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Autor: Sebastian Toplak
Konzultant: žádný
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Obsah

Introduction

Human Rights are, according to prevailing view[1], moral claims that individual possess by the virtue of being a human being and therefore they are universal, i.e. possessed by all humans (in all times and places), and inalienable natural rights. However, they are being more and more questioned.[2] It is quite legitimate to inquire as to whether they may be inferred from certain facts and, if not, to inquire as to why we must accept their normative assumptions. This issue is often regarded as one of the fundamental and central issues in moral philosophy.[3] Contrary to the naturalist account, some may argue, they may be a political-legal construct[4], and as Beitz puts it, the 'articulation in the public morality of world politics'.[5] The concept of Human Rights can still evoke scepticism even among those who admire the idea,[6] and tumultuous disagreements as to what is the foundation and content of Human Rights still occur.

A justification theory is necessary because of the problematic character of international human rights practice. Uncertainty exists in how these "human rights" should be defined, the grounds for preferring certain values over others as human rights, and the extent of obligations attached to these rights and to whom they apply.[7]

The Czech Charter of Fundamental Rights (Charter) follow the naturalistic approach, adopting it in preamble and its very first article and thus following the tradition of international Human Rights documents such as Universal Declaration of Human Rights (UDHR), International Covenants, and Vienna Declaration. The naturalistic approach has been pre-dominant in philosophical discussions pertaining to the justification of Human Rights.

[1] Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality' (2008) 16 Journal of Political Philosophy 137.
[2] See, e.g. Charles R Beitz, *The Idea Of Human Rights* (Oxford University Press 2009); Raymond Geuss and Lawrence Hamilton, 'Human Rights: A Very Bad Idea' (2013) 60 Theoria; Adam Etinson, *Human Rights: Moral Or Political?* (Oxford University Press 2018); Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality' (2008) 16 Journal of Political Philosophy 137.
[3] Martin Hapla, 'Explicative-Existencial Justificacion of Human Rights Analysis of Robert Alexy's Argument in Context of Is-Ought Problem' (2020) 15 The Age of Human Rights Journal 105 p. 108
[4] Laura Valentini, 'In What Sense Are Human Rights Political? A Preliminary Exploration' (2012) 60 Political Studies 180. p. 180
[5] Beitz, *The Idea Of Human Rights* (n 2). p. 1
[6] Beitz, *The Idea Of Human Rights* (n 4). p. 2
[7] Charles R Beitz, 'Human Rights and the Law of Peoples' in Deen K Chatterjee (ed), *The Ethics of Assistance Morality and the Distant Needy* (Cambridge University Press 2004). p. 193

However, recently, scholars have questioned it, abandoning the naturalistic account, and developing a new ´practical´[8] account, which is free from overreaching philosophical theory.

This essay aims to dissect and compare two contemporary accounts of human rights justification: naturalistic and practical. First Chapter will summarize the origins of Human Rights and succinctly introduce the natural law theory. Subsequently, second Chapter will introduce the Universal Declaration of Human Rights and explicate what philosophical challenges it brought about. Third chapter and fourth chapter will introduce and elucidate naturalistic and practical approach to human rights, respectively. Finally, Chapter V will conceptualize the Czech Charter of Fundamental Rights in contemporary debate and critique the overarching philosophical argument in the light of practical theory.

Chapter I – Origins of Human Rights

Prior the Universal Declaration Human Rights philosophers were looking for rights which are outside just a mere legal enactment. Thomas Aquinas came with the idea of natural law and that he saw it as imprinted by the God, as ‘a reflection of God's eternal law'.[9] the shift from a God-centered to a human-centered perspective began with thinkers such as Locke and the American Founding Fathers, where now human is endowed with inherent natural rights by the virtue of being a human, and this rights is not necessarily linked to the God existence.[10]

The origins of Human Rights can be traced back to the natural rights, although some scholars argue that both terms refer to similar or identical concepts.[11] For example, Simmons views Human Rights as those natural rights ´that are innate and that cannot be lost. […] [human rights] have the properties of universality, independence (from social or legal recognition), naturalness, inalienability, non-forfeitability, and imprescriptibility´.[12]

