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Human rights, juridical forms and the crisis of values in education

Summary

Though critical of, but nonetheless employing Habermas's notion of systems and lifeworld (which forms part of his reconstructive theory of law), I argue that rights-related values in South Africa have taken on a juridical form at the expense of substantive public deliberation. This brings about the assimilation of values into the systems world, which impedes deliberation about values in the lifeworld. The development of normative standards by means of deliberation in the lifeworld has been hindered by the juridification of values related to human rights, and this, I argue, has contributed to the crisis of values in education. I suggest that we utilise the lifeworld space more substantively and purposefully to engage with the crisis of values in education as a way of foregrounding "nonlegal mechanisms of cooperation"[1].

Menseregte, juridiese vorme en die waarde-krisis in die onderwys

Alhoewel ek krities staan teenoor Habermas se begrippe van stelsel (*system*) en leefwêreld (*lifeworld*) (beide vorm deel van sy rekonstruktiewe regsteorie), argumenteer ek dat waardes wat aan regte gekoppel is 'n juridiese aard ten koste van substantiewe openbare debat ingeneem het. Dit lei tot die assimulasie van waardes in die stelselwêreld (*system world*), wat 'n beperking op gesprekvoering ten opsigte van waardes in die leefwêreld plaas. Hierdie beperking dra by tot die sogenaamde waardekrisis in die onderwys. Ek stel voor dat ons die ruimte in die leefwêreld meer doelgerig moet gebruik om hierdie waardekrisis die hoof te bied as 'n wyse om "nonlegal mechanisms of cooperation"[2] te bevorder.

1. Introduction

At the same time that the world we know today is overridden by human rights standards in what Rabossi[3] describes as the "human rights phenomenon", a subterranean crisis of values has pronounced itself to the world in human right terms. And at the same time that human rights displace all other moral languages,[4] the "crisis of values" is increasingly expressed in moral terms. Moreover, as human rights sprawled across the planet over the past decades, human rights violations became more pronounced, widespread and globalised. South Africans, living in the first constitutionally engineered human rights state, with its landscape of child and women abuse, corruption, discrimination, intolerance, structural inequalities,

1 Posner 2002:4.
2 Posner 2002:4.
3 Rorty on Rabossi 1999:79.
4 Baxi 1997:1.

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violence, crime, intergenerational conflict, school-based violence, etc., find it traumatic that human rights violations have taken on an ingrained systemic nature. "Moral decay" and a "breakdown in values" have become catch-all phrases to explain this societal quagmire. Why does a country modelled on rights become the antithesis of such modelling? One would legitimately ask: Are human rights contributing to the "crisis of values" or are values contributing to the "sterility of human rights"? Are there alternative ways in which we can conceptualise the link between values and human rights? What would the practical expression of this reconceptualisation look like? And how can it provide tools for us to engage with this crisis of values in education? These are some of the central questions that this paper tries to engage with.

The point of departure of this paper is to build on the wealth of analysis that resides in "human rights critiques" from various perspectives. This stance is not a rejection of human rights and its juridical form, but rather an attempt to radicalise human rights and to re-imagine its transformative potential. The law and human rights have their place and function, but these need to be problematised in general and especially as far as values related to human rights are concerned. To do so requires an engagement with the political, economic, social and cultural critiques of human rights. Hopefully in this discussion it will become clear why human rights critiques and not human rights *per se* are crucial to respond to the crisis of values in education.

The annual conference of the South African Human Rights Commission in March this year (2009) was dedicated to the theme of *"Unity in Diversity: Promoting and Advancing Constitutional Values in South Africa"*[5]. It was postulated on the conviction that we are experiencing a crisis of values in general. The conference theme is a mimicry of the crisis of values in education as confirmed by the research reports[6] being published on the topic. These reports not only validate the "existence" of the crisis of values in education, it also verifies the dramatic increase in activities and engagements around "values in education" as a central pedagogical concern. The crisis of values in education seems to be a symptom of wider crises in education in general. In one of her very last publications, Katarina Tomasevski,[7] who sadly passed away on 4 October 2006, chronicles the serious rights-related ills of education worldwide in a report that represents an astounding finale to her work in the education rights sector. In South Africa the "educational crisis" is also documented in virtuoso in the South African Human Rights Commission's (SAHRC) Report[8] of the Public Hearing on the Right to Basic Education of 2006 which came five years after the adoption of the South African Manifesto on Values, Education and Democracy (the manifesto).[9]

5 See Sangonet 2009.
6 See, for instance, the South African Human Rights Commission 2005: Report on the Public Hearing on school-based violence, and 2007: Crime and its impact on human rights, conference proceedings.
7 Tomasevski 2006.
8 South African Human Rights Commission 2005.
9 The Manifesto: Page i. The manifesto was published in August 2001 by the Department of Education and followed a national "saamtrek" on values, education and democracy in the 21st century. The "saamtrek" was preceded by a document developed by a small group of people in 2000. In the manifesto the then Minister

Though values are generally referred to as "principles, standards, or qualities considered worthwhile or desirable and which guide human actions",[10] the manifesto, which represents the seminal policy text on values in education in South Africa, defines values as the "common currency that makes life meaningful"[11] and "normative principles that ensure ease of life lived in common".[12] The manifesto also links values and morality, arguing that "inculcating values at school is intended to help young people achieve higher levels of moral judgment".[13] A major movement of the manifesto was to link values with the South African Constitution[14] and the Bill of Rights[15] as the basis for arguing for a legitimate consensus on values. In what has become commonplace in South Africa, the text of the Constitution is regarded as providing values in its uncontested, juridical, human rights form. This movement is rooted in South Africans' understanding of themselves as citizens of a constitutional state – as descendants born from a heritage of human rights struggle. This heritage provides the hermeneutic[16] frame on how to interpret constitutional provisions and values that unfortunately sometimes result in some form of "rainbow jurisprudence".[17] "Rainbow jurisprudence" here refers to the superficial treatment of contested values in legal reasoning. The manifesto's articulation of

