

https://dspace.org/

The discourses on the right to housing in Gauteng Province, 1994-2008.

Thomas, Christopher Gerald

2010-05-25T09:15:57Z
http://hdl.handle.net/10539/8141

Downloaded from a DSpace repository. https://dspace.org/

CHAPTER THREE

RIGHTS PHILOSOPHY, CONSTITUTIONS, AND STATES

3.1 Introduction

The centrality of rights philosophy in the foundation of the Constitution requires that the idea of rights be unpacked in terms of how they work and how they are linked to the behaviour of various social agents. The notion of rights did not emerge from a smooth gestation in Western political thought. Considerable ideological, political and scholarly disagreement rages about the notion of rights. Concern about the limitations of rights doctrine in effecting changes in South Africa (see wa Mutua 1997) grounds my intensive examination of the genesis and meaning of rights doctrine as it has been understood in a range of Western political philosophies. Through reinvigorating thinking about the idea of rights, arguably, it (the idea) may become a powerful tool in the continued struggle to transform the apartheid legacy. I try to make sense of and examine the impact of ideas on social relations, social processes and social action through the use of theories of ideology and theories of discourse.

The idea of rights is rooted in the political philosophies of Western societies, and operates in the ideological systems associated with the specific conditions of Western societies, namely, the emergence of class domination under capitalist social relations, and the formation of nation-state type institutions. Since the emergence of rights philosophy in modern western Europe, particularly under the doctrine called “natural rights”, different mainstream approaches to promoting the idea have developed, namely liberalism, utilitarianism, collectivism, and Marxism. Liberalism has been associated problematically with the struggle to realise one category of rights favouring capitalist social and economic arrangements. Particularly, Marxist positions are critical of the idea system’s

links with bourgeois domination, but I have scrutinised the traditions in a manner that examines their potential to support social and economic rights as part of a social transformation strategy. Consequently, I have presented the discussion in terms of: how the idea can be either broadened or vitiated in ways that may make them 'counter-hegemonic' to further the struggles of subordinated classes; how the notion of rights has influenced the shaping of constitutions in the modern era; and the positions taken in the debates on the obligations of states about the realisation of social citizenship rights.

3.2 Rights: a contested notion

Wesley Hohfeld (1966:28, 37), an American scholar of jurisprudence, argued the idea of rights has been recognised as one of the most "broad" and "indiscriminately used terms" and means more than basic dictionary definitions such as "that which one has legal claim to". In political theory, 'rights' are a central concept to understanding political behaviour and the formation of modern political systems. Contrastingly, sociological theories raise ontological scepticism "on historical and comparative grounds, about the possibility of the social existence of universalistic rights and obligations" (Turner 1993:489-490, 492). Besides criticism about the implausible ontological foundations that rights are something that exist in human's natural state and doubtful claims to the universality of rights, the idea also has been problematically linked to an individualistic creed, as well as ultimately to the idea of private property, mostly due to the influence of the western European philosophical tradition (Leary 1990:17-18; Turner 1993:499).

Certain debates in political philosophy on rights are explorations of what the idea means and what rights we really do have. A list of rights bequeathed to citizens are generally recognised in a country's constitution or Bill of Rights, although there is some controversy over what kinds of rights states should give more attention and protection to over others (Waldron 1993). Sociologist Bryan Turner

(1993:489) contends there are “limitations to the idea of citizenship” hence it must be supplemented by theories of rights, which are to be understood as “social claims for institutionalised protection”. These concerns are captured in that realm of rights often interchangeably called second generation, or social and economic, or social citizenship, or welfare rights.

The political thought cultivated in Ancient Greece is a frequent reference point in Western political philosophy and theory, however, the discourse affecting the development of the modern state has simultaneously constructed a range of individual rights that would be unrecognisable to that reference point; in effect, rights are persuasively argued to be socially and historically constructed (Walton 1984:121). Walton (1984:121) argues the idea of rights are a social and historical construction of the era of capitalist market relations in the West. Whatever their geographic, cultural or historical origins, the idea has become a useful instrument for promoting human dignity in the context of the development of nation-states, as well as within the international community. The promotion of rights by scholars and politicians from places such as western Europe and North America (one may add the people of European descent in Latin America, Australia and new Zealand too) has produced the situation where scholars, politicians, and a range of other activists outside of the abovementioned regions of the globe tend to uniformly refer to the latter group’s conceptualisation of rights as a “Western” idea and approach to values and notions of human dignity.

Some scholars argue the cultural norms, symbols and traditions of non-Western societies must be incorporated into the international human rights discourse otherwise the latter is seen as a global imbalance of power relations, it is ethnocentric, and an invasion on the sovereignty of non-Western societies (Jones & Stokke 2005:12). An apt case of western hegemony over the definition and enforcement of rights is the United States’ emphasis on first generation rights in contrast to socialist bloc societies’ emphasis on second generation rights. This is prominent in the United States’ criticism of the human rights record of the People’s Republic of China (PRC), particularly after the Tiananmen Square incident in 1989; the case shows how the discursive strategies of the US

media's discourse of universal human rights is used to polarise societies presenting one society as positive (the USA) and the essential difference of the 'Other', the PRC, as evil, negative (Yin 2007:80-1). The response of the PRC state controlled media, unfortunately for the spread of acceptable human rights practices, portrayed the US media's discourse as meddling in a sovereign nation's handling of its internal affairs, as attempts to subvert the government, as attempts by the US to extend its global economic and political dominance to ideological dominance too, and did not give other countries leeway to develop human rights in step with the social and cultural conditions prevailing there (Yin 2007:85-8). Yin (2007:89) argues this case shows how discourse is hierarchical: the powerful declare their ideas as universal truth and tell the less powerful what to know and do; they fix the meaning and dismiss contestation of their definition or attempts by the less powerful to re-open discussion or make universal claims.

African human rights scholars (An-Na`im & Deng 1990:xi-xiii, 2-3) argue the idea of rights should not be seen as something peculiar to and enjoying a gestation solely in western European societies and cultures, then later extended to non-Western third world countries. These scholars noted that some governments and elites from developing countries reject the external imposition of international human rights standards because the conceptualisation of rights is dominated by "Westerners" and they embody "Western standards". They argue all cultural traditions have common fundamental values similar to the basis of the mainstream idea of human rights being claims that every person is entitled to claim by virtue of their being human. All cultural traditions have values of "human dignity" closely related to the idea of "human rights". If Western scholars and governments desire to promote a rights culture internationally as universal claims, then it appears they need to be more sensitive to a diversity of cultural values and traditions supporting the attainment of human dignity, which permits a cross-cultural enrichment of the conceptualisation and promotion of human rights. An-Na`im and Deng (1990:3) also note Western scholars have responded and accept that the values and moral standards underlying human dignity may be universally shared, however, the Western scholars assert there is a distinction. The idea of specific human rights being enforceable against the state

and having specific legal principles are a creation of “modern Europe”, and should not be confused with concepts of “human dignity” prevalent in the non-Western countries. Nevertheless, the mutually reinforcing relationship between the two can enrich the conceptualisation and promotion of human rights.

Issa Shivji (1989:23) argues that in Western political thought rights are linked to individuals; Western organised society is made up of individuals and individuals are the primary holders of rights. He presents Africa in a generalised and essentialist manner, focusing on African traditional society, which is based on the collective rather than on individuals, making individual rights foreign to African ethnophilosophy, as a way of contrasting Africa and the West. The West is also contrasted with African societies (and other developing countries as well as socialist countries) in how the different generations of rights are prioritised. The West prioritises first generation civil and political rights, while second generation rights are prioritised by socialists and by many Africans too:

> “African scholars and politicians not only stress the priority of social and economic rights but also seek to justify curtailment of civil and political rights, as traditionally understood, in the interest of economic development.” (Shivji 1989:26)

Other African scholars dismiss this prioritisation of the one generation over the other in the African context because it only legitimates authoritarian rule, consequently, they argue for the interdependence of the different generations of rights (Shivji 1989:26-7). Pertinent to the emphasis of some African states on second generation rights are two points made in the Encyclopedia Britannica’s position on this debate. First, second generation rights have become a major international priority because of the ascendance of the ‘Third World’ on the global stage and the “revolution of rising expectations” of the people of this part of the world. Second, the reality is that recognition and enforcement of rights across societies is not an either-or situation (either these rights or those rights), but a more-or less situation, where different laws and policies across societies emphasise either more of one generation and less of another generation.

