Chapter 1

The Origins and Framing of Human Rights

Discussions on human rights tend to be misleading because they lend themselves to taken for granted assumptions: all people are human, so, of course, everybody has human rights. Such assumptions project human rights as natural or even God given. Human rights are obvious because they are assumed to be natural and imply that human rights have always been in existence.

If this supposedly obvious truism was an internalised consciousness among all people, the ongoing violations of human rights would not occur. In a sense, it could be argued that it is precisely the taken for granted assumptions about human rights that allow for human rights violations to continue. Notwithstanding, when violations, anomalies or stark aberrations of human rights occur, public awareness of the ongoing violations of human rights is raised. It is, thus, important to theoretically interrogate such taken for granted assumptions about human rights in order to substantially inform understandings and hopefully prevent further violations of human rights.

At the same time, though, considerations of human rights also tend to be located within the discourses of legal theory, and political, moral and ethical philosophy, as will be shown in this chapter. In these ways, it is argued; human rights become perceived as related to matters of the law, and more about abstract and complex ideas about the nature and purposes of human life and forms of human development through political systems of government, rather than being about the daily and personal experiences of ordinary people. Whilst, human rights are matters of the law, tied integrally to political systems of government and deeply implicated in moral, political and ethical philosophy, human rights are also matters of the conditions of people's lives. Human rights are also about the ways in which people, on a daily basis, experience their humanity and their worlds.

Human rights, it is argued, are linked to the ways in which people live their lives, the opportunities to which they do or do not have access, the extent to and bases upon which they are oppressed, exploited, abused, violated, tortured, imprisoned and, in many instances, killed. Human rights, it is argued, are deeply personal and also about individual and collective human experiences. They are not only abstract ideas or workings of courts and political systems.

In this chapter I argue that human rights are socially constructed. Human rights have a traceable history. They have changed, are changeable and contestable. I begin by tracing the origins of human rights to the political philosophy of Locke (1962) and Hobbes (1979). I also argue that the United Nations Universal Declaration of Human Rights (1948) encapsulates and re-presents Lockean and Hobbesian ideas using modern philosophical constructs such as "nation-states", "sovereignty" and "citizenship". In this way I suggest that human rights, as they are currently framed, are modernist constructions.

I also look at earlier pre-modern articulations of human rights and show briefly the trajectory through which human rights emerged historically. Rather than lapsing in to a form of historical evolutionism, which Douzinas (2000: 9) describes as "evolutionary progressivism", with the attendant problems of implying causal connections and suggesting that the development of human rights is only a matter of continuous developments in the history of ideas, I argue that human rights have been shaped during modernity (and indeed prior to modernity as well) by the struggles of people throughout the world whose human rights were grossly violated. The assertions of their rights, particularly those of people in colonised countries throughout the world, "black" people, women and the working class, have contributed significantly to the development of human rights as they exist currently. Human rights, thus, cannot just be traced merely in terms of a history of ideas. Human rights also need to be viewed as emerging out of human struggles and tied centrally to constructions of power.

Nonetheless, it is important to explore how the notion of "human rights" developed as "human rights" – how they differentiated themselves from "natural rights" and "natural law " and how it is that they have become the motive force in the development of judicial systems, so central to modern political arrangements, including those on global, international levels. In this regard, I look briefly at the links between human rights, natural rights, natural law and notions of justice. I conclude this brief historical tour of the genealogy of human rights by arguing that human rights are framed as political, legalistic, universalist, formal, rationalist, depersonalised and generalised.

The Origins of Human Rights

The current globally dominant articulation of human rights is encapsulated in the United Nations Universal Declaration of Human Rights of 1948. It is still a foundational document that informs many international covenants, conventions, declarations and charters, as well as national constitutions and laws. Prior to the proclamation of the Universal Declaration of Human Rights of the United Nations, the Declaration of the American (USA) Independence of July, 1776, the Virginia (USA) Declaration of Rights of June, 1776 and the Declaration of the Rights of Man and Citizens of 1789 of the French Revolution all contained earlier formulations of human rights (see Osler & Starkey, 1996; Touraine, 1997; and, Weston, 2002). However, what were the theoretical antecedents that inform the conception of human rights in the Universal Declaration of Human Rights? What are the purposes of and rationale for the Universal Declaration of Human Rights?

Touraine (1997) states:

> human rights may be said to have their origins in the work of
> Locke and Hobbes (Touraine, 1997: 38).

Douzinas (2000), however, credits Hobbes more than Locke in influencing the development of human rights. Maintaining that theorists tended to

underestimate the influential contribution of Hobbes's work on modern legal thought because of what was thought to be the implicit "authoritarianism" of Hobbes' "leviathan" view of polity, Douzinas states:

> Hobbes is the founder of the modern tradition of individual rights, the first philosopher to replace fully the concept of justice with the idea of rights (Douzinas, 2000: 69).

Melden (1970), Kamenka and Erh-Soon Tay (1978) and Weston (2002), however, attribute Locke's work as having more influence on the Universal Declaration of Human Rights. Burns Weston's entry on human rights in the *15ᵗʰ revised edition of the Encyclopaedia Britannica* of 2002 notes that the works of Locke not only influenced the United Nation's Universal Declaration of Human Rights, but also the American Declaration of Independence and the French Declaration of the Rights of Man and Citizens (Weston, 2002: 1-2). Weston points out that the influence of Locke – and for Weston to a lesser extent Hobbes – was due mainly to arguments about the "equality in a state of nature" of "all human beings" as a counter claim to the "divine right of kings". In this regard, Weston states, "particularly important were the writings of John Locke" (Weston, 2002: 2). Similarly, Kamenka and Erh-Soon Tay in tracing what they call the "anatomy" of the "idea" of human rights note that "they drew above all on the philosophy of John Locke" (Kamenka and Erh-Soon Tay, 1978: 5).