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of Education, Professor Kader Asmal, argued that here was an idea of "moulding a people from diverse origins, cultural practices, languages, into one, within a framework democratic in character, that can absorb, accommodate and mediate conflict and adversarial interest without oppression and injustice". Page iii. "This document takes these further and explores the ideals and concepts of Democracy, Social Justice, Equality, Non-racism and Non-sexism, Ubuntu (Human Dignity), An Open Society, Accountability (Responsibility), The Rule of Law, Respect, and Reconciliation in a way that suggests how the Constitution can be taught, as part of the curriculum, and brought to life in the classroom, as well as applied practically in programmes and policy making by educators, administrators, governing bodies and officials. The Manifesto outlines sixteen strategies for instilling democratic values in young South Africans in the learning environment. Each strategy is accompanied by a series of remarks and observations (in boxes accompanying the text), that could be used by every institution in the country to frame a Values Statement and a Values Action-Plan, and be encouraged to develop a shared commitment to them".

10 Encyclopedia, the free dictionary 2009 http:/thefreedictionary.com/values (accessed on 23 April 2009).

11 The manifesto 2001:9.

12 The manifesto 2001:9.

13 The manifesto 2001:6.

14 *Constitution of the Republic of South Africa,*1996.

15 Chapter 2 of the *Constitution of the Republic of South Africa,*1996.

16 Hermeneutics refer to the study and principles of interpretation. See Rohmann 2009:174.

17 Keevy 2008:30 paraphrased Cockrell's notion of 'rainbow jurisprudence' in the following way: "When it comes to constitutional values, Cockrell (1996:11, 12) laments the absence of rigorous jurisprudence of substantive reasoning, for what we have been given is a quasi-theory so lacking in substance that I propose to call it 'rainbow jurisprudence' … the necessity to make hard choices such as this is fudged by rainbow jurisprudence which states baldly that all competing values can, mysteriously, be accommodated within the embrace of a warm, fuzzy consensus". One can only concur with Cockrell (1996:12) when he says: "Since 'logic and precedent' are of limited assistance, can the Court articulate a theory of substantive reasoning which can guide it in 'difficult value judgments'?"

values thus simply followed this tendency in terms of the link between human rights, jurisprudence and values.

This paper argues that the uncritical "juridification" of values might be one explanation for the crisis of values in education, simply because it makes the necessary ethical reflection on our actions more or less redundant. Values are then inevitably pushed into the conflictual rights paradigm with the legal system as the arbiter. Far from rejecting rights and its juridical forms, it is contended that the crisis of values in education can best be addressed by a critical posture towards its juridical form, as opposed to accepting the "myth" of a value consensus based on a perceived human rights agreement. The proposed "school pledge"[18] and the heated debates it generated constitute the most recent example of how the assumption of a human rights consensus on values can easily explode into a myriad of fragments. One reason for this fragmentation in seemingly consensual circumstances can be found in MacIntyre's analysis on "rival justices and competing rationalities".[19] MacIntyre's arguments have generated heated debates in human rights circles and his engagement with Gewirth's theory of morality as a theory of human rights raised fundamental questions about "moral justification" and "the proper role of rights and responsibilities".[20] A central theme of this paper is to highlight just how perilous it can be to base policies and administrative action on a perceived human rights consensus on values.

18 Janine du Plessis, 2008 reported as follows on the pledge in "Schools' pledge for South Africa": School children could be reciting a new national schools' pledge during morning assemblies by March this year. The pledge is intended to instil a renewed sense of morality in young South Africans. The schools' pledge, announced by President Thabo Mbeki in his State of the Nation Address this month, will be published soon, giving the public a month in which to give comments". Du Plessis 2008: http://www.southafrica.info/services/education/pledge-140208.html. The text of the pledge reads as follows: "We the youth of South Africa, recognising the injustices of our past, honour those who suffered and sacrificed for justice and freedom. We will respect and protect the dignity of each person, and stand up for justice. We sincerely declare that we shall uphold the rights and values of our Constitution and promise to act in accordance with the duties and responsibilities that flow from these rights." Corrigan 2008: http://www.soiia.org.za/governance-and-aprm-opinion/the-pledge-of-allegiance-a-lot-of-hot-air.html is particularly critical of the government's intentions with regard to the pledge: "The government's intention to introduce a pledge of allegiance – in an effort to inculcate values into the country's young people – is worthy of careful examination. The education minister, Naledi Pandor, has expressed the official position by saying that "the aim of reciting the pledge is to internalise those values we as South Africans have accepted as important. We agreed to enshrine these rights in our Constitution. (Internalise, one imagines, is official-speak for 'learn' and 'accept'.) If the intention of the pledge is to teach or instil values, it is misplaced".