3.3 The genesis of Rights philosophy

The broader notion of human rights is argued to date back to ancient Greece and Rome (Leary 1990:17). Richard Tuck (1979), however, doubts the ancient Romans thought of rights in the subjective terms as understood today ('what an individual has'); the roots of the Latin legal term *ius* appears to refer to the objective notion of "that which is right". He feels the modern conception of rights grew from ideas in two later periods. First, ideas current about rights over property during the European middle ages up to the early sixteenth century, only to be challenged by Renaissance era jurisprudence, for instance, legal philosophies which sought to construct laws aimed at co-operative social action. Then, in the second period, it flourished in the seventeenth century, with the latter theories of rights influencing the theories of democracy which flourished in the nineteenth century era of industrial capitalism (Tuck 1979:2,7-8, 32-57). I follow John Walton's (1985:121) argument and emphasise the contributions emerging in Europe under the specific conditions since about the seventeenth century --- the development of capitalist market relations and modern states. A dominant precursor to rights philosophy in Western political thought on relations between the state and citizens was the concept of "natural law" associated with St Thomas Aquinas. This tradition did not conceive of any notion of rights, but elaborated on the moral duties of citizens and rulers. Barry (1989:225) argues that "[I]t is only with the secularisation of natural law that we find the emergence of the potentially revolutionary doctrine of the rights of man". After enjoying popularisation through the seventeenth century, by the nineteenth century the now mainstream natural rights doctrine had to contend with the emerging utilitarian, collectivistic or communitarian, and Marxist critiques of the doctrine.

The doctrine of natural rights emphasised those individual and property rights associated with what TH Marshall called first generation civil and political rights. Since the expansion of the notion of rights to include second generation and then third generation rights, there can be much confusion in debates when the umbrella term "human rights", which has been used more commonly since around the middle of the twentieth century, is used to collectively refer to all

generations of rights. Barry (1989:224, 226-227, 236-237) notes the utilitarian, collectivistic, and Marxist systems of western political philosophy do not accept a notion of human rights. A common thread among collectivistic, utilitarian, and Marxist opponents of the doctrine of natural rights is that it is far too individualistic, ahistorical, and a hindrance to social reform. The traditions in Western political philosophy all have seminal figures, key texts, and mainstream dominant interpretations, as well as a potential to evolve given new challenges and opportunities (Donnelly 1990:51). Although enjoying currency for some four hundred years, the notion of rights experienced a resurgence of interest and reconceptualisation from the 1970s (Avineri & de-Shalit 1992:1), but the new developments are still identifiable with the broad framework of libertarian, communitarian, utilitarian, and Marxist approaches.

3.3.1 Rights: Ideology or discourse?

The notion of ideology and the intense analysis thereof is probably associated with the (European) Enlightenment ideas of demystifying the world, and has received considerable attention through Marxist approaches which emphasise ideology either in relation to sectional interests or in opposition to science; both approaches contain a notion of the distortion of reality, an obfuscating “false consciousness” (Giddens 1979:165-8). I focus on the former types of emphasis, particularly because a dominant approach among left wing movements is to see the notion of rights as bourgeois (Hunt 1990:326) and with little potential in the struggles to change the circumstances of subordinate classes.

Thompson (1984:73) says theories of ideology “examine the ways in which ‘meaning’ or ‘ideas’ affect the conceptions or activities of the individuals and groups which make up the social world”. Ideology should be studied in terms of how meaning or signification serves to sustain relations of domination and this is similar to many Marxist approaches (Thompson 1984:131). Marxist approaches to “forms of consciousness”, ideas and ideology emphasise these are determined by material conditions, or, in other words, the production of ideas

is shaped by humans's collective activities in producing their subsistence; the ideas or doctrines that people espouse are not autonomous but are the product of particular social and historical conditions (Thompson 1990:35-7). Marxists tend to discuss ideas in relation to 'ideology' in a restricted and negative sense in terms of how they obscure and "sustain relations of domination" in the collective activity of producing human subsistence where class domination and exploitation emerges; they protect the interests of dominant classes; ideas can be a "false consciousness" about these material conditions and an illusion about class relations; and ideology restricts what may or may not be discussed (Thompson 1984:1-5, 76-7, 81, 85; Thompson 1990:37-8).

There is, however, a rich variety of Marxist approaches to ideology. Giddens (1979:179) translates Althusser's argument about ideology as a functional necessity in any type of society, it is not necessarily a creation of the bourgeoisie, and ideologies can change together with processes of societal development. Stuart Hall (1986) argues Antonio Gramsci did not see the struggle of subordinate classes as entailing the replacement of whole idea systems, instead, they are reconstructed to serve their struggle. Slavoj Žižek (1989) integrates Marxism and psychoanalysis in order to move beyond the classical nineteenth century notion of ideology as a 'false consciousness', that people are naive and unaware of what they are doing, to a present day cynical reasoning about ideological universals (ideas such as 'rights', 'freedom', 'equality'): people are aware certain universal ideas are illusionary and hide forms of domination and exploitation, but still live their lives in accordance with such ideas.

Abovementioned aspects of ideology as restricting what may or may not be discussed bears a resemblance to Foucault's (1977:199) notion of discursive practices where there is a prescription about what can be said about an object. However, Foucault (1988:118) was reluctant to use the term ideology because it gave a homogenised representation of domination. In his notion of discourse, of the power relations involved in the production of knowledge, of power relations involved in determining what counts as science and knowledge, there is the possibility of resisting power through an "insurrection of subjugated knowledges"

(Foucault 1994:41). He argues there is a “polyvalence” of discourse; it is not a social reality where there is simply one accepted or dominant discourse, and other excluded or dominated discourses (Foucault 2005:234). A world of discourse is a complex and unstable process. Resistance to power and domination must see that, in a manner of speaking, “discourse is the power to be seized”; Tim Dant’s (1991:131) interpretation of Foucault on this is he meant that it is a practice of political activists which can transform power relations in and through the production of knowledge. A particular régime governs what statements may be said and how issues may be viewed; the modification of that régime effects a transformation in power relations (Foucault 1988:112-3, 131). Foucault argued this modification can be done through interventions in the production of knowledge; discourse is a type of political practice, it is a form of intervention that is part of a struggle where knowledge is a means of practicising power and must be challenged by new knowledge (Dant 1991:129-131; Foucault 1988:109). Alan Hunt (1990:313, 315) argues Foucault’s notion of “insurrection of subjugated knowledges” bears some resemblance to Gramsci’s notion of a counter-hegemonic strategy in the struggles of subordinate classes: it takes existing ideas and reworks or refashions them. This means the discourse of rights can be broadened to accentuate social or collective rights. I revisit this theme later in this chapter.

In the following section, I discuss different approaches to the idea of rights. The fact that the idea of rights can be criticised and elaborated on by different approaches influences my view that there is a duality about the notion of rights --- a duality in the sense that rights can be both ideology and discourse; an ontology of rights can be both a false consciousness about social reality, and it can be a language which empowers subordinate classes. While the language of rights can be protective of dominant class interests in capitalist societies, this language can still advance the struggles of subordinated classes. For instance, in the discourse of ‘development’ and debates about strategies for the material improvement of subordinate classes, we can see shifts involving a significant integration of the discourse of rights, particularly socio-economic rights; this is an important advance in a world where the ideas of adopting neo-liberal

capitalist economic policies have become dominant (Jones & Stokke 2005:1-25). Or, in other instances, housing may be a need or demand of the homeless, but they can resort to rights discourse to legitimate their demands and use litigation strategies to pursue test cases (Hunt 1990:317-9), which, hopefully, successfully establish their claim to that right.

Thompson (1990:61-7) says ideology operates, firstly, in ways which "legitimate" a prevailing system of authority and domination. Secondly, ideologies operate to "dissimulate"; they conceal how relations of domination serve the interests of some groups at the expense of others. Thirdly, ideologies operate through "reification", thus representing a prevailing state of affairs as permanent and natural. The Marxist tradition has also contrasted ideology with "science" as an alternative form of "truth", leaving space for Marxist approaches to be challenged by discourse analysis (Burton & Carlen 1979:19, 21). It may be justifiable to ask whether this has limited Marxist political or socialist strategies. Marxist approaches (Marx 1978, 1978a), as it will be seen later in this chapter, reject the ontological status of rights; rights are seen as a social and historical construct. But the basis of my view of the duality of the notion of rights is that it is a core issue around which the poor engage in daily struggles and is the language of that struggle. Jessop (1990:232) observes that Marxists such as Nicos Poulantzas were uncomfortable with Leninist notions of 'class instinct' as a way of explaining resistance and acknowledged that the struggles of subordinate classes are linked to ideology or idea systems of the bourgeoisie.