Human rights are said to be traceable to the works of Locke and Hobbes because it was Locke and Hobbes who first articulated human rights on the basis of equality of all human beings within and as political theory of "civil" governance. As Douzinas points out, their contributions shifted the emphasis on "justice" (and "natural rights" and "natural law", which will be discussed below) to that of "individual rights". It was Locke and Hobbes who argued for human rights as a "contractual" agreement between "citizens" and "states" in the establishment of a

political system of government. It was Locke and Hobbes who shifted the focus on individual rights, foundational to human rights, and argued for the relations between forms of government ("authorities" for Locke and Hobbes) and powers and responsibilities that follow from "contractual agreements" between governments and citizens ("subjects" for Locke and Hobbes). As will be shown later, the Lockean and Hobbesian views provided the beginnings of the shift towards modern political systems, via the development of the enlightenment era. It is now important to outline the arguments of Locke and Hobbes.

"A State of Equality by Nature"

John Locke's *Two Treatises of Civil Government*, which was first published in 1690, may be regarded as the first Western and European political philosophical document to have articulated explicitly the idea that all human beings have what he called "a state of equality by Nature" (Locke, 1962, pp. 118-125). In this, Locke argued against the sovereignty of the monarchy as that which was divinely given to Adam and which monarchs supposedly inherited. In pursuing this argument, Locke pointed to the inalienable rights that all human beings possessed "by Nature", by virtue of being human. For Locke, the natural state of being human is being "social" and "in community" on the basis of an "equality by Nature". In being social, human beings need to have clearly defined "social contracts" which would protect them from possible violations against them by society or the community. For Locke, such protections were the motivations for the establishment of laws, and thereby states, which administered courts, monitored human rights protections and took action against those who violated such laws. For Locke, then, human rights were the protections individuals contracted, "through reason" and "free will", against excesses of the monarchy, the state or other individuals in order to ensure their own freedoms and survival (Locke, 1962).

Like Locke, Hobbes also argued for the importance of a "social contract". Despite Hobbes' view that human beings are inherently selfish, he also arrived at the same

conclusion as Locke: that in order for human beings to live "in peace" in social formations, there is a need for human beings to enter into social contracts, through "consent" and "reason", so that they do not remain in a "state of warre" (Hobbes, 1979). In entering into such social contracts, human beings yield their "natural freedom and liberty" in "the state of nature" to an "authority" whom they charge with the responsibility to uphold the "peace" in their societies. For Hobbes too there is an "equality" in a "state of nature" among all human beings.

In contemporary terms, such social contracts exist as declarations, covenants, conventions, charters, constitutions and laws which establish nation-states, governments and a citizenry. It is on the basis of the social contract that enfranchisement gains its meaning in present situations, and it is also on this basis that citizenship rights, legal rules and procedures, and powers and responsibilities of states, groups and individuals get to be defined.

Human rights, thus, are foundational to any political system. In fact, one describes forms of government in terms of the ways in which they address human rights.

Steven Lukes (1993) described five different types of political systems on the basis of the ways in which they deal with questions of human rights. Lukes discusses what he calls "utilitaria", "communitaria", "proletaria", "libertaria" and "egalitaria". It is important to keep in mind that the political systems Lukes describes are not "real" or actual systems but rather "imagined" metaphorical types of systems. However, he indicates the centrality of human rights in the definition of types of political systems.

Lukes suggests that the defining characteristic of each social formation, and consequently the political systems that characterise them, is the way they deal with human rights. Utilitarian and communitarian systems give more rights to collectivities, like the "greatest happiness for the greatest number" (p. 21) for utilitarians, and a strong sense of identification with communities for

communitarians, as opposed to individual rights. Here the group or the social is what takes precedence over the individual. The proletarian system does not have a state and "proletarians lead extremely varied and fulfilling lives" (p. 26) with everybody's rights being upheld and there being no conflicts in the society. Libertarian lives, on the other hand, are driven by market principles, where individual rights are linked to ownership of property and market values. "Egalitarians are treated as being of equal worth" (pp. 33 to 34) and pride themselves in ensuring that everybody is treated and has access to things in egalitarian ways. Egalitarians recognise individual and group rights, but attempt to ensure maximum realisation of individual freedoms. As such, the ways in which human rights are treated provide the characteristics with which political systems may be described.

However, Kiwan (2005) has argued that human rights and citizenship are distinct discourses that should not be "conflated". Kiwan suggests that the discourse of human rights is universalist in its frame, whereas citizenship is more particular, and the conflation of the two "is not only conceptually incoherent, but may critically obstruct the empowerment and active participation of individual citizens in the context of a political community" (Kiwan, 2005: 37). As will become clearer later in this chapter, the need for human rights to be more particular is critical for the actual realisation of human rights, in practice, on individual and specific levels of people's lives. In addition, Kiwan is correct in suggesting that human rights and citizenship, particularly in the field of education, are distinct, although they are linked; and, as will be shown in Chapters 6 and 7, "Citizenship education" is but an approach to human rights education, and is not equal to and should not be conflated with human rights education. Keeping this in mind, one can say that whilst citizenship may vary in terms of the types of political configurations that inform it, all forms of citizenship are constructed, nonetheless, on the assumption of a social contract, which establishes the relationship between citizens and states in the first and final instances, and from which human rights gain their status and meaning.

Human rights, thus, exist in their current articulations as linked directly to modern political systems of nation-states. Their origins are traceable to the establishment of nations within the Western, European context and form the bedrock for modern political configurations.

