of either the Will's or Interest's theory, and calls have been made for the abandonment of both, as they lack a substantial overview of rights conceptualisation, and instead suggests a framework that contemplates "new non-revisionary approaches, rather than using analyses that do not reflect all the ways in which the term 'a right' is actually used".[67] Furthermore, others would suggest a hybrid of both the Interest theory and the Will's.[68] Given the variant possibilities, Hohfeld's analysis on legal rights has been highlighted as a point to start navigating the complexity, as it attempts a detailed exegesis of classification of legal rights, it has been shown is not without flaws, but still a helpful analysis. Whether we begin from Hobbes and Locke in noting the distinction of rights from law, to embracing Hohfeld's schemata on the classification of those rights if it evokes a correlative duty or not, we are left with the question of enforceability- I suggest what we couch right as, must be such that recognises the inherent and inalienable right in the human person and has legal enforceability, and such granted by State to preserve and enhance same not divorce from it. As suggested by Donnelly, beyond the game of life and purviews, it comes down to human relationships, protecting

[61]JC Smith, *Legal Obligation* (Athlone Press 1976) 236,239.
[62]MDA Freeman, *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet and Maxwell ltd 2001) 398.
[63] Paul Vinogradoff, "The Foundations of a Theory of Rights" (1924) 34 *Yale Law Journal* 60.
[64] MH Kramer "On the Nature of Legal Rights" (2000) 59 *Cambridge Law Journal* 473.
[65] Kramer 477.
[66] Kramer 508.
[67] Rowan Cruft, "Rights: Beyond Interest Theory and Will Theory" (2004) 23(4) *Law and Philosophy* 353.
[68] Gopel Sreenivasan, "A Hybrid theory of Claim-rights" (2005) 25(2) *Oxford Journal of Legal Studies* 257, 265-274.

interests. Suffices to say that a 'complete' theory of rights should crisscross and envisage the nature of rights in both the legal and non-legal context.[69] To avoid the problem of misinterpretation in the conceptualisation of rights, rights has to be envisaged in a legal and non-legal context, by contemplating its meanings in several horizons or contexts as experienced in a society.

ii. *Rights as a derivative of the law of nature and positive law:*

As canvassed certain aspects of rights can be seen through the lens of rights of nature- human rights, as a derivative of natural law. One could argue for the protection and enhancement of such rights in a moral society by its legal institutions. Where legal rights have been created an obligation exist to act in furtherance. It must be said that certain natural rights, human rights, by the very nature-being it originate from natural law, gain legal force, and cannot be obliterated by a legislative enactment, neither can it be argued it is non-existent because there is no written code. First, it is not an amplification to link classical common law of the 19th and 20th century as inspired by the 18th century natural law tradition in systemic structure analysis, which is relevant in the design of the modern legal system.[70] This is because the ideals it seeks to uphold, goes beyond 'abstract rationalistic thought',[71] it is inconsequential therefore that there are no formal declarations of rights for instance in England but Magna Carta 1215, it is nevertheless affirmed by its historic experience even though different in form.[72] "It would be very wrong to suppose that English law does not recognise the essential doctrine which lies at the basis of the declarations".[73] Wolf, as well as other legal and philosophical scholars agree that this doctrine as propounded by Locke forms the fulcrum of 'modern liberal democracy', and the background of several constitutional documents and treaties, including the constitution of the United States (American Declaration of Independence 4th July 1776)[74], and was the catalyst for the French revolution (French Declaration of 26th August 1789)- an uprising in opposition to oppression as advocated in the principle of natural rights to secure liberties that was denied.[75] Even though Locke's ideas are not verbatim it significantly influenced legal thought, his insight is seen in the declarations and instruments for individual human rights internationally.[76] For Locke 'it is pretty clear that all the requisites of a law are found in natural law'.[77] Not all legal scholars

[69] Joseph Raz "Legal Rights" (1984) 4(1) *Oxford Journal of Legal Studies* 2.
[70] DJ Ibbetson "Natural Law and Common Law" (2001) 15 *Edinburgh Law Review* 4.
[71] Vinogradoff 67.
[72] Vinogradoff 65.
[73] Vinogradoff 65.
[74] Preamble: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator *with certain unalienable Rights*, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness…"
[75] Wolf 19.
[76] Przetaczrik Franciszek, "Individual Human Rights in John Locke's Two Treatise of Government on Rights" (1978) 25(2) *Netherlands International Law Review* 195-216.
[77] Locke 111.