Recent work on language, the "linguistic turn", and the associated concepts of discourse and discourse analysis has given a new life to strategies to address the connections between power, interests, ideas, language, and the possibilities for social change, effectively giving discourse analysis a "sociological turn" (Thompson 1984:99, 133-8). In addition, it appears that, Marxists who have latched onto the concept of discourse in their analyses and political strategies, have shifted from a style of revolutionary politics and tactics critical of dominant classes and dominant ideologies to left reformism (Eagleton 1991:202-3, 205). Trevor Purvis and Alan Hunt (1993:474) say although "ideology" and "discourse"

are two distinguishable concepts, they refer to the same aspect of social life --- "the idea that human individuals participate in forms of understanding, comprehension or consciousness of the relations and activities in which they are involved...". It may be useful to integrate their respective insights, and I argue the notion of rights offers the possibility of integrating theories of ideology and the analysis of discourses, similar to Thompson's (1984:146) suggestion:

> "Neither the theorists of ideology nor the analysts of discourse have made a sustained and satisfactory attempt to integrate the study of ideology with the analysis of language, failing to pursue (or failing to perceive) the fundamental continuity of these concerns."

Purvis & Hunt (1993:476) distinguish between ideology and discourse thus:

> "Ideology thus implies the existence of some link between 'interests' and 'forms of consciousness'."

while,

> "Discourse ... focuses attention on the terms of engagement within social relations by insisting that all social relations are lived and comprehended by their participants in terms of specific linguistic or semiotic vehicles that organize their thinking, understanding and experiencing."

What connects the two concepts, they add, is:

> "If 'discourse' and 'ideology' both figure in accounts of the general field of social action mediated through communicative practices, then 'discourse' focuses upon the *internal* features of those practices, in particular their linguistic and semiotic dimensions. On the other hand, 'ideology' directs attention towards the *external* aspects of focusing on the way in which lived experience is connected to notions of interest and position that are in principle distinguishable from lived experience."

I argue the notion of ideology, supplemented by that of discourse, may be useful

in a critical reflection on the usage and practices associated with the idea of rights and to examine how subordinate groups might challenge the statement of their rights and how it contributes to sustaining relations of domination:

> "Thus the critical project of a theory of ideology is concerned to explain how the forms of consciousness generated by the lived experience of subordinate classes and social groups facilitate the reproduction of social relations and thus impede such classes and groups from developing forms of consciousness that reveal the nature of their subordination." (Purvis & Hunt 1993:478)

According to Marxists, rights have no ontological status, and they are ideas which conceal and protect ruling class interests, specifically, the property interests of the ruling class or bourgeoisie in the era of modern industrial capitalism. Tom Campbell (1983:1, 3) says Marxists and revolutionary socialists see the notion of rights as "incurably bourgeois"; they played an important role in the transition from the constraints of feudal society to capitalism, they are skewed or tied to the individualism of liberal capitalism; and, the notion has no role in a collectivist socialist society founded on social ownership of the means of production, of nature's resources, and the distribution of socially produced goods in an egalitarian manner. But the efforts of reformist socialist strategies to expand the meaning of rights requires that the struggles of subordinate classes for a redistribution of society's products give more attention to reshape the discourse of rights away from the individualist bias that favours the institutions of liberal democratic capitalism.

In the contemporary pragmatic approaches to rights discussed below, David Beetham (1995:59-60) argues the idea of rights has resonance among the poor and can be used to further their struggles. Neo-Marxists have reconsidered the classical Marxist ontological rejection of rights (discussed in section 3.3.5 below), they see the idea as a battle cry of subordinate classes (Tay 1987:104-6). The language of rights shapes certain meaning and subjectivities about the circumstances in which the poor and subordinated classes live. Foucault's (1988:118) position on avoiding the notion of ideology and its representation of

subjects in a homogenised fashion, proposed the notion of discourse since it captured the capacity of humans to resist power bears significance to this debate about how to use the language of rights in reformist struggles. To see rights simultaneously as discourse implies rights are an object of knowledge, statements are made about the truth of that object, processes about their nature exclude subordinate groups from challenging that truth. Subordinate classes' struggles must include strategies for an alternative discourse; Purvis and Hunt (1993:483-4) speak of this as a Gramscian counter-hegemonic project. Gramsci saw class domination as being achieved through coercion as well as consent, and, the struggle for liberation must challenge dominant beliefs, values, law, myths and so on, hence the counter-hegemonic world-view of the subordinated classes (Boggs 1976:17). Counter-hegemonic projects of subordinate classes entail developing concepts and ideological weapons in ways which challenge the prevailing intellectual and moral order:

> "But from the moment in which a subaltern group becomes really autonomous and hegemonic, thus bringing into being a new form of State, we experience the concrete birth of a need to construct a new intellectual and moral order, that is, a new type of society, and hence the need to develop more universal concepts and more refined and decisive ideological weapons." (Gramsci 1971:388)

Subordinate classes must challenge those "rarefied speaking subjects" who dominate the discourse on the nature of rights. Intellectuals, as "rarefied speaking subjects", complement the hegemony of dominant classes by defining the nature of rights. Of these intellectuals Gramsci says:

> "The intellectuals are the dominant group's 'deputies' exercising the subaltern functions of social hegemony and political government...."
>
> "The 'spontaneous' consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is 'historically' caused by the prestige (and consequent confidence) which the dominant

group enjoys because of its position and function in the world of production." (Gramsci 1971:12)

To achieve this "counter-hegemony" my research must ask whether the ideas and practices about rights of the major interpreters, and social agents and institutions dealing with their realisation, are flexible.

3.3.2 The mainstream Natural Rights doctrine

This tradition is associated with the urban bourgeoisie's political revolutions in western Europe since the sixteenth century against the aristocracy's ascribed status in feudal society, their privileges, as well as the resulting inequality, and spurred on in its high period in the late seventeenth and early eighteenth centuries by a broader system of political thought called "liberalism". This revolutionary criticism of the centralised absolute power of feudal authorities, later attracted various individual contributions to the liberal doctrine which gave birth to the development of the "rights-based state". The organisation of the latter is characterised by: the separation of the powers of law-making, the subordination of the executive wing of government to the law-making wing, local governments with some degree of autonomy from the central government, and the independence of the judicial bodies and the accountability of parliament to the judiciary (Bobbio1990:13).

Thomas Hobbes's ideas are foundational in the tradition of rights thinking and analysis in the modern era (Freeden 1991:12). However, there may be some tension in his conceptualisation of the original condition or state of humans. In that original state individuals enjoyed liberty, hence his argument that modern political institutions must not invade this liberty and should develop in order to protect this liberty. Contrarily, his defence of the need for a modern state to protect men from their internecine selfish pursuits, which produces a "poor, nasty, brutish and short" existence (Hobbes 1968:186), has been used in support of totalitarian systems of government or the total and arbitrary rule of

government over individuals (Kahl 1995). Hobbes (1968:189) conceptualises "man" in his "state of nature" as having every right to do whatever is needed for his survival. Human nature and humans' natural rights to pursue self-interest results in anarchy, but these rights are best secured by a sovereign authority, a state (Held 1984:33-7), contracted by people to represent their respective rights and to bring peace to the constant warring among humans pursuing their self-interests, as well as for their mutual defence (Hobbes 1968:189-93; 223-39).

John Locke was, nevertheless, distrustful of the state and emphasised it must rule by consent; people still have supreme power over the state to remove or alter the legislative body if it acts in ways contrary to what it has been entrusted to do (Locke 1955:124). Later, concerns with representative government, also understood as democracy, extended the appellation to "liberal democracy". Chantal Mouffe (2005:41-2) argues this has subsequently produced a confusing conflation, particularly among communitarian critics of liberalism, because these are different discourses which have been articulated together in some instances and the linkages between political liberalism and economic liberalism are distortedly presented as some unified project in the unfolding of capitalist relations of production. She adds, communitarians conflate individual liberalism and political liberalism, subsequently denouncing rights rhetoric, whereas they must discern political liberalism entails institutions making up the "law state" (such as: defence of rights, recognition of pluralism, limitation of the role of the state, separation of powers of the state) .

The tradition emphasises that the individual is recognised as having certain private interests and rights to realising these, for instance, rights to life, liberty, and property, and individuals behave rationally in the pursuit of these. Hence these rights should be defended from the state's or other social agent's action, which diminish the realisation of such rights (Barry 1989:226). This is the basis of their characterisation as "negative", or "freedom from" state constraints on human activity --- state power is to be limited, the state must not act in a way that violates these rights that humans have been endowed with in a "state of nature", and that precede society and the state (Fotopoulos 1991).

The *Declaration of Rights* by the people of Virginia on the foundation of their government in 1776, a precursor to the *Declaration of Independence* of the 4 July in 1776, which the state of Virginia later signed along with another twelve British colonies in North America, famously states this creed that people are by nature equally free and independent with inherent rights, and voluntarily entered into social arrangements must not deprive them of the enjoyment of life, liberty, happiness and possessing property (Kamenka 1978:1-2). The *Declaration of Independence* added to these rights the right to oppose any government not protecting these natural rights:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable 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 governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, ..." (Lewis 2003:334)

Thirteen years later, the French *Declaration of the Rights of Man and of Citizens* of 1789 similarly recognised the idea of natural rights. Article 2 of the Declaration was slightly amended in 1791, and Jeremy Bentham, a British political theorist living around the time of the French revolution and critic of the idea of natural rights, offered the following English translation of the document:

> "The end in view of every political association is the preservation of the natural and imprescriptable rights of man. These rights are liberty, property, security, and resistance to oppression." (Bentham 1943:500)

A typical representation of liberalism runs as follows:

> "the liberal conception of human rights rests on a definition of a person as "an isolated, autonomous individual ... with inherent rights in the domain of the civil and the political" (Adamantia Pollis cited in Donnelly 1990:31)

and,

> "individual self-aggrandizement, defined as power through ownership of material things, [is] the essence of man [and] private property ... a fundamental inalienable human right" (Adamantia Pollis cited in Donnelly 1990:31)

thus, earning liberalism the "possessive individualism" appellation (Donnelly 1990:39).