From "Natural Rights" to Human Rights

The idea that all human beings have a "state of equality in nature" was not an obvious or accepted truism. What constituted being "human", "nature" or "equality" differed significantly among Locke's and Hobbes' contemporaries and predecessors. These differences were impacted upon by views of dominant Western and European philosophical trends during and prior to the 17th century.

Douzinas (2000) provides what he calls a "genealogy of human rights" which traces some of the dominant pre-modern conceptions which impacted on human rights as they exist today. Beginning with conceptions of "classical natural rights", Douzinas notes that dominant views in early Greek society were framed by an ontology of the cosmos and projected natural rights as "anti-historicist", "universal" and "objective". The argument here is that "nature" is a phenomenal manifestation of a metaphysical order premised on "perfection". In this view, all in nature, including human beings, are allocated their appropriate function/s within the order of the "cosmos". In this way, the Aristotelian expression "the nature to each is his purpose" gains its meaning. "Nature" is also seen as acting "for an end", not as " inert" but as constantly in a state of motion and "becoming" as it moves inexorably to a future of "perfection". In this view, "natural rights" are about being true to one's allocated purpose/s in the order of the cosmos, and being "good" means living one's life according to the way nature determined it (Douzinas, 2000: 24-29).

The Sophists, Cynics and Hedonists of early Greek society, however, differed in their interpretations of "nature" (cf. Robinson, 1968). For them, the "essence" of nature is not metaphysical, but in *physis*, the corporeal, phenomenal world. The physical, natural world is seen as fixed, perfectly ordered and unchangeable. Their

views, thus, credit the physical natural world with ontological weight and not the cosmos. However, in this view too "nature" is seen as a normative principle, which accords each human being with his/her "essential" purpose in life. Being true to nature is what leads to the "good" life and perfection (see also Douzinas, 2000: 29-30).

What is of significance in the above views is that whether they were based on a cosmic or corporeal ontology, the notion of "rights" is articulated as that which is "right", i.e. as that which is correct, appropriate and "good". These views do not work with a legalistic view of "rights". In addition, "nature", "natural law" and "natural rights" work in these views as normative principles, which are universal and ahistorical.

Epicurus reversed the Hedonist position and argued for the "delights of the mind" as opposed to the Hedonists' "private pleasures" of the flesh. Followed soon by the Stoics, Epicurus' views were reinforced (cf. Ferry and Renaut, 1992). The Stoics argued for the superiority of the private life of tranquillity of the "mind" and placed the physical world against "nomos". "Nomos" is viewed as the necessary bond of the universe and the divine. Control of the passions and subjecting "physis" to "nomos" are seen as living a "good" life and leading to perfection. However, what is of critical importance in the Stoic's view is that they provided a basis for arguing for a "universal humanity". In the Stoic's view all human beings, no matter what their status is in life, have the task of using "reason" to control their passions and live "tranquil", contemplative lives. This is in contrast to the earlier views that placed human beings in a hierarchy of "purposes" within the cosmic or physical order of the universe. It was, thus, the Stoics who articulated the "rational essence" of all human beings and the attendant "equality" that all human beings shared in this respect (see also Kamenka and Erh-Soon Tay, 1978 and Weston, 2002). In relation to this Douzinas states:

> Their universal humanity, based on the rational essence of man and equal
> rights for the whole human race, was a dramatic departure from the Greek

world of free and slaves or Hellenes and barbarians … They made a lasting contribution to legal thought (Douzinas, 2000: 31).

Plato's (1974) influential and classical text the *Republic* brought an enquiry into "justice" to forms of governance.

> The Philosophical *Republic* is a programme for the best polity, a quasi-constitution that practices justice (Douzinas, 2000: 35).

Plato viewed human beings as social, always in political community. He applied natural rights to politics. For Plato, natural rights are revealed in reason. Such natural rights are framed within Plato's tripartite view of human beings and consequently the tripartite view of polity. "Doing one's own and proper task" maintains or leads to the harmony of the polity. However, Socrates repeatedly emphasised that reason is the necessary, but not sufficient, condition for a just polity and did not provide a definition for justice, and argued that the "good" itself is not accessible to reason. The "ideal" polity is not accessible to reason and indefinable. Consequently "justice", which is the political expression of the good, lies beyond reason and life.

> The best regime, which is according to nature, was perhaps never actual; there is no reason to assume that it is actual at present; and it may never become actual … in a word, the best regime is a 'utopia' (Strauss, cited in Douzinas, 2000: 37).

As such Plato provided a classical theory of justice as ethical and political doctrine through which human perfection may be achieved minimally, using the methodological tools of observation of nature and rational argument.

It is important to note that in Plato's work the emphasis is also on "natural law", "natural rights" and "justice". The idea of "individual rights", and by implication "human rights", does not appear in significant ways.

Aristotle (1976) drew a distinction between "general" and "particular justice" in his seminal *Nicomachean Ethics*. For him "general justice" is about the "whole of virtue" and "good of others". It is normative and universal. "Particular justice", however, relates to conflicts of views and interests "in the city". Particular justice is context specific, unpredictable and indefinite. Particular justice requires the act of judging mainly according to just principles of distribution and retribution, following reason. Aristotle, thus, provided the basis for the development of the "art of the judge" to arbitrate on matters of conflict in the phenomenal world and set into motion the possibilities for courts, legal procedures and judgements of other's actions to be established.

> Aristotle's *Nicomachean Ethics* and, in particular, its chapter on Justice are foundational texts for Western law (Douzinas, 2000: 39).