19 MacIntyre 1988:1.

20 See Walters 2003:183.

2. Rights, values and juridical forms

The "crisis of values" needs to be located in a global context in what Derrida[21] describes as the "spectacular" social and economic inequalities; Castells[22] analyses as the "dehumanization of Africa" within the context of "real virtuality"; Habermas[23] decries as the "cultural and political illiteracy" that is fuelled by the mass media and the "extraordinary potential [of human beings] for violence [and] injustice"[24]; Rorty[25] bemoans as "cultural pessimism"; and Wiredu[26] regards as the increasing tendency towards human rights violations in modern Africa. Thus, the crisis in South African society simulates comparable crises across the region and the world. These crises are expressed in violence of all sorts, crime, inequality, discrimination, etc., and are accompanied by what is generally referred to as "moral decay" and the realisation of the limits of our social conventions that are rooted in democracy and human rights. In addition, progress towards rights realisation has been slow and educational sites, especially schools, have become centres of aggression and violence.[27] The criteria for assessing these crises are rooted and expressed in human rights terms, especially as violations of human rights. Human rights thus provide assessment criteria and an adjudicatory frame for what we experience as societal ills. And what we experience as societal ills have become almost synonymous with a "breakdown of values", which in turn has come to deputise for a "breakdown in morality". In this regard, Rauch[28] made some incisive points on the fusion of the languages of morality, ethics and values in South Africa:

> There appears to be some consensus that there is a moral crisis in South Africa. Politicians, religious leaders and social commentators have all spoken about the breakdown in morality. The most commonly cited evidence of the crisis is crime – specifically crimes involving violence or those which involve citizens avoiding their basic duties and obligations to the state or to each other. The moral regeneration initiative was one response to this crisis, emerging in parallel to countless initiatives aimed at reducing crime, some of which have themselves contained explicit appeals to morals, values or ethics.

In the South African discourse, the language of rights, values, morality and ethics thus converged into a system of meaning-making signs that are ultimately captured or interpreted as juridical forms. The question of values thus becomes constitutional questions[29] with human rights answers or non-answers

21 Derrida in Borradori 2003:121.
22 Castells 1998:82.
23 Scheuerman 1999:167.
24 Cronin & Pensky 2006:viii.
25 Habermas on Rorty 2006:136.
26 Deng on Wiredu 2006:500.
27 South African Human Rights Commission, 2005: Report on the Public Hearing on school-based violence.
28 Rauch 2005.
29 Keevy 2008:20: "Since *S v Makwanyane*, the Constitutional Court and ordinary courts have produced a "seamless text" of rainbow jurisprudence. The concept of ubuntu was upheld as "humanness"; the "moral philosophy" of traditional African societies which was, according to Mokgoro (1989{b}), Tutu (1999) and Bhengu (2006), difficult to explain in a European language. Apart from the fact that the Court

as the discourse of rights is now steering our discussions on values[30]. The logical conclusion of this line of reasoning reconfigures rights-related values into juridical forms as part of the juridification of the South African society. Following Habermas[31], juridification refers to:

> An increase in formal law in the following ways: the expansion of positive law, i.e. more social relations become legally regulated; and the densification of law. i.e. legal regulations become more detailed.

Foucault[32] makes similar points in his lectures on *Truth and Juridical Forms* in relation to how judicial institutions manage ways of "authenticating truth, of acquiring and transmitting things that would be regarded as true". Thus, the truth index of rights, that is its legitimacy, is believed to be determined by its juridical form. And because truth and power, in a Foucauldian sense are mirror images of one another, rights acquire an ideological status as the most dominant language of political expression. Foucault has been critical of how the law creates a disciplinary, regulated society, and therefore he argues for a new form of right that is "anti-disciplinarian" so that "political action can be given rational form"[33]. He further argues that rights can be "created and affirmed through invention and struggle", because rights "can exist and be created without requiring foundational juridical premises"[34]. Foucault's arguments certainly point to the limitations of rights and values in their juridical form. However, from a human rights perspective, juridification and dense regulation might be required to, for instance, regulate the provision of housing, water, electricity, health, etc. The complexities emerge when juridification, uncritically and without substantive deliberation, steps onto the terrain of values related to human rights.

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represented ubuntu as a communitarian worldview which favours group rights and duties above individual rights and liberties, the Court also conceded that "ubuntu is in consonance with the values of the Constitution generally and those of the Bill of Rights in particular" (Mokgoro 1998{a}:22)". Keevy 2008:20-21.

30 This pattern is evident with the focus on human rights and values in the work of the South African Human Rights Commission: "The South African Human Rights Commission (SAHRC) launched its first dialogue series on constitutional values on 22 August in Johannesburg. Held under the theme, 'Unity in Diversity: Promoting and Advancing Constitutional Values in South Africa', representatives from government, human rights organisations and civil society came together to discuss constitutional values in a democratic society. The SAHRC hopes these discussions will enable South Africans to critically assess the inherent challenges of applying constitutional values as interpreted by different interest groups in a highly contested political, cultural, religious and economic terrain. SAHRC chairperson Jody Kollapen, said the meeting took place at a time when millions of South Africans 'live outside the Constitution.' Kollapen argues that South Africans should begin to deal with the fundamental values of the Constitution as the country approaches general elections next year." See Kollapen 2008.
Linking values, education and rights is also apparent in the White Papers on Education and Training, The National Curriculum Statements, General and Further Education and Training, the Saamtrek Conference Report and the Manifesto on Values, Education and Democracy.

31 Deflem 1996:7.

32 Foucault 1994:53.

33 Faubion 1994:xxxi.

34 Faubion 1994:xxxi.

Without negating the substantive differences between the intellectual and political projects of Habermas and Foucault, Foucault was arguing for an anti-disciplinarian, non-juridical form of right to take shape in Habermas's lifeworld. The colonisation of the lifeworld by systems, which one in this instance would regard as the juridification of rights and values into the system of law, represents a major challenge for dealing with the crisis of values in education. This argument will be picked up again later. For now the focus is on Habermas's notions of system and lifeworld[35] as useful ways of trying to make sense of the process of the juridification of values.