Liberalism initially spurred on revolutions for the recognition of civil and political rights and against the social and economic inequality rooted in feudal social relations, and passed down history to being caught in the contemporary conservative defence of private property in capitalist liberal democracies. Defenders of the modern liberal state are seen as conservative because they argue there should be no limits to the rights to accumulate private property and a primary duty of such a state is to guarantee this freedom, otherwise any undue state interference in the enjoyment of this right would make the state an oppressive organisation. This may be a distorted view of the modern liberal state and possibly demonstrates the import of Mouffe's point that the different political and economic liberalism discourses have been conflated.

Donnelly (1990:31-4) argues that because most critics of liberalism emphasise a minimalist conception of the scope of liberalist political philosophy, they interpret inaccurately a tradition embedded with a radical social vision from its inception. Critics emphasise liberalism's affinity to individualism and private property ignoring the radical or social democratic dimensions to the philosophy. Consequently, liberalism's popularity may have suffered due to the widespread emphasis on the minimalist conception of rights. This is despite the fact that in Locke's canonical seventeenth century contribution to the Natural Rights and liberal tradition, *Two treatises of government*, in today's terminology of political orientations, a radical "social democratic" current runs through Locke's argument and it is at odds with the dominant minimalist interpretation of his ideas:

> "To use twentieth-century vocabulary, all human beings are born with natural or human rights to freedom and equality. In the state

> of nature, however, the enjoyment of these rights is insecure. Society and the state are devices to guarantee a more secure enjoyment of human rights, and a government is legitimate (only) to the extent that it protects human rights through positive law and practice. This threefold commitment to equality, autonomy, and natural rights - rather than the conventional conception's emphasis on radical individualism, private property, and negative civil and political rights - is, I will argue, the essence of the liberal approach to human rights, from Locke to our own day." (Donnelly 1990:34)

The radical current in liberalism maintains that:

> "...individualism is moderated by social values, property rights are limited rather than absolute, and civil and political rights are coupled with economic and social rights." Donnelly (1990:33)

Apparently, Locke was cognisant of the threat that the accumulation of property and wealth by individuals meant to the lives of others, particularly in conditions of scarcity, and was convinced that "remedial political action" would be necessary, suggesting that he was in defence of rights in today's terms categorised as social and economic rights, thus influencing the radical currents' defence of the welfare state (Donnelly 1990:42-3).

The liberal tradition is much broader than merely the defence of civil and political rights. Contemporary analysis (Donnelly 1990:49-52, 54) of Locke's defence of private property must be seen as a defence of an economic or social right. Since the fundamental natural law is the preservation of "all" humankind it requires the defence of a broader scope of social and economic rights like health, food, and housing to serve that end. So liberals cannot restrict their understanding of liberty and equality to the civil and political realm of rights, and, for a government to defend the property of "all", it must protect them from the threat of scarcity and deprivation. The core values of liberalism are thus wide-open to sensible debate and reconsideration, and arguing along the line of "human rights" can help bring about political changes as well as economic changes.

3.3.3 The Utilitarian critique

The utilitarian doctrine was a response to the effects of urbanisation, the breakdown of rural communal life, the problem of moral diversity and secularisation which accompanied the transition to industrial capitalism in western Europe. Custom, tradition, christian values, and natural law were all eroded by these changes. In this context of social change, utilitarians were concerned with devising a new moral base for society, with achieving principled moral authority and decision-making (Plant 1991:139-40).

Nevertheless, core utilitarian protagonists like Jeremy Bentham and John Stuart Mill defended "liberal democratic" tenets of the organisation of government, as well as other social arrangements such as free participation in economic transactions, and the exchange of goods and labour through markets (Held 1984:42-3). Utilitarians were ambiguous in their rejection of the logical structure of the natural rights doctrine. Bentham rejected the notion, but Mill tried to accommodate the notion in a utilitarian doctrine (Barry 1989:225; Plant 1991:162-8). Bentham critically examined the articles of the *Declarations of Rights* of the French Revolution which asserted the idea of natural rights. He concluded the idea of natural rights existing prior to any form of government was full of errors and dangerous rhetorical "nonsense upon stilts":

> "That there are such things as rights anterior to the establishment of governments: for natural, as applied to rights, if it mean anything, is meant to stand in opposition to *legal* - to such rights as are acknowledged to owe their existence to government, and are consequently posterior in their date to the establishment of government." (Bentham 1943:500)

Bentham's position was that humans always live with some type of socio-political institutions. He accepted rights as something defined by these institutions, or government as it is termed in the modern sense, only after humans have developed the institution of government.

The core of utilitarian political thought is the view that political and social decisions must be made to the effect that they secure the optimum happiness of the majority or the "greatest social welfare", even though individuals were free to engage in the pursuit of their own interests through economic competition and free exchange (Held 1984:43; Plant 1991:140). Maximising the welfare of the majority means the greatest number of people are given what they want. Government policies then should ensure the greatest amount of satisfaction of wants. Mills' statement of the utilitarian doctrine was to defend it from its critics' view of it as a hedonistic pursuit of individual pleasure, whereas it was about embracing membership of a collective, and setting the welfare of the majority as a moral standard for social and political arrangements:

> "... utility would enjoin, first, that laws and social arrangements should place the happiness, as ... the interests of every individual as nearly as possible in harmony with the interest of the whole; and secondly, that education and opinion, which have so vast a power over human character, should so use that power as to establish in the mind of every individual an indissoluble association between his own happiness and the good of the whole; ...." (Mills 1910:16)

It is apparent that the utilitarian school favoured some form of curtailment of the liberal rights prioritised in the mainstream Natural Rights doctrine. Mill was in favour of regulation and minimalist interference in the lives of individuals, the object of exercising power over a member of the community against their will was to prevent harm to others (Held 1984:45)

Bentham and Mill accepted the idea of the pursuit of individual interests and institutions such as the free vote and the free market, thus to some measure transforming the dominant liberal philosophy because they felt the "common good" could still be attained in liberal democracy with minimal state interference:

> "Tied to the advocacy of a minimal state whose scope and power was to be strictly limited, there was strong commitment in fact to

> certain types of state intervention, for instance, the curtailment of the behaviour of the disobedient, whether they be individuals, groups or classes. Those who challenge the security of property or the market undermine the realization of the public good." (Held 1984:43-4)

Amartya Sen's (1996) contemporary defence of utilitarian thought argues economic policymaking in welfare states has been influenced predominantly by utilitarianists like Bentham's thinking (among others) about the rejection of the idea of natural rights, but the approach has recently had to rethink that position and accommodate the notion of rights. Sen discerns a utilitarian approach in Robert Nozick's arguments for the priority of rights over "common good" considerations. This approach defends liberal ideas of the individual being left to pursue their own interests and does not attach much significance to the consequences of this arrangement. Nozick (1983:476-7), however, is concerned that the state, to be seen as legitimate and justifiable, should be a minimalist one in how it protects the rights of citizens and effects redistribution in society. Sen favours the utilitarian approach discernible in John Rawls' argument that there are different types of rights, but they have different levels of relative importance in different circumstances. In Rawls' approach it appears that "the need to avoid social misery and economic hardship" (social citizenship rights) take priority over the nevertheless accepted importance of fulfilling other types of rights (liberty rights). Rawls' (1983:479-80, 486-7) conception of the hypothetical origins of a social contract binding people to the authority of a state contends this arose to achieve a sense of justice as fairness and to preserve certain social and economic conditions; one branch of the state protects equal enjoyment of basic individual liberties, the transfer branch of the state is concerned with maintaining a certain level of well being through regulating markets, prices, and wages, and a distribution branch of the state attempts to achieve approximate justice through taxation and regulating property rights.