The significance of Aristotle's distinction between "general" and "particular justice" is that he allowed the "particular" to be separated from the "ideal" and put into motion the possibilities of engaging with conflicts in human relations within situated and context specific conditions of human existence, allowing for what he called "situational appreciation" (see also Pendlebury, 1990).

Aristotle's notion of "practical justice" was re-articulated by Cicero (1949, 1998) in the context of Roman law. Roman law develops Aristotle's practical justice in casuistical ways, where the "art of the judge" is reinforced and placed within formal judicial systems. The art of the judge is to demonstrate "practical wisdom" in arbitrating between conflicting positions. The judge utilises reason in order to arrive at the best possible judgement in a given situation, the aim of which is to approximate to justice. Legal modes of operation which emphasise rules and procedures, and draw on precedents set by previous judgements and "authorities" were set into motion through Cicero's re-articulation of Aristotelian ideas. However, Cicero also saw the law, human institutions and rules originating in nature.

> The true law is the law of reason, in accordance with nature known to all as unchangeable and imperishable … To curtail this law is unholy, to amend it is illicit and to repeal it is impossible … (it is) one and the same law, eternal, unchangeable and will bind all people and all ages; and God, its designer, expounder and enacter, will be the sole and universal ruler and governor of all things (Cicero, cited in Douzinas, 2000: 50).

As the above quotation shows Cicero linked the "law of reason" with "nature", "in the name of God" and with an atemporal view as embodied in the notion of "all people and all ages". Cicero accorded to "reason" a status of paramount importance – "the true law". In this way Cicero turned the universal rationality of Stoicism to legal ideology. Rationalism became the hallmark of legislators and the modus operandi of the legal system. In the process, as Douzinas points out,

> Rationalism, the cult of the legislator and the rules associated with legal positivism, the celebration of individual rights which derive from human nature, they all appear for the first time in late Stoic thought and Cicero. But law's ontological dimension also promotes ideas of human dignity and social equality. The law as reason begets the world pushes towards an, admittedly abstract, fraternity of all human kind (Douzinas, 2000: 53).

These ideas of Cicero were later redefined by Augustine (1872) and, thereafter by Thomas Aquinas (1945, 1988). Augustine and Aquinas were instrumental in "Christianising" both natural and individual rights. For Christianity, God created nature *ex nihilo* and natural law is definite, certain and simple. It is formulated by God. Human beings through the use of reason and in quiet contemplation can achieve "closeness" to God in their "discovery" of perfection in nature. Unlike Cicero's view, Augustine's and Aquinas' views presuppose the idea of the "fallen man" who can re-enter into the kingdom of God through his/her relations with nature through reason. Both, however, agreed that true perfection, the good and/or "general justice" is elusive and cannot be grasped by reason.

Aquinas (1988. See also Lisska, 1996), however, followed more of an Aristotelian framework than Augustine. In addition to Aristotle's distinctions between "general" and "particular justice", Aquinas also distinguished between "eternal", "natural", "divine" and "human" law. Eternal law was in the hereafter; natural law here; divine law as that which God does directly; and, human law which is relative to individuals and context specific human conditions.

Two important aspects emerge out of Augustine's and more so of Aquinas' views: First, human beings, and consequently human rights, are universalised and, second, human rights are dissociated from the "ideal" or metaphysical. Thus, unlike the universalistic ontological claims of the Sophists or Stoics, the universalism implied in Augustine's and Aquinas' arguments refers to human rationality.

The Franciscans (cf. Kelly, 1992) subsequently further developed these ideas. Duns Scrotus (see Finnis, 1980 and Douzinas, 2000), for example, argued that the supreme expression of creation is individuality. This has two fundamental implications. It suggests that collectivities, of any sort, are artificial. General concepts do not have ontological weight, only individuals do. It also implies that individual will, rather than reason, is priority. This being the case because the exercise of reason is seen as a methodological tool with which to access the "general". Duns Scrotus also suggested that the "will" had no foundation in nature. He also separated God from nature and combined absolute legislative will with the nominalist claim that only individuals exist. These ideas reflect an individualistic political theory and re-articulate objective natural law as subjective individual rights.

Thus, it could be claimed that with the birth of modern "man" the individual and human rights passed through Catholic scholasticism, where the essential nature of "man" was seen as that which is created by God. Human beings were also viewed as volitional agents, characterised by will and reason.

The purpose of the above brief discussion of the genealogy of human rights is not to engage with the many debates and nuances in philosophy around these issues. Such a task would be a study on its own, and that is not the purpose here. Rather, tracing the historical development of human rights in the history of ideas is to indicate that human rights are constructed socially, have changed and are changeable. It also is intended to show that Locke's and Hobbes' ideas were in conversation with debates around such issues that existed prior to and during their lives. The ideas of human rights being linked to "human nature", the universality of human rights and the prominence of human reason and will are all linked to the ways in which such ideas developed historically. Locke and Hobbes re-articulated such ideas within systems of political governance. Through their contributions we have the emphasis, still present in contemporary societies, on notions of "equality in a state of nature", reason, free will, "social contracts" and "authorities".

The claim, then, that human rights is traceable to the works of Locke and Hobbes suggests that human rights as they currently exist are Western and European in their origins. They have developed historically within Western and European thought from claims about the cosmos, physis, nature, the individual, reason and will and as re-articulations of notions of natural rights, nature and justice. The Western and European framing of human rights are also indicated in the historical conditions that are presupposed. Human rights presuppose Western and European social orders. From the *Roman Statutes* of Cicero, *Republic* of Plato, monarchies of Locke, and *Leviathan* of Hobbes, Western, European political systems and contexts are assumed. As Kamenka and Erh-Soon Tay note:

> The concept of human rights is a historical product which evolves in Europe, out of the foundations in Christianity, Stoicism and Roman Law with its *ius genetium*, but which gains its force and direction only with the contractual and pluralist nature of European feudalism, church struggles and the rise of Protestantism and of cities (Kamenka and Erh-Soon Tay, 1978: 6).