[8] As named by Beitz; see Beitz, *The Idea Of Human Rights* (n 2).
[9] Johannes Morsink, *Inherent Human Rights : Philosophical Roots of the Universal Declaration,* (University of Pennsylvania Press 2009). p. 25
[10] ibid.; Although the normative status could be given by God. For instance, the Declaration of Independence (1776) states “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, […]” or Locke´s idea that we are “God's ‘Workmanship”.
[11] Peter Jones, *Rights* (The MacMillan Press 1994). p. 72; A John Simmons, ‘Human Rights and World Citizenship: The Universality of Human Rights in Kant and Locke' [2001] Justification and Legitimacy 179. p. 185
[12] Simmons (n 11). p. 185

Jones has categorized natural rights into two traditions, that of strong and weak sense. The former emphasizes that natural rights are ´the basic entitlements of all human beings´ and government obligation is to respect them. This tradition was espoused by John Locke or Thomas Paine, and it also paved the way for the modern idea of Human Rights. The latter conception was given by Thomas Hobbes (although it was not unique to him), in which he thought of natural rights as those rights every human possess in the state of nature. He understood them more as liberties without claim-right imposing duties. In other words, individual´s natural right did not have correlative duty. Therefore, state of nature was state of war in which everyone had the right to everything, as embedded in his notable Latin description *bellum omnium contra omnes*.[13]

For Locke, natural law was a body of rules derived from God. In this theocentric view, God was the creator of everything, and thus these natural laws were laid down by God for humans. They were considered natural because they were not man-made, unlike positive law. Whereas for Hobbes, Human´s state of nature was innately hostile, Locke saw it as a condition of peace and harmony. Moreover, these natural rights persist even after the establishment of a political authority.[14]

Furthermore, we must ask what it means for natural rights to ´exist´. Of course, they cannot be conceived of ´existing´ same as other things that we can observe. We can see a tree but can we ´see´ rights? Clearly not. In original Locke´s tradition (which modern human doctrine stems from), it is simply true that natural rights are God-given to humans *qua* being a human, just as ´it is true that bees live in hives and that oaks grow from acorns´.[15] Today when scholars argue about the existence of human rights, they mean their validity and their validity is then justified by moral reasons.[16]

Given that, it is erroneous to frame human rights on the original idea of natural rights. Contemporary International Human rights are not God-given but, as claimed in UDHR, rights based in ´the dignity and worth of the human person´. Furthermore, Beitz argues, Locke´s natural rights make sense only against assumption that a most central problem of political life is government's coercive power monopoly. They were tools that one could use to differentiate between legitimate and illegitimate uses of power. [17] On the contrary, contemporary human

[13] Jones (n 11). pp. 72-74
[14] ibid. pp. 74-76
[15] ibid. pp. 79-80
[16] Martin Hapla, 'Who Is Concerned by the Existence of Human Rights?' (2021) 29 Casopis pro Pravni Vedu a Praxi 801. p. 808
[17] Charles Beitz, 'What Human Rights Mean' (2003) 132 Daedalus 36. p. 41

rights doctrine serves dissimilar purpose. They enshrine a more ambitious project, that aims for political and social reform and provide ´a common standard of achievement for all peoples´[18]

Nonetheless, this is not to say, that we should abandon the Locke´s concept of natural rights completely. His theory can be still defended, even without the theocentric view. Firstly, if we find a moral right, regardless of whether they are recognized by positive law, that is fundamentally grounded in characteristics that people might be said to possess we can call them "natural" rights.[19] And this search for a normative moral theory is precisely the work of a naturalist theorists. (see below)

Chapter II – Universal Declaration of Human Rights

The most significant leap forward in the international Human Rights doctrine was the introduction of Universal Declaration of Human Rights (UDHR). The UDHR presented us a critical philosophical challenge by introducing metaphysical moral rights that are inherent and universal. At the time of drafting, it was much easier for framers to agree on the content of human rights rather than about underlying philosophical justification of the rights therein. Therefore, the UDHR does not propose any justifying theory. It simply declares certain values to be human rights.[20]