3.3.4 The collectivistic critique

The collectivistic or communitarian critics share similarities with Marxist criticism

of the natural rights doctrine, but are a broader spectrum of viewpoints. They reject the natural rights doctrine's mistaken conceptualisation of humans as rational and see it is "excessively individualistic and ahistorical" (Avineri & De-Shalit 1992:2-3; Barry 1989:236). Collectivists believe the emphasis on individualism cannot achieve a true community and argue it also neglects an alternative view of a good life in which the state should intervene to address an unjust distribution of goods. Collectivists are critical of the natural rights doctrine because it provides ideological justification for existing property rights, and insist the notion of human rights must incorporate a welfare element (Barry 1989:235). Waldron (1993:582) summarises the thrust of communitarian thought thus:

> "... the cardinal point about human society is that people make lives on terms provided by their culture or the community around them. That each lives a life on her own terms is, on that approach, a myth - and a pernicious myth if it encourages people to neglect or undermine the communal structures that in fact make human life bearable"

Contemporary defences of the individualist natural rights doctrine have accepted the communitarian critique and shifted their argument, claiming that the notion of rights may still be useful towards achieving the communitarian goals of community (Avineri & De-Shalit 1992:8). It may be by constant criticism of the individualist creed of the natural rights doctrine and exaltation of achieving different forms of community --- for instance, the state pushes policies convincingly aimed at outcomes like building social solidarity whether in the name of national unity or minimising race and class inequality, that a counter-hegemonic rights discourse could be constructed. Further usefulness of the approach in shaping a counter-hegemonic discourse lays in the fact that the politics of communtarianism entails creating a language and a practice of a politics of the common good; although it also needs to be borne in mind that this may have its problems in a context of a multilinguistic society and it has to deal with criticisms about whether the state or schools should promote one particular conception of the good (Kymlicka 1990:230-2).

5.2.5 The Marxist critique

The Marxist tradition is critical of the liberal starting point of the individual, their naturally endowed rights and their relation to the state. The thrust of its critique is, first, rejection of the the ahistorical notion of rights, and, second, rejection of the absolute nature of the statement of rights. The liberalist analysis of the modern state is criticised as ahistorical. Marx's basic approach to understanding the emergence of idea systems, and political and legal institutions is that they must be understood as products of particular economic and social circumstances and the historical period in which they gain hold (Barry 1989:225); they do not develop independently of the form of development of the material base of society, the prevailing type of forces of production and social relations they allow. Marx's classic statement on idea systems in *The German Ideology*, and repeated in other works, gave more attention to a structural analysis of capitalist society. It runs thus:

> "The production of ideas, of conceptions, of consciousness, is at first directly interwoven with the material activity and the material intercourse of men, the language of real life. Conceiving, thinking, the mental intercourse of men, appear at this stage as the direct efflux of their material behaviour. The same applies to mental production as expressed in the language of politics, laws, morality, religion, metaphysics, etc., of a people. Men are the producers of their conceptions, ideas, etc. — real, active men, as they are conditioned by a definite development of their productive forces and of the intercourse corresponding to these, up to its furthest forms. ..."
>
> "Morality, religion, metaphysics, all the rest of ideology and their corresponding forms of consciousness, thus no longer retain their semblance of independence. They have no history, no development; but men developing their material production and their material intercourse, alter, along with their real existence,

> their thinking and the products of their thinking." (Marx 1978a:154-5)

The thrust of Marx's approach is that the idea system of 'rights' must be understood to emerge along with the bourgeoisie's preferred mode of organising production and social relations. Marx's *On the Jewish Question* offers a classic statement on the notion of rights specifically. He argues religious systems and idea systems emerge at "stages in the development of the human mind"; political emancipation in the bourgeois democratic form of state does not require recourse to religious ideas to be justified, but expounds on ideas that conceive of an egoistic, abstract "Man" as separate from communities. He noted several documents of states (that is, different version of the French's *The Declaration of the Rights of Man and of the Citizen* and of American states prior to their union) in the modern bourgeois era conceptualise an abstract man by nature bearing inalienable "rights" to civil and political liberty, to property, to religious belief, and to equality (Marx 1978:28, 34, 37, 39, 40-3). The crux of his approach to analysing dominant idea systems is that they are also synchronous with the dominance of a particular class, as Marx says in another classic statement:

> "The ideas of the ruling class are in every epoch the ruling ideas: i.e., the class which is the ruling material force of society, is at the same time its ruling intellectual force. The class which has the means of material production at its disposal, has control at the same time over the means of mental production, so that thereby, generally speaking, the ideas of those who lack the means of mental production are subject to it." (Marx 1978a:172)

Across most of Europe, the bourgeoisie's ideas made them appear as revolutionaries against the privilege and power of the feudal aristocracy because they did not only represent themselves as a class, but claimed to represent the masses (Marx 1978a:174); they universalised one of their main weapons in that struggle, the idea of rights. However, it can be argued that the above statement is a one-sided view about the bourgeoisie's dominance or hegemony in analysing and giving meaning to ideas and connected practices. Marxist

revolutionaries such as Antonio Gramsci (1971:12; see also Boggs 1976:17) argue that subordinate classes may engage the dominant ideas in ways that transform their meaning and connected practices to further their interests.

Contemporary elaborations (Seleoane 2001:16, 22) of Marx add that his conceptualisation claims the theory of natural rights coincided with the European bourgeoisie's emergence and really conceals their interests as owners and controllers of the means of production, but the poor lack the means to enforce rights. Kymlicka (1990:163) notes that Marx rejected the notion of the right to equality because this ideal cannot be lived out in capitalist society. Private ownership of the means of production is the basis of material inequalities and injustice in society; this is the basis of class inequality in society and ideas and policies around redistribution of some income from the rich owners of the means of production to the poor still leave intact the source of inequality, the private ownership of the means of production. The socialised control of the means of production overcomes this inequality and injustice (Kymlicka 1990:160-1). Rights are seen as an expression of individualistic bourgeois capitalist society and limits the freedom of others; there would be no place for them in the future communist society where production is based on social co-operation and not on individual appropriation (Barry 1989:241).

Nevertheless, an ambivalence about rights doctrine permeates the Marxist tradition. For instance, in support of anti-colonial struggles, Marxists called upon the doctrine of the "rights of man" (Barry 1989:238), but Marxists remain critical of the individualism inherent in the mainstream rights tradition and its commitment to private property. Marxists acknowledge the language of rights may be useful "battle cries" in the struggle for social change, but the "bourgeois" civil and political rights were only partially liberating in humankind's struggle for freedom while private property rights remained, and must be complemented with an economic and social content (Tay 1987:104-6).

Whatever the Soviet Union's designation as a variant of socialist society (see Bahro 1977, Binns 1975, Kelly 1985, Mandel 1978), it pioneered by including

social and economic rights, as well as first generation liberal rights, in its 1936 constitution (Barry 1989:239); the right to housing was added to the 1977 constitution. Whether these rights were respected in practice, and how human rights, in general, were eroded in Soviet bloc countries, is an important issue in the history of human rights abuses under an authoritarian regime, and perhaps had an important contributory role in mobilising for a democratic transition, but is not an issue my thesis will digress on. Soviet intellectuals (see Kudryavtsev 1986) argued it is erroneous to believe that the socialist conception of human rights prioritises economic rights, whereas in the development of their constitutions of 1918, 1936, and 1977, the interrelationship between the different rights and their respective development unfolded as economic, political and cultural conditions in their society changed. The place of rights in socialist reconstruction of society is to see them as tied to duties in a social collective:

> "The law, by giving legal form to rights, freedoms and duties, regulates relations between state and citizen, and their reciprocal rights and duties. It is difficult to accept the theory that man can acquire freedom only outside society and the state. It would, we think, be more correct to say that an individual acquires all his rights and freedoms through being inseparably linked with society; for the state is required to sanction, guarantee, safeguard and protect those rights and freedoms." (Kudryavtsev 1986:87)

In rights philosophy and debates on the institutional arrangements to best realise rights, the state emerges as a central role player towards that end. The Marxist tradition is also ambivalent in its analysis of the state. One approach sees the state as an instrument of the economically dominant class, and another approach sees the state as relatively autonomous of the economically dominant class (Held 1984:54-6), hence, there is the potential for a reformist socialist strategy based around civil society movements engaging a democratic constitutional state on one of the core ideas it claims to be a protector of. However, Callinicos (1984) says Marxism tends to minimise the significance of rights and sees the state as a coercive organisation which manages but cannot eliminate the class conflict in capitalist society; politics is really about a power

struggle by the modern wage labour proletariat to end their exploitation and misery and to enjoy the plentiful products that advanced capitalist economies make possible against the greed of the capitalist class whose control over the distribution of that product is protected by private property arrangements; in the communist society which is a possible outcome of this struggle, there will be no such class conflict nor will a state exist.

Marxists are divided into two overarching approaches over whether socialism is to be espoused as a series of values or morals, or whether socialism is a scientific method which reveals that the material conditions exist to make possible a necessarily revolutionary reorganisation of new social relations first and, from these new material conditions, a new socialist psychology is possible (Collier 1981). For instance, can the solidaristic and collectivistic values of traditional societies in Africa (see An-Na`im & Deng 1990, and Shivji 1989) be used as some moral force that can prompt governments to formulate policies and act in ways to eliminate poverty and inequality. In the first approach then, the language of the realisation of socio-economic rights would be a premier tool in social transformation, whereas it is not likely to be so in the second approach.