As will be shown below, Western and European contexts and world views continue to inform the United Nations Universal Declaration of Human Rights. Human rights, thus, are constructed socially, historically contingent and context specific.

However, the above genealogy may be read as a sort of "evolutionary progressivism" and this is not the intention here. As will be seen below, the development of human rights is as much a matter of the struggles of people throughout the world, as much as it has been influenced theoretically by the history of ideas.

The Legalistic Framing of Human rights.

Dr H.E. Evatt of Australia, who proclaimed the Universal Declaration of Human Rights on behalf of the United Nations, said:

> This is the first occasion on which the organised world community has recognised the existence of human rights and fundamental freedoms transcending the laws of sovereign states (cited in Osler & Starkey, 1996, pg. 2).

Dr Evatt's references to "the organised world community", "rights", "freedoms", "laws" and "sovereign states" provide the significant indicators of the conditions of emergence of human rights as they currently exist. The Universal Declaration of Human Rights became the first global intervention of the United Nations. The United Nations was formed after the Second World War (WW II) in 1945. Its primary purpose, at the time, was to ensure that the gross violations of human rights that occurred during WW II never repeated themselves in any part of the world. The nation states that were members of the United Nations then accepted that certain limitations had to be placed on the sovereignty of states in an effort to protect citizens against the state violating their rights and in pursuit of a greater

justice. These ideals were specified in the Charter of the United Nations of 1945 with human rights being detailed in the Universal Declaration of Human Rights of 1948.

It should be noted that the United Nations Universal Declaration of Human Rights originated directly within Western and European contexts. It was meant to address wars on the European continent, drafted by North Americans and Europeans and dominated by nations within the "Alliance" of WW II. However, as a document of the United Nations – an international organisation – the Universal Declaration of Human Rights refers to and is applicable to "all in the family of nations". Within the context of the Universal Declaration of Human Rights of 1948 human rights are claimed to be "universal rights". They are about legal protections "citizens" have against "states". They attempt to ensure "human freedoms" for the realisation of "justice". They circumscribe the limitations of powers of states and individuals and freedoms of citizens. The Universal Declaration of Human Rights of the United Nations of 1948 recognises the "inherent dignity and the equal and inalienable rights of all members of the human family".

The Universal Declaration of Human Rights of the United Nations specifies what are known as first, second and third generation rights (Henrard, 1996). First generation rights, or "blue" (Douzinas, 2000: 115) rights, (Articles 1-14) affect an individual's life, i.e. the protection of human life and survival. They cover civil and political rights of individuals. Second generation rights, or "red" (Douzinas, 2000: 115) rights, (Articles 15-28) refer to social, economic and cultural rights, such as rights to basic education and fair labour practices. Third generation rights, or "green" (Douzinas, 2000: 115) rights (Articles 28-30), refer to the environmental rights which need to be protected in order to ensure the survival of the human race, socio-economic development, limitations of the rights spelt out in the Declaration, particularly in relation to the sovereignty of states, and the parameters of the ways the clauses in the Declaration may be interpreted. Third generation rights are generally also concerned with rights concerned with solidarity (Universal Declaration of Human Rights of the United Nations, 1948).

The idea of 1st, 2nd and 3rd generation rights is one that also further indicates the Western, European presuppositions in the framing of human rights. Weston points out that:

> The notion of three generations of human rights, advanced by the French jurist Karel Vasak, was inspired by the three themes of the French Revolution, they are: the first generation of civil and political rights (*liberté)*; the second generation of economic, social and cultural rights (*egalité)* and the third generation of solidarity rights (*fraternité*) (Weston, 2002: 5).

Weston also notes that first generation rights derive primarily from the 17th and 18th century (North) American, English and European reformist theories and are infused with a "political philosophy of liberal individualism". Second generation rights, Weston points out, "originated primarily in the socialist tradition" and call on greater state interventions, whilst first generation rights emphasise the curtailing of central state interventions and maximising possibilities for individual liberty and freedom. Third generation rights, Weston notes, are more about collective rights in comparison to first and second generation rights, and whilst linked to the French Revolution's theme of "*fraternité"*, third generation rights are "best understood as a product of the rise and the decline of the nation-state in the last half of the 20th century". By this Weston suggests that third generation rights have also been developed and emphasised significantly by rising nationalisms within postcolonial, Third World countries, and their calls for "self determination", development, a healthy environment free from disease, and peace. Although these issues are discussed again later in Chapter 2, it is important to note here that the notion of human rights being distinguishable as three generation rights is a notion that also indicates the Western and European framing of human rights, including in the United Nations Universal Declaration of Human Rights.

Nonetheless, the Universal Declaration of Human Rights outlines the "rights" that citizens have as individuals, as members of groups and as citizens. It also places limitations on the powers of nation states and accords them with the responsibility to protect and uphold human rights in their dealings with their citizens. Human rights are constructed and projected as political, formal and legalistic. They also are modernist in the social orders that they presuppose.

The legalistic nature of human rights referred to as a social contract by Locke and Hobbes, and then re-articulated as a multi-level contract by the Universal Declaration of Human Rights of the United Nations in 1948, establishes what may be seen as the necessary conditions of human rights. This means that without the legalistic framing of human rights, one cannot speak about human rights at all. Human rights, as legalistic, suggest that they take on the following characteristics. Human rights are about political systems of government. They are formal and legal, and they are formed rationally on the basis of contractual agreements. They are arrived at through free will, consent and reason. I will first elaborate upon the political framing of human rights. Thereafter I will consider the basis for the rationalist framing of human rights.