> The claims of communicative actions in everyday social life, Habermas argues, are often not questioned or criticized because they are raised within the contours of an undisputed, shared lifeworld. The lifeworld offers the commonly accepted background knowledge within which action can be coordinated … next to providing a set of cultural values, the lifeworld also secures that social actors abide by the normative standards of their society … [Habermas] supplements the lifeworld with a systems theory, specifically paying attention to the economic and political systems[36].

Communicative actions are those actions aimed at mutual understanding that assist in reaching agreements on interpretations. The reason, according to Habermas, why the drive towards mutual understanding is not disputed is because it happens within the realm of a shared lifeworld. The lifeworld thus "concerns the shared, taken-for-granted presuppositions of social action that enable actors to interpret each other's actions and to participate in common institutions".[37] Political and economic systems, though generated through the lifeworld, exhibit relative autonomy in relation to the lifeworld. This autonomy is relative since systems "must be anchored in the lifeworld through institutions"[38] and through these institutions social relations are increasingly regulated.

The political and economic systems are decoupled from the lifeworld[39]. That is, the systems world, though linked to the lifeworld through public institutions such as the legal system, gets "further and further detached from the social structures through which social integration takes place"[40]. The normative standards and values that are generated within the lifeworld take on juridical form when they are assimilated into the systems world in the form of laws and regulatory policies. People subject themselves to the coercive power of the law because the process of lawmaking is thought to be grounded in the democratic procedures that determine the legitimacy of law. In fact, in Habermas's[41] understanding, the democratic procedure is the "only postmetaphysical source of [the] legitimacy"

35 This is not to accept that Habermas's analysis is unproblematic. For a solid analysis on these notions, see Habermas 1999b. For a critique on Habermas's thinking on lifeworld and system. An alternative way of engaging Habermas's ideas on system and lifeworld is to be found in Bourdieu's notions of "structures, habitus, practices". See Bourdieu 1999:107-118.
36 Deflem 1996:3.
37 Bohman 1999:73.
38 Bohman 1999:75.
39 See Habermas 1999b:173-183 on The Uncoupling of System and Lifeworld.
40 Habermas 1999b:172.
41 Habermas 1996:136.

of law. The democratic procedure in turn is dependent on a system of individual rights that makes democracy possible in the first place. These rights are more often than not viewed as values[42], principles and normative standards. At least two fundamental questions need to be raised here.

Firstly, because they have been codified as rights, some values, principles and normative standards are viewed as "entitlements" within the broader schematic language of rights. And because they are viewed as entitlements, they then take on the adversarial logic of rights. Peace workers, in line with certain forms of African philosophy, have long ago started questioning the conflictual logic of rights. The reason for this conflictual logic is aptly described by Simone Weil following Kwamu Gyekye in Bell's book on *Understanding African Philosophy*,[43] where she explains that rights are linked with notions of "exchange of measured quantities … it has a commercial flavor, essentially evocative of legal claims and arguments". The adversarial, conflictual logic of rights makes it inevitable that competing rights claims tend to be dealt with by the arbiter of law. Genealogically speaking, Foucault[44] analysed old Germanic law and the judicial settlement "as the ritualisation of that conflict between individuals". This analysis is probably true for modern human rights settlements. Charles Taylor[45] in *Conditions on an Unforced Consensus on Human Rights* further argues that rights encourage people "to be self-regarding … [which] in turn lead to a higher degree of conflict … social solidarity weakens, and the threat of violence increases". Though this is not Taylor's ultimate conclusion, it certainly points to the conflictual human rights potential of human rights. In Foucauldian terms the meaning and expression of values, in its juridical form, are to be determined by law. Once this consequence unfurls across society, the exercise of values becomes an exercise of legal claims, and not one of principle and virtue. And once it becomes an exercise of legal claims, the potential of conflict and discontent increases, and social cohesion and solidarity wanes. What is then expressed as disrespect and intolerance towards one another and between groups might be related to the exercise of values as legal claims. Likewise then, what is regarded as social fragmentation as opposed to social cohesion might be a consequence of groups and individuals exercising values as legal claims.

Secondly, since normative standards and values are generated within the lifeworld, they require broad-based legitimacy in the lifeworld on which to base their future legal legitimacy. Stated differently, a "value" must have high lifeworld currency to be regarded as legitimate law once it is codified as a right, at which stage it becomes part of the systems world. For example, rights related to sexual orientation are firmly entrenched as law but the public response to the Civil Unions Act[46] in 2006, which legalised gay and lesbian marriages, certainly proves that it does not have the kind of lifeworld legitimacy as was first assumed[47]. The point here is that South African society remains a highly

42 See manifesto 2001:iv.
43 See Bell 2002:67.
44 Foucault 1996:35.
45 Taylor 1999:106.
46 Act 17 of 2006.
47 Mary Alexander reported on 1 December 2006: "On 14 November Parliament passed the Civil Union Bill into law by a vote of 230 to 41. The ruling African National

discriminatory one and no number of laws will be able to change it without solid work being done on equality as a normative standard and cultural value in the lifeworld. Another example relates to "virginity testing". Despite the fact that virginity testing was outlawed through the Children's Act[48], communities in KZN displayed total rejection of the law[49]. Though "virginity testing" and discrimination on the basis of sexual orientation are clearly violations of human rights, it is through a culture of human rights in the lifeworld that we need to develop the values of non-discrimination and human dignity as normative standards. And though legal measures are certainly desirable, the efficacy of these measures in developing normative standards and cultural frames is questionable in the absence of political action in the lifeworld. The more the lifeworld gets colonised by systems, the less space the lifeworld has for political action. The less space available for political action, the smaller the chances for the lifeworld to shift those taken-for-granted presuppositions and norms in the context of a changing society. And the smaller these chances, the more the "legitimacy" of law will be questioned. Over the past 15 years South Africa ended up with a spectacular electoral democracy and a weak deliberative democracy[50]. Without citizens' deliberation in the lifeworld that can ultimately provide the normative standards for policy and law-making, law will continuously suffer a crisis of legitimacy – and values, when captured as juridical forms, will be suffering the same fate.