take lightly to this, Jeremy Bentham a Jurist and Utilitarian Philosopher believed that 'from real law comes real rights', by that to only legal rights; in a letter to *Brissot* in 1789 objected strongly to natural law's principles- "natural rights is simply nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts".[78] His criticism was in response to the developments in his day, the declarations for him were not only metaphysical but a product of mischief and driven by anarchy- "let no articles be what they may, I will engage they must come under three heads- 1. Unintelligible, 2. False, 3. A mixture of both... The best thing that happen to the declaration of rights will be, that it should become a dead letter; and that is the best wish I can breathe for it." Another scholar in that dispensation actually disagreed with him, Blackstone he held the opinion that the existence of law was to be distinguished from the 'merit or demerit', "whether it be or be not is one enquiry; whether it be or not conformable to an assumed standard, is a different enquiry."[79] Smith highlights that rights are not declared 'fundamental' merely because they are included in the Constitution but 'they are enshrined therein because they are considered to be fundamental', and it is immaterial that a particular political system has no Constitution. These rights are uncodified and fundamental being principles of natural justice.[80] Bentham's radical stance does no longer bear the reality of the moment, as these rights are considered ingrained. Blackstone and Smith's position would be of much relevance in our view. Over the years, nations have found it necessary to put to paper 'core' minimums to safeguard the rights of a human being. The *Universal Declaration of Human Rights*[81] is classic example of a legal instrument that embodies the principle of natural law and preserve the natural rights of individuals- universally as legal rights. These legal rights are not absolutes, though, as one cannot exercise a right to unlawfully interfere with another's. Article 3 of UDHR for instance guarantees everyone's 'right to life, liberty and security of person.'[82]These natural rights and God-given rights are a derivative of natural law, what we now call human rights, and forms the basis of legal human rights; but exercising it do not guarantee a right to infringe on another person's natural right, as in the case given, to life. This reflects Locke's position, as well.

Locke argues whilst natural law could dictate a father's duty to feed and take care of his children, but rules cannot actually make him 'be a father'. What then has changed or been diminished, is not its ageless or universal 'binding force' or say the rights of the child to the advantage of the father's duty, but instead it is either natural rights has not been 'given at all to any part of mankind' or secondly 'that it has been repealed'.[83] Locke gives in, that law could operate to discountenance,

[78] Philip Schofield "Jeremy Bentham's: 'Nonsense upon Stilts' (2003)" 15(1) *Utilitas* 6, 16
[79] Blackstone, Commentaries on the laws of England, I, 40-43
[80] Smith 240-241.
[81] UNGA **resolution** 217 A (III) of 10 December 1948-Preamble UDHR: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."
[82] As to the universal nature of rights I would point out Locke agrees with Aristotle's position, inferring from his statement- 'a natural rule of justice is one that has validity everywhere' (Aristotle, *NichomacheanEthics* (H Rackham, 1943) 97, though he concedes that the 'circumstance of life are different'. Locke 197 Nevertheless, the law of nature is binding by its 'intrinsic force'. Locke 187
[83] Locke 197.

trump or repeal, the natural rights of a person but does not necessarily make it void- 'neither of these two things, however, can be maintained'.[84] A supplementary illustration could be given in the context of a doctor-patient relationship, where the patient of a stem cell transplant relies on the doctor to exercise his expertise to treat professionally and not in a careless manner or with total disregard to the wishes of the patient- it would be irrelevant if the law of a particular jurisdiction authorises the doctor to inject the patient with a deadly virus, or repeal the right of the human person to be treated in a dignified manner andfitting; nor does the bad rule, make the patient's right void. Hobbes' radical stance for the indispensability of legal rules as enacted by a 'sovereign' which must be obeyed irrespective of natural rights, would appear to operate to the disadvantage in this case. For Locke, this is not negotiable even if it means overthrowing a sovereign (government) authority, as such a decree would be subservient to natural law given by the sovereign will of God, and in breach of the principles of natural rights- "If natural law is not binding on men, neither can human positive law be binding. For the laws of civil magistrate derive their whole force from the constraining power of natural law, certainly so far as the majority of men is concerned… For, we should not obey a King just for the fear, because, being more powerful, he can constrain (this in fact would be to establish firmly the authority of tyrants, robbers, and pirates), but for conscience sake, because a King has command over us by right; that is to say, because the law of nature decrees that princes and a lawmaker, or a superior by whatever name you call him, should be obeyed. Hence the binding force of civil law is depending on natural law; and we are not so much coerced into rendering obedience to the magistrate by the power of the civil law as bound to obedience by natural right."[85]Locke does not assert the right to govern as a natural right, but a 'right' which could be a creation of civil law, but does not remove from the authority the right to obedience by natural law, so long it is in conformity to the principles of natural rights. Hobbes on the contrary contends that the jus naturale is dependent on the 'institution of the commonwealth', the sovereign, who prescribes rules and dictates what any one is to do without disobedience on any condition.[86] The 'sovereign' in Hobbes' dialectic is the 'mortal god' under the 'immortal God', and has a mandate to secure the peace and command defence of the people, he concedes that sovereign power is conferred by the people,[87] though the people can never renege on this. The Lockean model of rights is not one of absolutism, or that pushes for the recognition of all rights as natural rights, his writings appeal to legal rules to be a derivative from, as well as conform and respect these inherent rights by virtue of their fundamental nature. He distinguishes between existing laws, for instance that grants legal rights to the sovereign or political government to rule but not arbitrarily, but concedes this law must have regard to natural law;[88] this check only buttress the rational