The UDHR adopts an approach resembling that of naturalistic[21], also referred to as the orthodox[22] or practice-independent[23] approach. According to the view of naturalist theorist the justification for and content of human rights is not constrained by the historically contingent and politically compromised practices that we happen to live with. Rather, Human Rights principles are derived through other means, like morality, intuition, human dignity[24] or

[18] Sangiovanni, 'Justice and the Priority of Politics to Morality' (n 2). p. 153
[19] Jones (n 11). pp. 80-81
[20] Beitz, 'What Human Rights Mean' (n 17). pp. 36-37
[21] As laid down in preamble of UNDHR: ‚*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.'* or art. 1: '*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'*,
[22] Andrea Sangiovanni, 'Beyond the Political-Orthodox Divide: The Broad View' [2018] Human Rights: Moral or Political? 174.
[23] Eva Erman and Niklas Möller, 'What Distinguishes the Practice-Dependent Approach to Justice?' (2016) 42 Philosophy and Social Criticism 3.
[24] See John Tasioulas, 'On the Foundations of Human Rights', *Philosophical Foundations of Human Rights* (Oxford University Press 2015).

human agency[25] and then applied to assess or reform that practice. Individuals enjoy their Human Rights simply by the virtue of being human. We ask whether 'X is a normatively salient interest attached to our status as human beings that is weighty enough to place duties on others to respect or protect it'[26] and this essential characteristic grounded in our humanity is shared across 'innumerable historical, geographical, cultural, communal, and other contingencies that shape our lives and our relations with others in unique ways'.[27]

While human rights in the UDHR are based on the principle of human dignity, many of the rights listed in the document would not be possible in a state of nature. For example, it is elusive to imagine having rights to due process or nationality without any social or political arrangements in place.[28] Therefore, it is clear that international human rights enshrine more than a minimum standard advocated in most contemporary naturalistic theories, such as those of Locke´s or Griffin´s (see below).

The UDHR is not without criticism, however. For example, relativist theorists, such as The American Anthropological Association in 1947 or the recent ´Asian Values´ discussion. These theorists mostly push back Human Rights presuppositions as they perceive it to be western cultural imperialism. The notion about UDHR as ´western´ invention can be easily rebutted by pointing out the fact that non-western nations played an active role in the formation of the UDHR and International Covenants.[29] Furthermore, the Vienna conference conducted in 1993 declared that regional and national particularities must be borne in mind, it stated that ´it is duty of states regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms´.[30]

Chapter III - Gewirth's and Griffin's normative agency

Since the UDHR, the justification of Human Rights, as being rooted in naturalism, has been pre-dominant in international jurisprudence. One of the most notable

[25] See Alan Gewirth, *Human Rights : Essays on Justification and Applications* (University of Chicago Press 1982); James Griffin, *On Human Rights* (Oxford University Press, Incorporated 2008).
[26] Valentini (n 4). p. 180
[27] Patrick Macklem, *The Sovereignty of Human Rights* (Oxford University Press 2015). p. 6
[28] Simmons (n 11). p. 186
[29] See Kathryn Muyskens, 'Avoiding Cultural Imperialism in the Human Right to Health' (2022) 14 Asian Bioethics Review 87
[30] United Nations, 'Vienna Declaration and Programme of Action', *World Conference on Human Rights in Vienna* (1993).

theories within this framework are those presented by Gewirth and Griffin, which will be explored in this chapter.[31]

Alan Gewirth and his *Human Rights: Essays on Justification and Applications* is a well-known account of Human Rights. He argues that it is possible to infer rights to certain object just from 'the fact that certain objects are the proximate necessary conditions of human action that all rational agents logically must hold or claim', because without these indispensable 'conditions' an agent would not be successful in achieving his purposes or goods. Gewirth identifies two conditions: freedom and well-being. Freedom is to control one's behaviour without being forced whilst having 'knowledge of relevant circumstances'. Well-being consists of other 'general abilities and conditions required for agency'.[32] Every agent, by the virtue of being one, has a moral right to these conditions.[33]