Congress ordered a three-line whip, the strictest disciplinary command the party can give its MPs, to compel them to be both present in the chamber and to vote in favour of the party line supporting the Bill". Alexander 2006: http://www.southafrica.info/services/rights/same-sex-marriage.htm (accessed on 23 April 2009). This particular action was necessary to force MPs not to vote against the bill in the context of widespread criticism against it.

48 Act 38 of 2005.

49 Sipho Kumalo reported on 5 September 2007: "Thousands of Zulu maidens from KwaZulu-Natal have undergone virginity testing ahead of the Umkhosi woMhlanga (reed dance) ceremony to be held at KwaNongoma, near Ulundi, at the weekend. This is despite the passing of the Children's Act early this year, which outlaws virginity testing of girls younger than 16. Most of the girls attending are younger than 16. The Act says that failure to comply with its provisions could end in a person being arrested – a position that is being rejected by Zulu traditionalists as interfering with their culture. Nomagugu Ngobese, of the Nomkhubulwana Culture and Youth Development Organisation, said that girls had been tested at all KZN villages as they could not attend the reed dance without undergoing testing". http://www.iol.co.za/index.php?set_id=il (accessed on 23 April 2009).

Xoliswa Zulu reported on 12 September 2007: "An emotional King Goodwill Zwelithini deviated from his prepared speech at the royal reed dance in Nongoma on Saturday and said he would rather be thrown in jail than let the virginity testing tradition he revived 21 years ago be abolished. The reed dance sees thousands of Zulu maidens gather to celebrate and declare their virginity. Some get tested to prove that they are still virgins. The Children's Rights Bill, which was passed in July by the National Assembly but awaits approval from the National Council of Provinces, bans virginity testing, saying it violates the human rights of girls. The king has defended virginity testing, saying it decreases the rate of HIV infection in the province".http://www.iol (accessed on 23 April 2009).

50 Deliberative democracy refers to a culture of decision – making that regards citizens' deliberations as central in policy development processes. Gutmann & Thompson 2004.

3. Values, rights and political action

The strategic plan for South African society is captured in the Constitution[51] as the ideal vision to work towards. The inherent contradictory logic of rights that permeates our Constitutional text can probably be traced to the weak justification for human rights and the inherent adversarial logic underpinning it. It is through justification that legitimacy is developed and this legitimacy is sourced from the normative standards and cultural values within the lifeworld. That is, people are more inclined to follow those laws and regulations that have normative value in the lifeworld. Values become a shared and cohesive force only by recourse to the normative standards in the lifeworld, and normative standards are only achievable through deliberation in the lifeworld. How does this work?

Because justification is tied to legitimacy, and legitimacy is tied to normative standards, the answer to this question might lie in the efforts at justifying human rights. Fagan[52] points out that the validity and justification of rights cannot reside in their legal codification since rights have to be "demonstrated as valid norms and not facts". Fagan[53] argues that the "interest approach" views human rights as having the principle function to protect and promote human interest. The "will theory approach" tries to establish the validity of human rights on the dictum that "rights are a manifestation of the exercise of personal autonomy" or, as Gewirth will have it, that human rights are the "logical corollary of recognising oneself as a rationally purposive agent".[54]

Freeman[55] argues that a human rights theory must be focused on the justification of rights. He presents the various arguments forwarded by Donnelly, Dworkin, Nussbaum, Gewirth, Walzer, Rawls and Rorty for justifying human rights. According to Freeman[56], consensus on the philosophical foundations of "human rights may be impossible to achieve … [but] there are various strong reasons for supporting human rights":

> … derived from respect for human dignity (Donnelly), the basis of moral action (Gewirth), the demands of human sympathy (Rorty), or the conditions of human flourishing (Nussbaum) … The moral and humanitarian case for assigning the concept of human rights to a leading role in political theory is … very powerful.

Other attempts at justifying human rights include the notions of "social recognition" and the "common good" forwarded by Green (Martin, 2003: 71). The various articulations on "justice" from Gewirth (1985; 1996), Rawls (1971), Nagel (1987), Nozick (1996), MacIntyre (1992) and Young (1990) all have implications for the justification of human rights. It is, however, in Habermas's theory of law and human rights, linked to the notion of the lifeworld that may represent ways of thinking through the various available strategies.

51 *Constitution of the Republic of South Africa,* 1996.
52 Fagan 2003:13.
53 Fagan 2003:13.
54 Freeman2003:15-16.
55 Freeman 2002:60-75.
56 Freeman 2002:75.