[84] Locke 197.
[85] Locke 189.
[86] Thomas Hobbes, *Leviathan of the Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil* (4th edn, George Routeldge and sons 1894) 85.
[87] Hobbes 84-87.
[88] Locke 205.

understanding that it must not be in interference or invaded by others,[89] so rulers 'by force and the aid of arms' cannot compel the obedience of multitudes or put them under obligation. Raymond Wacks believes there is a modern recognition and 'reawakening' in the 21st Century of the natural law theory, which he credits to six factors which include as the 'yardstick' of the international declarations and treaties affirming these rights as intrinsic, also the 'Hart-Fuller' debates in jurisprudential legal study, as well as the Nuremberg War trials, which decided the activities of persons who abused their authority by claiming legality as being a 'crime against humanity' despite a lack of positive law. Amongst other factors.[90] It would appear the Lockean theory of rights is vindicated, given the now widespread condemnation of oppressive regimes who put the superiority of State's interest over human rights.[91] Legal rights as created by institutions of State exist to protect fundamental or core individual's interest, but though as has been suggested there are 'hard cases' where there could be a gap in the rules,[92] the government might have to engage in a 'balancing act' to protect both individual and collective needs.[93]

While we have argued that natural rights also impose duties (obligations) on the State or the person on whom the burden lies to protect the interest of the rights holder, and that where the right in question is a legal right that it simultaneously evoke certain duties. It is appropriate to envisage and justify rights in both context, as it gives a proper understanding. Vinogradoff, argues for the delimiting of extremes, but rather the possibility of pursuing the co-existence of the 'core of truth in the doctrine of imprescriptible and unalienable rights' as well as the 'necessity of state law'.[94] In his opinion this is a necessary compromise to be accepted, a civil and 'well-ordered' State must see the individual as worth being safeguarded and treated with respect. Vinogradoff agrees with the Lockean model, classifies it as 'subjective rights' but shares a contrary view to Hobbes's doctrinal position- as it does not fit.[95] Raanan Gillon also citing Locke, contemplates rights too as correlatives, applicable in medical ethics, and invokes a duty "not to harm, to respect autonomy, to seek justice, and to help others."[96]There needs to be a synergy, even though natural rights were justified often in terms of natural law, it cannot be defended in natural law alone but also in terms of 'consistency with the basic principles, premises, assumptions and properties of the legal system itself'.[97] This seems to be a middle ground approach rather than an arbitrary legal fiat, which rarely protect rights interest. One could argue, that for instance the *Nigerian Constitution* (1999) is not a radical departure from the Lockean right theory, as its' provisions are acclaimed to be based on the 'principles of freedom, equality and

[89] John Locke, Treatise II 7, 271.
[90] (Raymond Wacks, Understanding Jurisprudence: An Introduction in Legal theory (3rd edn, OUP 2012) 4.
[91] Franciszek 211.
[92] Dworkin 104.
[93] Dworkin 198-199.
[94] Vinogradoff 67-69.
[95] Vinogradoff 63.
[96] Raanan Gillon, "Rights" (1985) 290 *British Medical Journal* 1890.
[97] Smith 233, 243.