Here, we can see how 'the necessary conditions of actions' can generate positive and negative rights to insure success in agent's actions. Furthermore, in his view, every action has two characteristics. First, it is free and voluntary. Second, it has purpose and intentional (i.e. it is purposive; it seeks to attain a certain goal), thus 'every agent recognizes his freedom and well-being as a necessary good'. Implicitly, agent arrives at the conclusion that she has right to these 'goods'.[34]

Given that, Gewirth then introduces 'Principle of Generic Consistency' (PGC) where he argues that agents must comply with this principle that prescribes them to respect generic conditions of agency, which is all 'dialectally necessary', i.e. it is a logical premise that agent cannot deny, concretely, a claim that they or someone else is not an agent, otherwise they would be in contradiction.[35]

This theory has spurred a lot of criticism.[36] For instance, some people can never be a prospective purposive agent (PPA) under this approach and therefore should not have any Human Rights. Kohen illustrates this on a child, who fails to fall under Gewirth's categories. It is therefore acceptable to deny child's rights to freedom and well-being?[37] This issue was

[31] There are more naturalistic theories than those of Gewirth´s and Griffin´s; e. g. Capability theory of Amartya Sen [see Amartya Sen, 'Capability and Well-Being', *The Quality of Life* (Oxford University Press 1993)]; However, for the scope of this essay, we will focus only on those two.
[32] Gewirth (n 25). p. 46-47
[33] ibid. p. 41
[34] Hapla (n 3). p. 111
[35] Deryck Beyleveld, 'Human Dignity and Human Rights in Alan Gewirth's Moral Philosophy', *The Cambridge Handbook of Human Dignity* (Cambridge University Press 2014) p. 230
[36] See Joseph Raz, 'Human Rights Without Foundations Human Rights Without Foundations'; Hapla (n 3).
[37] Ari Kohen, 'The Possibility of Secular Human Rights: Alan Gewirth and the Principle of Generic Consistency' (2005) 7 Human Rights Review 49 p. 64

addressed by Beyleveld: ‘A question might be raised about the extent to which the practical import of the PGC is narrowed by conative normality's being a definitional requirement of being a PPA. The answer is, Not very much! Conative normality is, after all, something that is characteristic of most adult human beings. In practice, we are required to treat human beings as conatively normal (as PPAs) unless we have compelling evidence that they are not PPAs’.[38] However, what exactly defines ‘compelling evidence’? As aphoristically put by Richard Rorty ‘the problem cannot be solved by sitting down with a chalkboard and diagramming how the agent and his potential victim are both PPA.’[39] This argumentation can easily slip into justification of, for instance, homophobia or misogyny, where the agent might know the victim is PPA, but other factors (being a queer, a woman) with far greater resonance could preclude the victim having the same rights as the agent.[40] Similar critique is presented by *Massimo Renzo* ‘One problem with this view is that it has the unappealing implication that children, the severely mentally disabled, and individuals suffering from advanced dementia cannot be said to have human rights. Given that these subjects do not have the capacity for normative agency, they cannot enjoy those rights whose justification consists in protecting normative agency’.[41]

Gewirth’s theory of agency is further expanded in by Griffin.[42] He also argues that individuals are endowed with Human Rights by the virtue of being human, or more precisely, by the virtue ‘of their normative agency’.[43] However, Griffin does not share Gewirth’s logical reasoning in grounding Human Rights, although his theory still shares some similarities. For example, he also presents abstract ‘conditions’ that have to be fulfilled in order for an individual to be regarded as ‘normative agent’, or in other words having ‘personhood’.[44,45] Personhood is an ‘interpretation of the idea of human dignity’,[46] which is comprised of three components. Firstly, one must have ‘autonomy’, that is ‘[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood’. Secondly, one must have ‘have at least a certain minimum education and information. And having chosen, one must then be able to act [minimum provision]’. Thirdly, one must act voluntarily, and others must ‘not