Habermas's universal pragmatics, which holds that all speech acts have an inherent purpose of mutual understanding, provides the basis for his theory of communicative action and human emancipation. Upon this then he builds his reconstructive theory of law and the procedural strategy of discourse ethics[57] to determine the validity of positive law and human rights. The democratic process and procedure thus house the legitimacy and validity of law. For Habermas the validity of law is not dependent on the existence of a higher natural law. Neither is it dependent on the social contract theories usually associated with Hobbes, Lock and Rousseau. It is also not dependent on the master theses of legal positivism or the constructive interpretivism of Dworkin. Valid law is derived through a deliberative model on the basis "of a discursively achieved agreement".[58] Human rights are consequently discursively grounded within a "procedure of presumptively rational opinion and will-formation".[59] Because rights are constituted by the democratic legislative procedure and as such meet the approval of those affected (according to Habermas), they have sufficient justification.

Habermas's notions of systems and lifeworld, deliberative democracy, universal pragmatics and discourse ethics come together in a reconstructive (as opposed to Derrida's deconstructive theory) theory of law as a way of answering the question: "Is valid law possible?" Since the legitimacy of law and rights resides in the procedure of discourse ethics, Habermas believes that law and rights can be justified. There are however, opposing viewpoints. MacIntyre believes that all attempts at justifying human rights have failed since "the reason for not believing in rights is the same reason for not believing in witches and unicorns".[60] For Critical Legal Studies, human rights are constructions that fit the liberal conception of law and because they create false consciousness, they are antithetical to justice. From here it was only a small logical step for postmodern and postcolonial legal theory to refer to the body of rights as the "modern myth of a people"[61] or a "human rights imaginary",[62] which are in fact conduits of power and domination.[63]

This discussion on justifying rights provides the backdrop for returning to the earlier question: "How can rights and values as juridical forms claim legitimacy through public deliberation in the lifeworld?" The first response is that rights, for all the expression of popular consensus, are difficult to justify other than arguing that they are codified as law. It is common knowledge that this justification is weak since justification should be based on norms, not fact. The norm, the value and the normative standard are generative of the lifeworld – they reside in it. It is only through popular and public deliberation within the lifeworld that the

57 Deflem 1996:9 – "The principle of the ethics of discourse therefore states: 'Only those norms can claim to be valid that meet with the approval of all affected in their capacity as participants in a practical discourse'". Habermas in Scheuerman 1999:156 – "Only those juridical statutes may claim legitimate validity that can meet with the agreement of all legal consociates in a discursive law-making procedure that in turn has been legally constituted".
58 Habermas 1996:137.
59 Habermas 1996:144.
60 Walters 2003:187.
61 Babha 1999:193.
62 See Douzinas 2000.
63 See Lenta 2001:184.

legitimacy of values and rights as juridical forms can be established. Despite the fact that the crisis of values is presenting itself so vividly, and groups are retreating into their cultural, religious, language and "racial" frames, this logic continues to escape South African society.

Secondly, the juridification of values at such a young age of our democracy was bound to follow conflictual patterns and dislocate communities from their taken-for-granted suppositions – from their cultural frames. All this happens without substantive deliberation in the lifeworld and alternative norm formation. Thirdly, South African society has abdicated its responsibility to deliberate to law. The colonisation of the lifeworld contributed to this abdication. Further, the processes for this colonisation were facilitated by the lifeworld actors themselves as they view the juridical expression of their objectives as the ultimate achievement. These juridical forms are perceived as the definitive demonstration of transformation. Human rights juridification and standard generation are thus viewed as human rights delivery in itself. So, instead of focusing on and working at the level of the lifeworld, South African society too easily deferred questions of values, ethics and morality to law – a shortcut that has proved to be detrimental to this society because laws make reflection within individuals and communities redundant. In this scheme, law has a preconfigured truth (even about values) that simply needs to be revealed through interpretation. The responsibility to reflect is thus no more required, and consequently ethical and moral considerations are not processed. Ironically, this is where political action around rights and values is most needed. It might be here that society can be convinced again that values ultimately have to do with directing our actions towards the suffering of others. The "moral decay" that is consistently articulated might simply be a consequence of an abdication of values to law.

This argument has its critics. Some of them are bound to argue that South Africa's problem is one of rights enforcement and of policies and laws that are not properly implemented. They would do well to remember that legitimacy is a central, practical policy risk factor. Legitimacy and justification is a prerequisite for implementation. The challenges relating to the implementation of laws and policies are linked to the extent of the normative validity that needs to precede the construction of policy and the enactment of laws. This process would include some form of deliberative discussion, debates and political action within the lifeworld. The upshot of this argument is that if the implementation of law, policy, values and rights as juridical forms is hindered by a lack of normative standards that should have been captured by the policy in the first place, it is impossible to speak of ideal or good policy or law. There is of course the conviction that progressive law can play a transformative role in society and there are a few examples of those in the country. Most of these laws, such as equality[64] and access to information[65] legislation would be ones that are built on already existing normative standards that grounded them in some form of legitimacy. But to understand the values of equality and transparency in these two instances will still require more work in the lifeworld than in the systems world.

64 *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.
65 Act 2 of 2000.

4. Values/Rights, deliberation and the lifeworld

The following are a restatement of the main questions of this paper: Are human rights contributing to the "crisis of values" or are values contributing to the "sterility of human rights"? Are there alternative ways in which one can conceptualise the link between values and human rights? What would the practical expression of this reconceptualisation look like? And how can it provide tools to engage with the crisis of values in education?