My argument is that a Marxist politics which clings to the classical Marxist rejection of rights doctrine in the contemporary world would be misguided given the fact that the politics and language of the struggle of the working class and poor today is framed in the language of rights. Strategically, states must be seen as organisations with an ability to impact decision-making over societies' resources, and an organised working class or civil society groups can engage the state and influence its decision-making through the language of rights. It would be more fruitful to engage in the discourse of rights in ways that transform their meaning from the liberal democratic emphasis on individual and private property rights to asserting the equal importance and urgency, especially for democratic consolidation, of the social and economic rights that can transform the material conditions of the poor subordinate classes. A purist Marxist politics that clings to the classical rejection of rights discourse would only alienate itself from the classes it claims to speak on behalf of their emancipation. The Marxist

approach also needs to reconsider its refutation of the rights doctrine and incorporating the institutions that democratise a political order, even though they may be linked to liberal democracy. Marxism's hostile scepticism of rights doctrine has inhibited the promotion of a rights culture and also constrained the study of rights or, as Turner (1993:493) says, "the emergence of a sociology of human rights as aspects of social entitlement and membership."

3.3.6 Contemporary pragmatic approaches

Despite the complex sophisticated philosophical contributions of the liberal tradition's position on natural rights being criticised on ontological and historical grounds, the work of a variety of twentieth century scholars and political activists shows a growing pragmatism about the notion of rights. It appears that political struggles cannot simply dispense with an idea argued to have no ontological basis nor dispose of it as an historical construct that enables the emergence of a ruling class. Rather, the struggles of subordinated classes and people should be to reconstruct the idea and the obligations of institutions to realise the idea.

Hannah Arendt (1951) observed an interesting contradiction about rights philosophy: it emerged in Europe, but the most serious violations of "inalienable rights" occurred in European countries in the course of the nineteenth and first half of the twentieth century. Likely, this was because the notion of the Rights of Man that emerged in the French Revolution was tied to national sovereignty, and, the state became an instrument to protect the rights of the members of the nation. Consequently, minorities and refugees were regarded as "stateless" and excluded from enjoying any "inalienable rights"; sovereign states could maltreat these outsiders virtually without reprisals from other states. Nevertheless, it was still through the language of "human rights" that they sought the intervention of international forces such as the League of Nations so that they may enjoy the "right to asylum" as well as certain civil and political rights; the language of rights was not jettisoned, but people struggled for the "right to have rights".

Paul Lauren's (1998:139-171) historical overview shows the notion gained increased acceptance following international experiences in the course of World War II when it became practical to talk in terms of rights to deal with the Nazi violations of rights and genocides in prison camps, and with the problem of racist brutality across the world. Churchill and Roosevelt responded to the consolidation of Nazi power in central Europe by drafting the *Atlantic Charter* in 1941, which contained principles for economic and social security and a better world for all. A flurry of documents followed espousing rights claims, such as the Beveridge Report in Britain in 1942, which dealt with class inequality in that country and the need for a variety of welfare measures to deal with it. Acceptance of the notion eventually culminated in the formation of the United Nations and a document recognising civil, political and socio-economic rights, the *Universal Declaration of Human Rights* (UDHR), drafted in 1948.

Louis Henkin (1998:1-7) notes that contemporary versions of rights don't lend themselves to fallible philosophical claims about natural law or social contracts, instead, they merely give a rhetorical rather than philosophical justification for rights. Henkin accepts that the contemporary idea of rights may be traced back to the natural rights doctrine, the contributions of individual thinkers such as John Locke, and revolutionary documents such as the American *Declaration of Independence* and the French *Declaration of the Rights of Man and the Citizen*. Henkins says in this new "Age of Rights" rights are taken as self-evident; the rhetoric spells out the principles of rights being universal and that society or governments have an obligation to satisfy these rights claims. However, he adds, rights cannot be taken as "absolute", it must be accepted that governments recognise rights subject to permissible limitations. In this new context of expounding on rights, where the expanded appellation, "human rights", is used, they are not bound to any particular economic system such as capitalism or socialism.

William Edmundson (2004:173) sees the UDHR as giving a new impetus to the expansion of rights discourse; furthermore, the Cold War rivalry saw the West criticising the Soviet bloc and elaborating on the importance of civil and political

rights while the Soviet bloc criticised the West and emphasised the importance of addressing economic security and inequality. Karel Vasak (1977) says the formation of the United Nations (UN) after the World War II conflict saw it play an important role in the universalisation of the idea of human rights. The constitutions of UN member states, and many other subsequent international treaties, express the comprehensive ideals found in the UDHR, although the tendency in these disparate treaties may be to focus on one of three different "generations" of rights. In this breakdown into generations of rights, the first two are identifiable with the debates emerging from the early liberal tradition to the mid-twentieth century: the first generation rights are "negative" rights, they are the individual liberties or civil and political rights that, ideally, the state must not tamper with; the second generation rights require the state to perform "positive" actions in the implementation of social, economic and cultural rights, or citizens' "rights to" goods and services such as housing, healthcare, and education; the third generation were a development from around the early 1970s and cover rights to development, to a healthy environment, to peace, and to ownership in the common heritage of humankind (Vasak 1977:29).

Contemporary sociological approaches remain sceptical, on historical and comparative grounds, about the notion of universalistic rights and obligations (Turner 1993:489-490, 492). If there are such systematic and logical refutations of the notion of human rights, sceptics may ask: why study rights at all? Beetham (1995:59-60; see also Craven 1995:11) argues that while Marxist, collectivist, and utilitarian critics reject the idea, the idea has a resonance among the poor, particularly social and economic rights, which are based in redistributionist values, and is arguably a sound answer to the question of whether rights should be studied at all. Turner (1993:496) provides useful advice on this issue: he says that while sociology may reject the ontological grounding for the notion of human rights, it should recognise rights as claims for services or privileges, given the competition between social groups over resources.

Ronald Dworkin's pragmatic approach is not bothered with seeing rights as some gift from God. He argues, we should take rights seriously as a means of

getting government to secure the idea of human dignity, although this may be a vague notion itself (Dworkin 1983:497). An invasion of this right to human dignity is a grave injustice; consequently, governments should endure the incremental costs in social policy or efficiency to pre-empt any invasion thereof.

Clearly, the concept of rights has expanded considerably since World War II and has moved beyond the individualistic preoccupations of the eighteenth and nineteenth centuries to give more attention to social and economic rights, or welfare rights (Barry 1981:241; Craven 1995:8). The language of rights has the authority of international recognition and agreement, it echoes the conceptions of the poor, and is an instrument that empowers the poor with claims, making them potential agents of, and beneficiaries of social change. Turner (1993:508-9) adds to this that attention to citizenship had blurred the significance of rights, but that globalisation forces have made the struggle for rights increasingly important, particularly when citizens claim that the nation-state has diminished their rights and, though a rare occurrence, they subsequently make appeals to courts outside of the state.

In tracing the genesis of rights and the positive commitments that states attempt towards their realisation, I mentioned above that, in the course of their pioneering experiment in a socialist reconstruction of society, the former Soviet Union leadership also pioneered through the inclusion of socio-economic rights in their constitution of 1936 (Barry 1989:239). At an early stage in the evolution of socialist thinking, particularly among those socialists influenced by Marx, there had been an ambivalence about 'human rights' and, for some time, they avoided the language of human rights that had been dominated by foundationalist approaches and notions of the rights of the individual against the power of the state. Later, neo-Marxist approaches have campaigned for the inclusion of socio-economic rights alongside liberty rights to advance their struggle for a socialist ideal (Barry 1989:225, 238-9; Craven 1995:8-9; Mendus 1995:12-13). In the spirit of a critical discourse approach, this appears to be a promising way of countering the strong individualism of liberty rights and supporting socially provided mechanisms for people to realise their potential. Whatever its standing as a society modelled along Marxist lines in the eyes of other dissenting Marxist

thinkers, the inclusion of socio-economic rights in the Soviet Union's constitution symbolically may have been an admirable advance over the trend in other states. But for many contemporary thinkers, socialist models have lost their credibility and the poor everywhere have lost a powerful "organising ideology" that the idea of socialism meant (Beetham 1995:43), and around which they could mobilise for redistribution. A response to this is to insist that human rights thinking give more attention to defending the realisation of socio-economic rights (Beetham 1995:43-44). Beetham (1998:75) warns though that the liberal democratic political systems, which are lauded as the only alternative, however, need to be approached with caution: their statements about human rights refer to civil and political rights and avoid economic, social, and cultural rights.