38 Deryck Beyleveld, *Dialectical Necessity* (University of Chicago Press 1991). p. 448
39 Kohen (n 37). p. 65
40 ibid. p. 65
41 Massimo Renzo, ‘Human Needs, Human Rights*’, *Philosophical Foundations of Human Rights* (Oxford University Press 2015). p. 574
42 Griffin (n 25).
43 ibid. p. 48
44 ibid. pp. 33-37
45 Griffin’s personhood is a another term for normative agency
46 Beitz, *The Idea Of Human Rights* (n 2). p. 60

forcibly stop one from pursuing what one sees as a worthwhile life [liberty]'. And because we regard our 'personhood' as having high value, we 'see its domain of exercise as privileged and protected'.[47] Griffin contends that we (people) recognize normative agency as 'valuable'[48]

The content of Human Rights and their 'strategic role'[49] is derived from these specific values.[50] For example, when discussing right to 'satisfactory living', as to what is the exact content of the right in the word 'satisfactory', he tries to refine 'personhood' account and use it to find 'some stable, non-arbitrary, normatively based criterion' for defining the right to satisfactory living, he argues that '[o]n the personhood account, […] there is one: the cut-off point is when the *proximate necessary conditions* for normative agency are met. That point will be higher than mere subsistence but lower than levels of well-being characteristic of rich contemporary societies'.[51] How exactly find the proximate necessary condition is not clear, mere abstract statement is laid down that 'hard interpretive work' has to be done in order to 'find it'.[52]

But the notion of 'personhood' is not the only ground for Human Rights. In order to determine when we should protect the values of 'personhood' by conferring them the power to make such claim, Griffin postulates second category called 'practicalities'.[53] These are features of 'human nature and of the nature of human societies'[54] and they will help us to 'determine the threshold of autonomy that human rights protect, but that considerable work is necessary to find the right threshold'.[55] These two categories – 'personhood' and practicalities'- are, according to Griffin, sufficient to generate certain substantive Human Rights. He is aware of discrepancies between the International Human Rights Doctrine and his list of rights, However, confidently enough, he argues that the Doctrine should be revised to conform with the personhood account.[56]

Raz noticed similarities in Gewirth's and Griffin's theories (what he categorised as 'traditionalist approach'). He characterized them as having similar logical features. Firstly, they derive (or try to derive) Human Rights from basic and essential features of human beings, which are important and 'valuable' to our human life. Secondly, Human Rights are the most

[47] Griffin (n 25). p. 33
[48] ibid. pp. 150-152
[49] Charles Beitz, *The Idea Of Human Rights* (Oxford University Press, Incorporated 2011). p. 60
[50] Griffin (n 25). p. 33
[51] ibid. p. 183
[52] ibid.
[53] Beitz, *The Idea Of Human Rights* (n 49). p. 61
[54] Griffin (n 25). p. 38
[55] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011). p. 474
[56] Beitz, *The Idea Of Human Rights* (n 49). p. 61

important moral right. Thirdly, a little consideration is given to the distinction between something 'valuable' and having 'right to it'. Fourthly, rights tend to be individualistic and omitting 'aspects of life which are essentially social'.[57]

According to Raz, 'traditionalist' theories fails for multiple reasons. One is that the conditions necessary to be an normative agent are too easily satisfied, that is for instance, even slave can act purposively (make decisions), but most importantly still satisfy the 'liberty' condition for normative agency, as they can still 'form a conception of a worthwhile life within the constraints to which they are subject and take effective steps to pursue it'[58], in other words, 'worthwhile life' is not impossible in slavery, therefore Griffin fails to 'generate' Human Right against slavery which is clearly one of the essential Human Right in International Law. Again, this shows how relatively terms as 'worthwhile' or 'well-being' can be interpreted differently among individuals which is the crux of the problem in naturalistic accounts of Human Rights.

Another example of an abstract and relative term is in Griffin's third condition of 'minimum provision' (i. e. minimal education and information etc., see above), where little is stated concerning how 'minimal' ought to be regarded. Of course, Griffin suggests generous provision 'necessary to support life as a normative agent, which is substantially more than just subsistence'.[59] However, as noted by Raz, there is no certain criteria of how we should determine the minimal standard, especially to those considered as universal rights, that is not arbitrary.[60]

Griffin's theory fails to accommodate some forms of discrimination, such as same-sex marriage. According to him, from appeal to 'liberty' condition, we can infer a right to same-sex marriage. But as correctly argued by Buchanan, the state's failure to recognize same-sex marriage is not 'coercive interference', but rather a refrainment from giving a legal privilege.[61]