Human rights serve as a way of regulating social interactions among human beings in any part of the world. As a regulation of human interactions, human rights provide the basis for constructing organisations among human beings in order to regulate social interactions. In this way, human rights provide the bases upon which political systems of governments may be established. Political systems are the legal machinery put into place in order to practicalise the ways in which human social interactions will be regulated, identifying modes of organisations and governance. It is for this reason that the United Nations Universal Declaration of Human Rights is directed primarily at governments or states. "So", as MacKinnon points out, "the model of human rights violations is based on state action" (MacKinnon, 1993: 93). In addition, as pointed out in the earlier discussion on Lukes, political systems may be characterised by the ways they position and relate to human rights. In the first place, then, human rights are

about political systems of government, about the law; drawing on the notions of "authority" and "social contract" of Locke and Hobbes.

If human rights are political and legal, it also suggests that human rights are formal and rationalist. From whence does this formal and rationalist character come? Why would, for example, the Universal Declaration of Human Rights (UNDHR) state things like:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards each other in spirit of brotherhood (Article 1, UNDHR, 1948).

And, why does the Declaration use the notion of "pledge" in its preamble and exist as a "Declaration" in the first instance?

Human rights are attempts to regulate human interactions "with reason". For Locke, human beings got into situations of conflict with each other when they re/act out of "passion". When human beings use "reason", this argument suggests, human beings are less likely to be in conflict with others, because they are "sober" and rational. For Hobbes, however, human beings are "in a natural state of war". In order to ensure that human lives are not "nasty, brutish and short", human beings regulate interactions among themselves. This act of regulating human interactions necessitates the use of reason. This being the case because emotions and passions are considered to be impediments in the regulation of human interactions. It is this assumed relation between reason, emotion and conflict that constructs the rationalist basis of human rights.

In attempts to regulate human interactions, the actual human beings that are to be regulated need to be aware of the attempts to regulate their interactions. Human beings may become aware of what these regulations are when the regulations are being constructed or when they are being enforced. Being aware here includes knowing what a person/people can or cannot do and what to expect if and when

the regulations are enforced. If regulations are contested it means that there is no regulation of human interactions and, human conflict and being in a constant "state of war" are likely scenarios. It follows, then, that in any attempt to regulate human interaction it is important that the human beings involved agree to the regulation that is being envisaged. Their consent is fundamental. The regulation of human interaction only applies to those who have consented to the regulation and whose behaviours are framed by the regulation. Regulations imply contractual, 'mutually consented to' agreements. They are, in Lockean and Hobbesian terms, "social contracts". In the words of the Universal Declaration of Human Rights it is a "declaration", a formal statement of intent and commitment, "a pledge". Human rights are thus rationalist and formal as they attempt to regulate human interactions.

There are already several problems that may be identified in this framing of human rights. To what extent is the determination of regulations of human interactions actually arrived at rationally? Are these acts of the "use of reason" really impartial and sober, as it is suggested? To what extent do human beings actually consent to the construction and enforcement of regulations of human interactions? Is the enforcement of regulations done in ways that are just and fair? Is it not possible for the enforcement of human rights to lead to violations of human rights?

I raise these questions at this stage to signal that one cannot assume that human rights, even in terms of their historical origins, are unproblematic. There are critical questions that need to be engaged with in order to ensure that in the construction of human rights, they actually fulfil the requirements of their own existence; the requirements of consent, free will, being rational, formal, binding and, in reality, ensuring the protection of all human life. These requirements cannot be treated as given but need to be verified. I return to these issues in Chapter 2.

Universalism, Generalisation and Depersonalisation in Human Rights

Whilst it is the notion of "rights" in human rights that lends them to the legalistic, rationalist and formal, it is the notion of "human" in human rights that allows human rights to be universalist and generalised. Once cast in legalistic, rationalist, formal, universalist and generalised terms, human rights constitute the basis for treating human beings in depersonalised terms.

The scale of application implicit in human rights is that of all human beings in the world. From Locke, Hobbes, to the Universal Declaration of Human Rights, there is consistent use of notions akin to the idea of an "everyman". The "subjects" Locke had in mind referred to "all human beings", and, like Hobbes, his argument is about the conditions of human existence qua human beings. These were derivative from earlier ideas of the "natural", "human" and "good", as discussed earlier in the genealogy of human rights. As also discussed already, the universalistic claim of human rights was an important retort to claims about inherent inequality in "nature" and/or the "cosmos", and the divine rights of kings.

The Universal Declaration of Human Rights captures this explicitly by using the term "universal" in its definition of itself. In the words of Dr Evatt, it is because human rights are "universal" that they are able to "transcend the sovereignty of nation states". The Universal Declaration of Human Rights, thus, consistently uses words such as "all human beings", "everyone" and/or "the human family". The universalistic focus of human rights allows them to be projected as fundamental to and transcendent of specific political systems. Again, it is important not to conflate human rights with citizenship and particular political configurations. As Lukes pointed out, in the discussion above, political systems may vary and such variations will determine the kinds of emphasis human rights will take within them, and the emphasis of human rights in such contexts may also determine the kind of political system that is developed in such contexts.

However, as Kiwan noted, also in the discussion above, human rights are distinct from citizenship and have a universalist focus. The universalistic focus makes human rights to take precedence over all else, transcendent and "inalienable". In the words of the Universal Declaration of Human Rights:

> The General Assembly proclaims The Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society ... shall strive ... to secure their universal and effective recognition and observance … (Universal Declaration of Human Rights, 1948, Preamble).