In comparative international perspective, the evolution of the different generations of rights and constitutional protection thereof has also witnessed that a clear divide has existed between the liberal democratic nation-states and those of some form of socialist or welfare state (most welfare, social democratic states are also liberal democratic) orientation about the place of social and economic rights in their constitutions:

> "A remarkable feature of international opinion - indeed a near consensus - is that socioeconomic rights deserve constitutional protection. The principal exception to the consensus is the United States, where most people think that such rights do not belong in a constitution." (Sunstein 2001:221)

Although the UN had included social and economic rights in the UDHR, their inclusion has not gone without criticism (Beetham 1995:41-3). One criticism is that these are not proper rights, but merely goals and aspirations and, in conceptions of rights, it is clear who has the duty to uphold the right, furthermore, the responsible agents should have the capacity to fulfill their obligations. Governments cannot always be expected to guarantee all people a livelihood, accommodation, and a healthy environment. Other objections contend providing for these entails an extensive bureaucracy, and more taxes, which impinge on another right --- the right to freedom (Beetham 1995:42). An additional criticism

of socio-economic rights is that they require a redistribution of power and resources both within countries and between them. The most significant objection is that realising socio-economic rights necessitates some system or measures of wealth redistribution, which possibly would interfere with individual liberty (Craven 1995:11). Furthermore, socio-economic rights are not deemed to be human rights since they are not regarded as universal, that is, rights ascribed to all by virtue of their humanity. Because they pertain to certain classes, they consequently fail the test of universality (Craven 1995:13-14).

Two other approaches with arguably pragmatic positions on rights and the law that deserve mention are that of Marxist historian EP Thompson (2001), which has similarity to that of Antonio Gramsci (1971), and the 'critical legal studies' (CLS) movement among American legal scholars. Thompson and Gramsci share a similar contention that the law and adjudication, the domain of judges, is not simply a one-sided phenomenon, that is, it represents the ideology of dominant classes and is an instrument that protects their interests; contrarily, these may be used by subordinate classes to further their interests, they can use the law to right a wrong. The 'critical legal studies' movement expresses similar optimism that legal doctrine may be manipulated for an infinite spectrum of possibilities (Macleod 1999:128). Useful points for strategic decisions about rights emerge in the debates of the CLS movement, where a predominant trend argued that the bourgeoisie dominates in rights definitions, the granting of rights in its terms, and co-opts social movements who use that discourse. The CLS movement seeks a pragmatic strategy which transcends instrumentalist views of the law being the protection of claims to private property and corporate interests's views of how and when the property may be used; CLS proponents acknowledge that a legal discourse which defends property rights as symbols of individual freedom and economic efficiency "conceals the violent, arbitrary, and ugly faces of existing institutions" (Gordon 1998:645, 652). Bartholomew and Hunt (1990:50) argue that rights should rather be seen as a "potential resource" and not altogether discarded in the struggles of the subordinate classes. Olsen (2001:1112) aptly notes the important strategic question of: 'what to do until the revolution comes?', which emerged in these debates. Bartholomew and Hunt (1990:52)

partly draw on Foucaultian notions of ‘discursive struggles’, but opt more explicitly for similar Gramscian notions of struggles for hegemony (1990:55-6) which are more attentive to the commonsense of subordinate classes about political issues.

The decline of welfare state measures resulting from the structural reorganisation in capitalist state, social and economic relations in line with the Washington Consensus principles and neoliberal globalism has challenged scholars to resuscitate thinking about distributive justice, individual rights, and notions of equality (Turner 1990:190). Turner notes that, for a considerable time, the ideas of Louis Althusser were influential in how critical scholars perceived the welfare practices of states in capitalist societies as part of their “ideological apparatus”, effectively rejecting reformist strategies of struggling for welfare state measures. The global restructuring of capitalism, the decline of the welfare state since the 1980s, and the subsequent diminishing of the standard of living for the working class and poor, prompts scholars to rethink the doctrine of rights as the basis for social reconstruction and social reform. Turner acknowledges that intellectual support for the abstract idea of human rights and its association with natural law is declining, but scholars are cognisant that the institution of rights cannot be separated from democratisation in society, which, in turn, prevents agencies of power, law and knowledge from falling into the hands of one body. It is thus important to reinvigorate our thinking about the entitlements of citizenship rights in the face of the new economic restructuring of capitalism.

Francis Fukuyama (1989) argues contemporary state forms are converging towards capitalist liberal democratic forms characterised by regular elections to replace elected representatives, where individual freedom is paramount, and the property as well as civil and political rights of individuals are protected from the state (Dunleavy & O’Leary 1987:4-6). Fukuyama (1989:3-4, 9, 11; 2001:201-3) also asserts that class is no longer a major divisive factor in capitalist liberal democracies; he says the spread of bourgeois consumerism has made the historical record of poor economic performance of socialist alternatives less attractive, and, socialist regimes are incompatible with the high levels of science

and technology that support long-term successful economic performance. Fukuyama's indictment of socialism, and his forecast of the universal triumph of capitalist liberal democracy, has implications for political strategies focused around rights discourse. While the competitive individualism of liberal democracy has been linked to the notion of rights, it was socialist thinkers and activists who played a major role in extending the meaning of rights to include social and economic rights and made the notion a useful weapon in reformist socialist strategies (Campbell 1983:1-12). Although TH Marshall was a key formulator of the idea of the emergence of the different generations of rights and gave considerable attention to the importance of policies to realise second generation rights as an ameliorative to class inequality and conflict, he was by no means a socialist at all. Nevertheless, over time, for many political analysts, social and economic rights have become associated with socialist practises. In this regard, Fukuyama's ideas pose a significant challenge to the continued campaigning for the realisation of socio-economic rights, especially when champions of the latter explicitly state that it is part of their reformist strategy towards a gradual reorganisation of society along socialist lines.

3.4 Constitutions and the realisation of rights

Karl Loewenstain, a scholar of constitutions, argues the architects of constitutions in open societies make compromises amongst themselves towards the end of producing a constitution. The compromises are based upon present conditions, but the architects are still unable to foresee future trends. He says:

> "In a way every constitution is a leap into the dark. Once enacted it begins to have a life of its own" (Loewenstein 1972:173).

Hanna Pitkin (1987) says, ideally, one of the senses of a "constitution" is that it is about creating something new, it is a "human creation" given the specific history of a particular people, and is the result of a political struggle wherein, in exaggerated terms, some would win while others lose. Cass Sunstein's (2001:67-8) characterisation sees constitutions as being one of two kinds, either

preservative or transformative. Preservative constitutions seek to protect long-standing practices that may be threatened by new trends, while transformative constitutions attempt to steer society towards some idealised future.

Given the apparent decline of the socialist ideal, struggles for the redistribution of income may have to consider strategies Barry (1989) observes socialist movements in other parts of the globe have resorted to. Redistributive values are fought for within the framework of a liberal democratic political order and an expanded notion of justice, particularly, the realisation of second generation rights (Barry 1989:133-168, 169-190). Including socio-economic rights in the constitutions of countries that have recently undergone transition encounters several objections.

Objections to the inclusion of socio-economic rights entail the view that a constitution should protect individuals against an aggressive state, the "negative" rights of what a state should not do; constitutions should not be about private entitlements to protection by the state, also called "positive" rights. Where a constitution protects socio-economic rights it has the potential to undermine "negative" rights altogether as it may weaken the central obligation of a state --- "preventing the abusive or oppressive exercise of government power" (Sunstein 2001:222). The criticism of this objection is that even by protecting negative rights, there are costs or budgetary implications for the state and its taxpayers. Another objection entails the view that the judiciary branch of government does not have the resources to enforce these constitutional promises:

> "[T]hey will find themselves in an impossible managerial position ... . How can courts possibly oversee budget-setting priorities? If a state provides too little help to those who seek housing, maybe it is because the state is concentrating on the provision of employment or on public health programs or on educating children. Is a court supposed to oversee the full range of government programs, to ensure that the state is placing emphasis on the right areas?" (Sunstein 2001:223).

Another objection is that because judges do not have the same public accountability as elected officials, it would amount to "the illegitimate usurpation of policymaking by unelected judges who are not accountable to the population" (Ndima 2002:31).

Despite the inclusion of socio-economic rights in constitutions, societies have to frequently bear violent protests about the non-realisation of some rights. Habermas (2002:373-4) sees civil disobedience as a means of getting politicians to revise their decisions in view of criticisms, and it also shows that the norms of a constitution are dynamic, demanding better interpretations of rights and of their institutionalisation.

3.5 States and the realisation of rights

Constitutions alone cannot ensure citizens enjoy the rights to which they have legal claim. Accompanying the evolution of the modern state in western Europe since the sixteenth century has been the recognition of the state as the main organisational body in society entrusted to act in "negative" or "positive" ways to facilitate the realisation of rights, to protect rights and to enforce rights claims --- its actions must be oriented towards achieving the "common good" (Barry 1989:59-62, 226, 241; Plant 1991:253). My discussion in this section focuses on the issue of the extent and use of the state's resources towards the realisation of socio-economic rights.