Even if we take aforementioned theories into account, they nonetheless fail to accommodate contemporary human rights practice. As Beitz noticed, to better grasp the ethical and political significance of human rights, it is necessary to evaluate their practical implementation in the contemporary world and then determine if the natural rights framework supports or hinders our understanding. By identifying how the traditional framework

[57] Raz (n 36). p. 3
[58] Allen Buchanan, 'The Egalitarianism of Human Rights' (2010) 120 Ethics. p. 695
[59] Griffin (n 25). p. 90
[60] Raz (n 36). p. 7
[61] Buchanan (n 58). p. 696

misrepresents human rights practice, ´we will be in a better position to appreciate the real nature of human rights and the reasons why we should care about them´.[62]

Chapter IV – Practical approach

Naturalist theories like those of Gewirth and Griffin are not wrong *per se*. They provide us with ideas that are ethically important and serve as a foundation for generating some universal rights. However, they do not provide us with convincing reason why international Human Rights should take their theories into account.[63] Thus, a new approach is advanced that follows the practice of Human Rights in justifying conception of justice that is referred to as practice-dependent, practical or political approach.[64] For practice-dependent theorist it is wrong to model a conception of Human Rights on the idea of natural law or any other normative point of view 'unfettered by the form or structure of existing institutions and practices'.[65]

In *Law of Peoples*[66] Rawls introduced new account of Human Rights that is seen as a political theory of Human Rights[67], also referred to as practice-dependent or just practical approach. This theory defines and justify human rights in terms of the particular institutional or cultural contexts in which they arise. Such theories ask not whether a given practice conforms to an externally derived ideal but what functions it does or might serve in the real world.[68]

The most notable definition of Human Rights based on practical approach is constituted by Rawls in *The Law of Peoples*: 'Human rights are a class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy'.[69] Firstly, for Rawls, Human rights limits state's 'internal autonomy' or in other words 'sovereignity'. Secondly, he sees Human Rights as a standard necessary for the 'decency of domestic political and social institutions'. Finally, they limit 'the pluralism among people'.[70] This account of practical

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[62] Beitz, 'What Human Rights Mean' (n 17). p. 38
[63] Raz (n 36). p. 8
[64] Sangiovanni, 'Justice and the Priority of Politics to Morality' (n 1). p. 137-138
[65] ibid. p. 137, 153
[66] John Rawls, *The Law of Peoples : With, The Idea of Public Reason Revisited* (Harvard University Press 2001).
[67] Sangiovanni, 'Justice and the Priority of Politics to Morality' (n 2). p. 138-139; However, some scholars would argue against such characterisation of Rawls´s theory, e.g. see Robert Lamb, 'Pragmatism, Practices, and Human Rights' (2019) 45 Review of International Studies 550.
[68] See Sangiovanni, 'Justice and the Priority of Politics to Morality' (n 1).
[69] Rawls (n 66). p. 79
[70] ibid. pp. 79-80

approach is called by Valentini as 'narrow version', as Human Rights in this version solely serve as legitimization for foreign intervention.[71]

Rawls introduces list of Human Rights that society must follow to be considered (at least) 'decent hierarchical society' (i.e. non-liberal society) that can be member of reasonable 'Society of Peoples'. Violation of the right on the Rawls's list is condemned by the 'Society of Peoples', therefore, according to Rawls, states that conform to his list of Human Rights are able to intervene in the state that violated them.[72]

Rawls's ideas stand in contrast with naturalistic approach as it sets a 'political doctrine' for specific purposes in international law. He does not turn to any overreaching moral and philosophical view to justify his position, because, in this respect, Human Rights are values upon which should 'liberal and decent' societies should agree on.[73] Consequently, his list of Human Rights is narrow so it can be considered universal among all cultures and therefore inconsistent with actual International Human. Rights practice. Beitz argues, however, that our aim is to 'grasp the concept of a human right as it occurs within an existing practice' and for this we need a model that represents the important aspects thereof.