justice', and also it states further that it exists as a 'sovereign nation under God'[98]. Section 14(1) grants the people of Nigeria sovereignty, and states that power and authority is derived from the people. It is important to note, this 'power' is non-justiciable and does not form the rationale for litigation in a court of law, as it constitutes 'fundamental objectives and directive principles' of the State. In essence, it is an unenforceable legal right. Section 1(2) however, bars any Nigerian from taking control of the established government, also overrides any inconsistent 'law'. I argue, at best, Nigerians could exercise their 'constitutional sovereignty' to protect their inherent 'power' not by overthrowing the government, but by seeking to change the government of the day by legal means. Having said that, the 1999 constitution have entrenched as legal rights already, certain natural rights relevant to our discussion in this paper. Section 33 protects the individual's right to life, and Section 34 guarantees the dignity of his person, which ought not to be subjected to 'degrading treatment'. These rights and others as contained in *Chapter IV* of the constitution are justiciable. Furthermore, in the case of *United Trust Bank (Nigeria) v. Ozoemena,*[99] the Supreme Court have upheld the principles of negligence in common law and statute, and established that where a duty of care is owed to a person, his or her rights should be protected else damages would ensue, nonetheless, burden is on the one who claims, to prove the merits.[100]Again using the example of a health professional (similarly applicable to any professional with a duty of care), on the strength of this case and the provisions of the constitution, he would have to satisfy the court that he has exercised his duties professionally so as not to infringe on the protected interests or rights of his patient. Also, irrespective of background in belief system- secular thinkers, ethicists andChristian theologians, agree on the foundational premise, that a vital principle in medical ethics is the right for instance to the autonomy to one's body, and such that is to be preserved and treated with utmost dignity.[101] Deryck Beyleveld and Roger Brownsword suggests that 'human dignity' represents the sense that an individual has a right to respect for his or her dignity by other humans, and a right to support circumstances that are essential if they must flourish as a human being, being the capacity to make autonomous decisions.[102] It is in this context of empowerment, these natural rights could be interpreted as preserving human dignity, and as anessential condition in electing to both sanction a form of biotechnology and provide a sound framework, such that resulting risks are effectively minimised. The

[98] Locke and Hobbes's theory contemplates a State as operational under God's sovereignty, whilst Hobbes distinguishes God's sovereignty from the State's, and argue the State's sovereignty should not be contested even if it breaches principles of natural rights and make bad rules that infringes on their - at this point Locke share a different view.

[99] (2007) 1 (Pt2) SC 211.

[100]The Judgment delivered by Ikechi Francis Ogbuagu, J.S.C. made reference to Lord Denning in *H & N. Emmanuel Ltd, v. C L C Co. &anor.(1972) II All ER. (sic) 835 @ 838 – 839,* and Lord Atkin in *Donoghue v. Stevenson (1932) A.C. 562, 581-582* to buttress his points and relied on expositions of legal literatures of scholars, the common law as well as previous judicial decisions in Nigeria courts and statue- *the Torts Law of Anambra State of Nigeria* to arrive at the conclusion, upturning the two lower courts. I would conclude therefore, that the attitude of the Nigerian court, as demonstrated in the apex court is to have regard to legal rights or liabilities as enshrined in the laws of the land, as well as instructive common law principles where applicable. I have argued that common law principles are mostly not at variance with natural law.

[101] KM Hedayat, Global Ethics: The possibility of a Universal Declaration of Biomedical Ethics (2007) 33 *Journal of Medical Ethics* 317

[102] D. Beyleveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford University 2001) p. 18; Abbo Jimeta and some other writers also agree that organ or tissues transplantation for instance could be considered as a "medical intervention that touches on the fundamental rights of the donor or the recipient" - A. Bakari, A. Jimeta, M. Abubakar, S.U Alhassan, E.A Nwankwo, 'Organ transplantation: Legal, ethical and Islamic perspective in Nigeria.' (2012)18 *Nigeria Journal of Surgery* 53.

States obligation would be therefore, not to create these natural rights but to protect and secure these inherent liberties, and resist forces that seek to limit or obliterate them.

Conclusion:

It is my submission that rights is uniquely constructed to embody the interwoven complexity at various ends, and be understood as representing diverse meanings, both at the legal and non-legal sphere- I think to make reference to Hohfeld's schemata is a possible start point in the dialectics. It is suggested that a meaning is adopted that criss-crosses horizons and gives credence to core values that uphold human rights and the well-being of all people. The argument is made for the principles of natural law, jus naturale, as propounded by Locke's theory of rights particularly when given legal impetus, even though it has moral and legal strength inherently.

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