The notion of rights as a characterisation of legal relations between citizens, corporate bodies, and the state has evolved and endured in usage in state and legal institutions, but with much inconsistency, thus challenging scholars to clarify how rights regulate the chain of legal relations between these social categories. Hohfeld (1996; also Barry 1989:228) distinguishes four types of rights which are referred to in legal terms. Unpacking what rights are, how they work, and how they are linked to the behaviour of various social agents is particularly useful to understanding their expected realisation. Firstly, liberty

rights, which do not impose any particular duty on another party --- entail the freedom of the individual to speech, thought, religion, ownership of property, and fair legal treatment. Secondly, claim rights, which depend on another party to perform a duty. Thirdly, immunity rights, which exempt certain persons from particular laws. Fourthly, political institutions have rights in the form of powers to perform certain actions like those of a sovereign parliament to determine the rights of others. Rights are generally understood as one party's claims against another; it is correlated with the "duty" another party has to perform for the first person. If the duty is not performed then the right has been violated. In some instances the duty may be that the second party ought not to perform a certain act against the first party (Hohfeld 1966:6-7, 35-8). In the case of claim-rights, their existence is dependent on another party performing certain duties. The first party that is recognised to claim a right is deemed to have "power" in the legal relation with the other party. In the event of the second party breaching its duty, it is considered "liable" or responsible (Hohfeld 1966:60).

Noting Hohfeld's unpacking of the four types of rights, how they work, and how they are linked to the behaviour of various social agents, is particularly useful to understanding their expected realisation. Only two are pertinent to the focus of my study, namely, liberty rights and claim rights. My subsequent discussion of a culture of rights deals directly with claims and powers rights, and the forms of associated behaviour. Theories of rights also generally spell out the conditions under which another party has certain duties whenever the rights of one party is recognised. This typology helps us understand how rights are interpreted in a legal system, particularly where the constitution circumscribes the duties of the state and where a Bill of Rights asserts that the rights it identifies are justiciable. The typology may also help evaluate whether the language used in the formulation of them in a constitution is adequate, in the sense that the statement of the rights satisfactorily acts as a catalyst that can set off processes with an end result that approximates the essence of the guaranteed rights. The role of states is central in the enforcing of a right. To say that an individual has a right means that it can be claimed or demanded, action has to be performed by some agent towards realising that right (Craven 1995:15-6).

Once civil, political, or social and economic rights have been successfully justified, it is necessary to clarify the obligations of parties who have to fulfill these rights (Beetham 1995: 50-1, 58-9). To make a right effective, states were created to do that, and the duties of states are threefold: first, to avoid depriving people of any necessities; second, to protect people from any deprivation; third, to aid people if they are deprived. The *International Covenant on Economic Social and Cultural Rights* (ICESCR) expects that states which have ratified the Covenant will appoint appropriate agents to fulfill their duties to realise positive rights, and it makes regular pronouncements reminding these signatories to uphold a minimum agenda of rights irrespective of their circumstances:

> "State parties are obligated, regardless of the level of economic development, to ensure respect for the minimum subsistence rights for all .... A state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter or housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant." (ICESCR quoted in Beetham 1995:58)

The state emerges as a crucial agent in a context where expectations of bringing relief from poverty are high. This is often referred to as the role of a "strong state". The modern state is associated with philosophies on the recognition and protection of rights of individuals or liberty rights, philosophical debates on the mechanisms required to ensure democracy and prevent the state from becoming an instrument for the arbitrary use of a minority; wa Mutua (1997:67) stresses that "[t]he modern state is the primary guarantor of human rights" and the reason for the development of human rights law. As industrialisation gathered pace effecting tremendous social transformations particularly in Britain during the eighteenth and nineteenth centuries, by the first half of the twentieth century debates crystallised on the extent of state intervention in markets and whether constraints should be placed on individual rights in order to realise collective welfare rights (Hall 1984:1,10,37-39,43; Walton 1984:110,121). The commonly agreed upon features of what makes the modern state include it having "a

relatively unified central authority, an increasing apparatus of bureaucratic control, and a clearly defined set of national boundaries" (Alford & Friedland 1985:2). The state is expected to be the primary performing agent when rights claims are made. But the analysis of the state is not monolithic; American scholars Robert Alford and Roger Friedland (1985) argue the state can be analysed from three different umbrella perspectives, each offering valid insights into its operations, and also as to how it may act as far as the realisation of positive rights is concerned. The pluralist perspective is mainly concerned with the behaviour of individuals and groups and their influence on government decision making. The managerialist perspective is concerned with organisational structures inside and outside of the state, the domination of these structures by elites, and how these structures protect themselves from unorganised political participation. The neo-Marxist class perspective focuses on the state's role in the conflictual relations between capital and labour in capitalist society, the stabilisation of democracy, and the constraints imposed on state policy by capital accumulation (Alford & Friedland 1985:2-6). This implies that my empirical analysis of the realisation of socio-economic rights or the right to housing may exclusively use one perspective or attempt to integrate the strengths of different perspectives at different points: I could focus on how groups influence government decision making on the meaning of rights, and the acquisition and use of resources towards the realisation of rights; I could focus on the organisation of departments and elites heading them that are pertinent to my reserach; and I could focus on the government's capital accumulation policies as ultimately having an impact on socio-economic policy.

Generally, the unfolding realisation of socio-economic rights has led to the designation of contemporary states in Western Europe as well as North America as attaining some degree of a welfare state --- they implement certain redistributive policy reforms that may encroach on the enjoyment of individual liberty rights (Teeple 1995; Walton 1984). The concept of a welfare state is very broad; it is basically a capitalist society but the different states choose different mixes of intervention measures to reproduce the conditions for the continuation of capitalist relations of production (Teeple 1995:14-9; Esping-Andersen

1990:18-33). However, realising socio-economic rights through dependence on welfare-state type arrangements appears to have its limitations particularly when emphasis is given to state spending on specific services towards the realisation of such rights. State social spending became a tremendous burden for the governments of advanced industrial societies; one study noted:

> "The cost of social services in Britain as a share of GNP has risen dramatically from around 4 per cent before the First World War to 29 per cent in 1975...They now account for one half of all state expenditure." (Gough 1979:76)

Notwithstanding the issue that the welfare state is not solely about social spending, it must be noted that provision of welfare services is financed by raising taxes, charging for state services and borrowing. The real problem though is that the growth of social welfare expenditures severely constrains the accumulation of capital and growth of the economy. Marxist political economists refers to this situation where the state experiences pressures for more social spending and the enigma of how to finance such spending as the "fiscal crisis of the state" (O'Connor 1973:2; Gough 1979:13, 94, 122, 127; Offe 1984:147-161). Economist James O'Connor (1973:6) argues the state in capitalist society must fulfill two mutually contradictory functions --- "accumulation" and "legitimation". The accumulation function means "the state must try to maintain or create the conditions in which profitable capital accumulation is possible". Simultaneously, the state must seek legitimation by working for social harmony between the owners of capital and poorer classes who want government to spend more on ameliorating their conditions. Increasing government capacity and resources for spending comes through higher taxes, but both corporations and individual citizens are reluctant to pay higher taxes. The state has a support base in its electorate that persistently demands increases in social spending as well as in the corporations which seek the state's protection of the capital accumulation process and their ability to increase profits. State revenues are dependent upon corporations operating in conditions where economic conditions make profit increases possible. The state mystifies and conceals its involvement in the capital accumulation process. Claus Offe (1984:153) sees this as a

contradiction in that capitalism cannot co-exist with the welfare state, but capitalism also cannot exist without the welfare state. The contention that there are limits to a state's benevolent welfare spending, is born from such political economy approaches to the state --- that the state's activities include ensuring conditions where capitalist social relations are reproduced and that the accumulation of capital is to persist. Rather than misleadingly citing extensive figures on annual state social expenditures and giving the pretence that the state's benevolence is colossal, my thesis is mindful of these arguments about the fiscal limits to the state's resources.

3.6 Conclusion

A historical survey of the notion of rights demonstrates that the notion has undergone considerable criticism, rethinking and reformulation. Attempts to universalise the notion of rights have had to contend with criticisms that the dominant formulations of rights are ethnocentric ones shaped by western scholars, and that the value systems of non-western cultures must be acknowledged as having potential to enrich the discourse of rights.

Having moved beyond the criticisms of rights as having no ontological basis, contemporary pragmatic approaches merely resort to rhetorical statements about rights and radical legal scholars and activists use the notion in courts to represent the interests of subordinate classes. Marxists have made considerable concessions about the notion and have sought to advance reformist socialist strategies through the language of socio-economic rights. The capacities of states towards the realisation of socio-economic rights is constrained by their fiscal resources.