Although Rawls idea of 'Law of Peoples' is not without flaws, the underlying notion that Human Rights can be detached from philosophical and moral normative views and framed within discursive international practice spurred new discussion. Sangiovanni proposed an 'practice-dependent' thesis, where ´[t]he content, scope, and justification of a conception of justice depends on the structure and form of the practices that the conception is intended to govern'[74]. Furthermore, Raz argued for ´an ethical doctrine of human rights [that] should articulate standards by which the practice of human rights can be judged, standards which will indicate what human rights we have. In doing so it will elucidate what is at issue, what is the significance of a right's being a human right´.[75] They have tried to justify the concept of Human Rights by looking at the function they play in the international law and politics.

Practice-dependent theorist does not deny that core components of Human Rights could not be based on naturalistic views like human dignity or human need[76], after all, Human Rights practice itself adopts independent approach. He rejects the notion that *ius naturale* is sufficient for developing 'a fully articulated conception of human rights' which is in line with

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[71] Valentini (n 4). pp. 182-183
[72] Rawls (n 66). pp. 5, 63-66, 79-81
[73] Beitz, *The Idea Of Human Rights* (n 49). p. 99
[74] Sangiovanni, 'Justice and the Priority of Politics to Morality' (n 1). p. 137-138
[75] Raz (n 36). p. 2
[76] Sangiovanni, 'Justice and the Priority of Politics to Morality' (n 1). p. 154

the intended role they are meant to play in current international practice.[77] For Human Right 'X' practice-independent theorist will ask: Is the right X an crucial element of our Human autonomy or agency. Is the right X required for our well-being. Conversely, practice-dependent theorist will ask: What role is concept of right X meant to play in institutional and political structures.

For instance, in the case of right to speech, practice-dependent theorist will point out to the role of freedom of speech, which plays salient role in legitimizing political regime, namely, the role is to promote expression of different values and prevent abuse of power. However, practice-dependent would deny the idea that violation of right to speech legitimize various form of international interference because the disruption of daily lives would be unproportionate to the effect that violation thereof causes. As Sangiovanni puts it: 'Because the concept of a right to free speech plays an altogether different role in the international context, the institutionalist claims that the content, scope, and nature of our basic rights should vary accordingly'.[78]

Practice-dependent approach, however, seldom engage with actual international judicial interpretation of human rights, instead focusing mainly on the international political practice.[79] Karen Knop argues that the role and meaning of international human rights may 'diverge significantly at the national level'.[80] For instance, McCrudden noticed that when domestic court refer to The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), they usually do in order to advance domestic goals. Furthermore, they see themselves as domestic players merely using international law rather than 'international agents'.[81]

Given that, Valentini argues that justification of Human Rights sometimes requires practice-independent moral reasoning suggesting that, perhaps, the best theory of Human Rights 'is in fact one that combines insights from both natural-law and political views'.[82]

Chapter V – The Czech Charter of Fundamental Rights: Critique

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[77] ibid.
[78] ibid. pp. 159-160
[79] Christopher McCrudden, 'Is the Principal Function of International Human Right Law to Address the Pathologies of International Law: A Comment on Patrick Macklem's the Sovereignty of Human Rights'' (2017) 67 University of Toronto Law Journal 623.
[80] ibid. p. 626
[81] Christopher Mccrudden, 'Why do national court judges refer to human rights treaties? A comparative INTERNATIONAL LAW ANALYSIS OF CEDAW' 534.
[82] Valentini (n 1) p. 189

The Czech Charter of Fundamental Rights (Charter)[83] instantiates the naturalistic tradition and grounds it in preamble and its very first article: ‘fundamental rights and freedoms are inherent, inalienable, non-prescriptible, and irrepealable’. My aim is to examine the principles embedded in the first article of the Czech Charter of Fundamental Rights from a practical perspective of human rights and use that to develop a critique, primarily drawing from the work of Charles Beitz. In the first place, we must elucidate the claims in the first article of the Charter.