The preceding argument certainly established that the uncritical juridification of rights-related values in the absence of deliberation in the lifeworld contributes to its weakness. One way of engaging with this dilemma is to do what Motala[66] proposes in "building and [defending] [the] democratic state", or to paraphrase it, building a deliberative democracy. Habermas[67] of course has worked through his intellectual project in defence of constitutional democracy on the basis that the "demand to orient oneself to the common good, which is connected with political autonomy, is also a rational expectation insofar as only the democratic process guarantees that private individuals will achieve equal enjoyment of their equal liberties". Habermas's deliberative constitutional democracy is one way of rethinking how to engage with the crisis of values in education – and most importantly, how to construct political action within the lifeworld, with civil society as the prime generator of 'communicative power'[68]. The conversion of communicative power into administrative power through law takes place within the context of deliberative democracy.

One predicament of Habermas's[69] analysis is an "inadequate critical assessment of 'real-existing capitalist' democracy", which then turns into a utopian depiction of law making and legislative procedures. He thus ends up defending a form of human rights and law that is constitutive of a capitalist democracy and that runs counter to the "aspiration to destroy illegitimate socio-economic inequality".[70] These inequalities limit the possible deliberations of the vast majority. Their participation in the lifeworld is thus handicapped and the ideal of developing legitimate normative standards is compromised. Both Habermas and Derrida argued in favour of a democracy centred on human rights and the notion of cosmopolitanism in *Philosophy in a Time of Terror*.[71] It is however difficult to see how deliberative democracy will take shape since equal "deliberation", the communicative action so central to Habermas's thinking, is almost impossible in the context of systemic inequalities and poverty. Both overestimate the value of international human rights and law and pay too little attention to the possibility that, given the unequal power relations between people and nations, international law and human rights may well serve the interest of the powerful.

Still, it is in Habermas's lifeworld, and not our legal institutions, where substantive deliberation should take place, and the following challenges that constitute the crisis of values in education need to be addressed:

66 Motala 2003:12.
67 Habermas 2006:128.
68 Scheuerman on Habermas 1999:157.
69 Scheuerman on Habermas 1999:155.
70 Scheuerman on Habermas 1999:161.
71 Borradori 2003.

- "Codification" of values into regulatory frames.
- De-contextualisation of values and the norm-forming role of values.
- Quality of education and educational outputs.
- Weak cultures of learning and teaching.
- Commodification of education.
- Impact of poverty and economics on education.
- Misconceptions about diversity, difference and culture.
- Ghettoisation of equality.

With democracy, social justice, equality, non-racism and non-sexism, ubuntu (human dignity), an open society, accountability (responsibility), the rule of law, respect and reconciliation as the central values in education, sustained and long-term deliberation needs to take place in the lifeworld for these values to have norm-forming value. Already the claims of respect for difference and culture have developed into a fragmented, ghettoised and de-contextualised impersonation of equality over the past two decades, which views identity and identity formation as independent of economic and power relations. And thus South Africans have fallen into the trap of fighting, selectively so, for self-serving identity-based equalities such as those associated with "race", religion, culture and language. Moreover, these tendencies are ritualised into a mechanical logic of "us" and the "other" forgetting that in the lifeworld what is required is a "genuine reciprocity in which you encounter the difference of the other's humanness so as to inform and enrich your own"[72]. The lifeworld provide the space to develop human agency to collectively challenge systemic inequalities and discrimination.

So again, it is in the lifeworld where the "crisis of values in education" has to be engaged to develop an understanding of values that epitomises "solidarity within difference". Here values are not driven by difference *per se* but by a common solidarity within difference. This solidarity can only develop when all values are subjected and open to critique and examination at all times. What was hoped for is that the Constitution and the Bill of Rights would provide the bedrock consensus for the development of our values framework. However, this consensus is superimposed onto a fragmented and conflict-ridden social reality that is characterised by unequal power and economic relations – and unequal communicative power. These complexities and challenges have vividly been brought to our attention by the crisis of values in education, here and elsewhere.

Constitutions and constitutional values are generally viewed as providing a context within which to have debates around societal values and the role of education in relation to them. In addition, the development of human rights has provided further impetus to the idea that it is possible to develop a rights-based values framework. However, the normative ideals of human rights have literally developed into a form of human rights idolatry that has been unable to root a human rights values framework within the lifeworld and the lived social realities

72 Cillier undated: 4 http://academic.sun.ac.za/tsv/Profiles/Profile_documents/ Johan_Cilliers_IN_SEARCH_OF_MEANING_BETWEEN_UBUNTU_AND_INTO.pdf. [accessed on 19 October 2009].

and experiences of most people across the globe. Thus, it should come as no surprise when postmodernists refer to the human rights body of knowledge as mythology and that Lenta[73] would argue that "law's creation of legal subjectivity may be deconstructed to reveal subjects who have rights but lack equality and material well-being". Rights without material wellbeing and equality certainly have the potential to render themselves mythological.

It might therefore be logically impossible for values to source their legitimacy from constitutional rights. Rather, it is constitutional rights that should re-enter the lifeworld and be rooted within a normative, not a legal, validity – and this is the ambit of social, moral, ethical and political norms within the lifeworld. The political action related to the emergence of social movements and other deliberative spaces confirms for Habermas[74] the specific function of the lifeworld.

> In Habermas's view, all these movements are new historical occurrences because they do not coalesce around individual grievances, which would fall under a strategic practical horizon, but rather form around principles of free discourse and communicative action. This is proved by their lack of interest in gaining any shares of state power and by persistent debates concerning their self-identity.