The universalist focus of human rights also means that human beings are viewed in generalised terms.

> The higher status of human rights is seen as the result of their legal universalisation, of the triumph of the universality of humanity. The law addresses all states and all human persons *qua* human and declares their entitlements to be a part of the patrimony of humanity, which has replaced human nature as the rhetorical ground of rights (Douzinas, 2000: 116).

It is possible to also draw a distinction between universalism and generalisation. In the case of the former, as the above discussion implies, statements are of an ontological order, and refer to "the universality of humanity". In the case of the latter, the reference is to categories. Generalisations imply a homogenisation within identified categories. Thus, it is possible to make universalistic claims and at the same time to also generalise within categories. For example, one could make universalistic claims about equality of humanity and generalise about the categories to which people may belong, such as racial, ethnic or religious groups. Thus, one could claim that all people are equal and claim simultaneously that all Jews, Muslims and Christians are equal, thereby generalising all Jews, Muslims and Christians in terms of their religious categorisations.

Whilst, the universalistic focus of human rights establishes a generalisation of human beings as entailing all human beings on earth, within human rights there are other levels on which the generalisation may be seen to work. Human rights are also generalised in terms of the social categories to which people are said to belong. In the works of Locke and Hobbes one may note their description of human beings in terms of social categories people occupied during the 17th century. Locke and Hobbes, for example, whilst making universalistic, ontological claims of human beings, also described human beings as "subjects" of monarchies, as "members of the common wealth" and/or as holders of different types of "property". However, Locke's and Hobbes' argument about "a state of equality by nature" suggests that although people are recognised as occupying different social positions, such categorisations did not detract from the claim of equality among all human beings. In the case of the Universal Declaration of Human Rights, distinctly modernist social categorisations of people are recognised, but by not making "distinction of any kind" on the basis of such categorisations. Article 2 states:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status... (United Nations Universal Declaration of Human Rights, Article 2, 1948).

In the above quotation from the Universal Declaration of Human Rights, one can notice the use of social categories in the description of people as raced, gendered, etc. As such, the universalistic nature of human rights also informs the use of generalisations in the description of human beings. Although the Declaration does use social categories in the description of people, in its own words, it does so "without distinction of any kind". Thus, the use of social categories in the description of people, indicates the non-usage of such social categories in understanding human rights, in order to construct the universalistic focus of human rights. In this regard, Marx pointed out:

The 'real man' is recognised only in the shape of the egoistic individual, the true man is recognised only in the shape of the abstract citoyen (Marx, cited in Kamenka and Erh-Soon Tay, 1978: 29).

Whilst Marx was referring to the Declaration of the Rights of Man and Citizens of 1789 of the French Revolution, and pointed to the liberal individualistic philosophies that informed it, his comments are relevant to the Declaration. In relation to the quotation above, it is important to keep in mind that the "egoistic individual" is an abstraction too. Two things are noticeable here. First, in the use of universalistic claims about, and generalised descriptions of human beings, human rights become simultaneously depersonalised. Second, the use of generalisations in the description of human beings also points to the changing, changeable and context bound character of human rights.

Human rights are depersonalised because they are universalistic and generalised. They do not directly address the individual human being in that they attempt to make human rights impartial and rational. Here it is assumed that by being personal, one is subjective, read also passionate, biased and irrational. Thus, the depersonalisation of human rights is assumed to reinforce their rationalist and impartial character. On the surface this makes sense in so far as human rights, out of necessity, have to be extricated from the interests of particular human beings, and be protections for all human beings. However, "the community of human rights is universal but imaginary" (Douzinas, 2000: 117). It is precisely due to the "imaginary" character of the "human rights community" that one notices the specification of different social categories which human beings actually occupy in their personal lives being explicated in the Universal Declaration of Human Rights. The use of social categories in the description of human beings in the Universal Declaration of Human Rights, albeit in generalised ways, indicates the need to spell out the different personal spaces people occupy in their lives, to ensure that human rights in effect have universal application. Human rights are for everybody: whites, blacks, males, females, old, young, abled or disabled, rural or

urban – everybody and in the same way. But, the attempts to make human rights more particular remain on the level of social generalisation. Social categorisations to which people belong are recognised so that people within such categories are generalised in order to make the claim for universality of equality of all humanity.

Human rights are constructed under specific historical conditions and moments. Locke and Hobbes lived at a time (17th century) that was plagued by religious wars and their works were appropriate responses to this state of social conflict. They did not experience the First or Second World Wars. They did not have the benefit of discourses of 'race', class or gender. They did not witness the anti-colonial struggles throughout the world. They did not experience the assertions of "black" people, women and "slaves" in re/claiming their "dignity" from the yokes of abject oppression and blatant exploitation. The Universal Declaration of Human Rights of the United Nations and the establishment of the United Nations itself were based on precisely these experiences during the 20th century. As such, the United Nations Universal Declaration of Human Rights, draws on and further develops human rights, suggesting that human rights are changeable and change on the basis of our specific experiences as human beings at particular points in time and in particular spaces in the world. Further evidence for the changeability of human rights is the plethora of conventions, covenants and other declarations that have been adopted since the passing of the Universal Declaration of Human Rights. Here are a few examples:

> International Convention on the Elimination of All Forms of Racial Discrimination of 1965.
> The International Covenant on Economic, Social and Cultural Rights of 1966.
> The International Covenant on Civil and Political Rights of 1966.
> The Covenant for the Protection of Children's Rights of 1975.
> The Declaration of Race and Racial Prejudice of 1978.
> The Convention on the Elimination of All Forms of Discrimination Against Women of 1979.