Firstly, the inherence[84] of rights constitutes a key tenet of the naturalist approach, which asserts that fundamental rights are pre-institutional, thus they exist in a pre-political state of nature. Such rights are natural and people enjoy them solely by the virtue of their humanity. Secondly, the inalienability refers to one incapability of transferring or renouncing their fundamental rights. Thirdly, the term 'non-prescriptible' denotes that essential rights are not bound by the constraints of the statute of limitations. While fundamental rights are not bound by the statute of limitations, meaning that their existence is not affected by the passage of time, their enforcement after being violated is subject to such limitations. Fourthly, the concept of irrepealable pertains to the prohibition of revocation of rights that have already been granted, thereby precluding any public authority from abrogating such rights from individuals.[85]

While practice-dependent theorists may not object to the concept of inherent human rights, that is, rights that all people enjoy *qua* human, the notion that such rights are pre-institutional is not conceivable in practical theory. If this were true, these rights would need to be self-evident to people in institutionless arrangements. While certain rights, such as Lockean right to life, liberty, and property, may be conceivable in this way, others may be more difficult to do so. Article 13 of the Charter (which states that no one may violate the confidentiality of letters) may be an example of a ´Fundamental Human Right´ that is tricky to imagine as pre-institutional. For instance, who would provide postal services in a society without institutions? Additionally, the second division, consisting of political rights is, in itself, a paradox in conjunction with the concept of pre-institutionality. Why, indeed, conceive rights

[83] Constitutional act No. 2/1993 Coll. The Czech Charter of Fundamental Rights 1993.
[84] While the official English translation of the Charter employs the term "inherence", however, a more precise translation would be that they are 'non-assignable', meaning that a state cannot assign them to individuals as they already belong to people by virtue of their humanity
[85] Michal BARTOŇ, ‘Úvod’ in Husseini Faisal and others (eds), *Listina základních práv a svobod.* (C H Beck 2021).

as pre-instituional. As Beitz puts it ´The idea simply would not occur to anybody not already in the thrall of the natural rights tradition´.[86]

Inalienability is another key principle in the Charter, integral to the inherence. One could argue that Huaman Rights are not inalienable but rather ´radically contingent´. In Arendt´s words, ´No paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as inalienable those human rights, which are enjoyed only by citizens of the most prosperous and civilized countries, and the situation of the rightless themselves'.[87]

First article of the charter does not refer to the rights as 'Human Rights' but as 'Fundamental Rights' as is common in most national human rights documents. However, the second chapter of the Charter is named 'Fundamental Human Rights and Freedoms'. This ambiguity of term is not unanimously resolved. The term ´fundamental rights´ usually refers to a broad concept that encompasses the rights enshrined in the Constitution. It reflects the way these rights are legally protected and regarded as essential. In other words, fundamental rights are human rights that have been given legal recognition by the state.[88]

Implicitly, one can assume that the intention was to not recognise rights in subsequent chapters (Economic, Social, Cultural rights and rights of minorities) as human rights and therefore the first article would not apply. Whilst this may seem true to outside reader that the first article and its naturalistic tenets pertains only to the second chapter of the Charter (Human Rights and Fundamental Freedoms), according to the Czech Constitutional Court it pertains to all rights enshrined in the Charter.[89] This results in illogical expansion of natural human rights to those of economic, cultural, and social without any justification why that should be held valid.

Given that, we can see how naturalistic philosophical theory anchored in the Charter is not consonant with the actual practice.

Conclusion

The essay analysed and presented two salient contemporary Human Rights theories with the aim to explicate why practice-dependent approach is more appealing in the

[86] Beitz, 'Human Rights and the Law of Peoples' (n 7). p. 198
[87] Serena Parekh, 'A Meaningful Place in the World: Hannah Arendt on the Nature of Human Rights' (2004) 3 Journal of Human Rights 41. p. 44
[88] BARTOŇ (n 85).
[89] I. ÚS 305/2000, 24. 10. 2000. *Czech Constitutional Court*

justification of Human Rights. Although with flaws it is, indeed, a view without the need of grounding Human Rights in dogmatic naturalistic way that relies on a abstract relative terms, such as ‘good life’, ‘well-being’ or ‘minimal provision’ and presents more pragmatic approach to the International law and justice. The exact human rights that we are supposed to defend may be easier to define if we focus on human-rights practise.

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