The Convention Against Torture and Other Cruel, Inhuman or
Degrading Treatment or Punishment of 1984.
The European Convention of Minority Rights of 1995.
The Convention for the Protection of the Environment of 1993.
(Osler and Starkey, 1996; Henrard, 1996; and Weston, 2002).

As this very limited list of some international human rights instruments
indicate, the adoption of such instruments are direct responses to particular
struggles and identities among people. The struggles against racism and
discrimination of ethnic minority groups, the violations of children and
destruction of the environment are experiences that motivate the
proclamation and adoption of such international human rights instruments.
They indicate the continuous development of human rights, the shifting
positionalities of people and changes in forms of human identities and the
conditions within which they live their lives. As such, human rights are not
fixed, given or static. They are changeable and change, and relate to
particular historical contexts and moments.

In concluding this chapter it is important to raise some of Jeremy Bentham's
renowned criticisms of the French Declaration of the Rights of Man and of the
Citizen which are also of importance to the United Nations Universal Declaration
of Human Rights. Jeremy Bentham (*in* Melden, 1970), pointed out that despite the
attempts to construct a social contract within the Declaration of the Rights of Man
and the Citizen, and prevalent in the United Nations Universal Declaration of
Human Rights, there is confusion between natural law and rights and the legal
basis of and for rights. This confusion, for Bentham, was due to,

a perpetual vein of nonsense, flowing from a perpetual abuse of words …
word and propositions of the most unbounded signification, turned loose
without any of those exceptions and modifications so necessary on every
occasion (*in* Melden, 1970: 30).

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Bentham regarded the lofty and rhetorical phraseology of the Declaration of the Rights of Man as an "abuse of words". In addition Bentham viewed the generalised claims about all human beings in the Declaration as having "unbounded signification". For Bentham such generalisations meant that "exceptions and modifications so necessary on every occasion", i.e. specific contexts and individual particularities were not taken into account. For Bentham, then, the universalistic, generalised and rhetorical language of human rights made them not specific enough to be useful, and confuses ontological claims of natural law with legislative prescription, thereby rendering the Declaration "nonsense".

In the light of Bentham's points it can be said that the ontological claims of "equality in a state of nature" of "all people in the human family" in the Universal Declaration of Human Rights, indicate both its theoretical historical location, and an ambiguity between morality and the law. This is most starkly reflected, following Bentham, in the Universal Declaration of Human Rights claim that human rights are "inalienable" ("natural" and "imprescriptible" in the Declaration on the Rights of Man and the Citizen) and at the same time in its claims that the Declaration is necessary to protect human rights. If human rights are "inalienable" why should they be in need of protection? In addition, Bentham also questioned the validity of the "contract" assumed in the Declaration.

> Whence is it, but from government, that contracts derive their binding force? Contracts came from government, not government from contracts (Bentham *in* Melden, 1970: 34).

The Universal Declaration of Human Rights also assumes that conditions of a social contract will be put into place through its implementation. But, where were the contracts that mandated the writing of the Declaration? Through whose consent and in whose interests, was the Declaration proclaimed? Is Bentham correct in suggesting that the contracts come from government and not governments from contracts? If this is the case then aren't the bases for the establishment of governments questionable? Was Marx correct in suggesting that

the Rights of Man and the Citizen, and by implication the Declaration, is "the ideology of the rising bourgeoisie"? Following on Marx is Zizek (2005) correct in suggesting within contemporary contexts (21st century) that the discourse of human rights and the Declaration are superstructural, ideological justifications of a global political economy?

I raise these questions here to highlight that it is important to keep in mind that the United Nations Declaration of Human Rights, despite its global importance, relevance and appeal, is problematic, even in terms of its historical origins, theoretical assumptions and articulations. The Universal Declaration of Human Rights cannot be assumed to have resolved the age-old "dilemmas" of moral justice and legal justice, between social orders and individuals or whether human rights are conservative attempts of preservation of the existing status quo in societies or potential for social change (cf. Raphael, 1970). Thus whilst one is able to identify the legalistic, formal, rationalist, universalist, generalised and depersonalised features in the framing of human rights in the United Nations Universal Declaration of Human Rights, it is not as if these are without problems, tensions and contradictions. The United Nations Universal Declaration of Human Rights is a document that is ambiguous. As will be seen later, Castells (2000) would argue rightly so.

In this chapter I have argued that human rights in Western, European political thought may be traced to the works of Locke and Hobbes. I have also traced briefly the genealogy of human rights in order to place the views of Locke and Hobbes in their theoretical context within a history of ideas. However, rather than lapsing into a historical evolutionism, I have also postulated that human rights as they exist in the United Nations Universal Declaration of Human Rights, have been influenced by the struggles of people in the world: ranging from WW I, WW II, anti-colonial, anti-racist and anti-sexist struggles to working class movements. I have shown the similarities and links between the works of Locke and Hobbes and the United Nations Universal Declaration of Human Rights. I have also shown that in all of these instances human rights are constructed as political,

legalistic, rationalist, formal, generalised and depersonalised. I have also shown that human rights have changed and are changeable. I have discussed all of these to demonstrate that human rights are discursive, social constructions. They are not natural or God given. They are what we as social beings have constructed and are still changing.

The concern in Chapter 1, then, has been to outline the ways in which human rights are constructed and the theoretical frames they imply. In this, the focus has been more on "rights" within human rights and the construction of "human rights" as human rights. In the next chapter, I explore the ways in which conceptions of human identities are implied in "human rights". Chapter 2, then, turns the focus on the "human" in "human rights" and demonstrates that conceptions of human identity are also historically contingent, socially constructed and changeable.