Social movements in South Africa are probably the closest *we* have to Habermas's deliberative lifeworld. In South Africa these would include the Anti-Privatisation Forum, the Treatment Action Campaign and the Education Rights Project. The lifeworld needs to be broadened to include universities, academia, professional associations and councils, youth formations, networks, etc. The newly formed Public Participation Education Network (PPEN)[75] in its Call to Action captures the ideals of public participation in the lifeworld very well:

> The education crisis is the responsibility of the government as well as of all of us who constitute the public at large. For, it is a fact that we seem to have forgotten that the success and the quality of education depend on the active participation of the broad public. That is why we make this public Call on parents, communities, teachers and other educationalists, academics, NGOs involved in education, young and old and those who occupy positions of leadership in society and organizations across the board to assist in the process of mobilising public participation in all our educational issues.

PPEN's articulation of the communicative and deliberative power of Habermas's lifeworld and its construction of deliberation as an interface with the state is an appropriate example of the productive tension between communicative and administrative power. There is, however, a reversal of the Habermasian linearity from communicative to administrative power since it is administrative power that now needs to re-enter the lifeworld to be able to understand the critique on itself that is generated within the lifeworld by people's daily struggle for a decent education. In Habermasian ideals, administrative power would be open for review and change. In PPENian ideals, administrative power

73 Lenta 2001:184.
74 Borradori 2003:67.
75 See PPEN website, http://www.ppen.org.za/ (accessed on 20 April 2009).

should step back to allow for a more authentic expression of communicative, deliberative power through public participation. PPEN seems to aim at the interface between communicative and administrative power and in this process hopes for educational policies and law and their implementation to have closer alignments with the normative standards, aspirations and values deliberated upon in the lifeworld through public participation. This public participation takes into account the reality of socio-economic inequalities and the constraints that they impose on deliberative action. In essence, the present configuration of education on a schools level in terms of curriculum, funding, governance and community participation does not align well with the normative ideals and socio-economic reality of the majority of our people.

Except for social movements that are operating under difficult conditions, the lifeworld's communicative power in South Africa has to a large extent been transferred to administrative power as the systems world encroaches onto the lifeworld. South Africa is becoming a regulated, disciplinary and surveillance society, which simply adds to the genetics of our conflictual and adversarial dispositions. In this society there is growing evidence that the juridical forms of rights and values, in the absence of a deliberative democracy, probably add to our conflict and fragmentation. That is why Habermas's reconstructive theory of law and rights and systems and lifeworld logic is dependent on "deliberative democracy". His ideals of democratic transnational institutions and universal human rights rest heavily upon the development of a global lifeworld as represented by the World Social Forum – a global deliberative democracy that challenges predatory, capitalist democracy. Without it, his justification for rights and law will logically fail. Stated differently, the dominance of the values and logic that drive capitalist democracy makes it almost impossible to orient values and ethics towards the common good. So the "crisis of values" in education is not about the absence of "values", but about the dominance of a certain set of individualistic, self-centred, self-interest and entitlement driven values which in no small measure contribute to the reality of socio-economic inequalities, school-based violence and what is perceived as a general moral decay.

If, on a mundane level, it is difficult to justify rights and values as juridical forms, it is not surprising that the crisis of values in education is presenting itself in such graphic detail. Perhaps all the crises of values in education attest to a failure to engage with values from the perspective of communicative rationality. A powerful alternative is for the rights discourse to reclaim its critical stance towards law in order for rights to more seriously examine values and social and moral norms as important non-legal forms of societal regulation. Here Foucault's notion of an anti-disciplinarian right that does not require judicial justification seems to fit appropriately. These anti-disciplinarian rights and values have always been present in the ways that communities organised themselves against oppression during apartheid. The PPEN initiative can be interpreted as a rallying call around non-juridical rights and values that relate to developing solidarity with human suffering as expressed, in this instance, as educational challenges. Public participation around educational challenges might be a way of facilitating the expression of the communicative power of those who suffer the negative consequences of an unequal education system.

The modern-day lifeworld of South African society will do well to formulate alternative non-disciplinarian rights and values that can form the basis for developing communicative and deliberative power. That is, rights that speak directly to human suffering and values that respond commensurately to the common good, so that deliberation can provide normative standards to deal with a fragmented society, divided across class, cultural, religious, linguistic and racial fault lines. From here one can then build a scaffold to engage with the crises of values in education where human rights, values, morality and ethics are considered as part of the language of educational critique and the vernacular of pedagogical possibilities.

5. Conclusion

Why would such commonsensical logic of the importance of substantive lifeworld deliberation be so difficult to take shape in South African society? The unease with which a critique of the juridical forms of rights and values will be met is understandable, given the dominant ideological function of human rights. The idolatry that accompanies constitutional and policy analysis has long ago blunted the critical faculties of our analysts as far as human rights and values are concerned. As values and moral and ethical principles get usurped into the human rights idol, society terminated any substantive and critical public deliberation on these matters.

Most lifeworld actors and the donors supporting them have viewed the conversion of their particular issue into a juridical form as the ultimate goal of public advocacy and lobbying. The notion of ongoing and sustained public deliberation is entirely missing from this schema. Except for a few donors, even the schema of lifeworld support was usurped into the systems world. Thus it became incomprehensible for these actors to consider that it might be more desirable to focus on anti-disciplinarian rights and non-juridical values. The winning of court cases (mostly as hollow victories) ultimately became more important than a deliberated consensus or overlap of understanding. Habermas[76] foresaw this when he argued that systems "suppress forms of social integration, even in those areas [such as values] where a consensus-dependent coordination of action cannot be replaced".

The crisis of values in education is not about rights-related values implementation, but about rights dislocation. It is about dislodging the logic of juridical values, which makes deliberation in the lifeworld so limited. Something as commonsensical as communities with different worldviews coming together on a large scale to "deliberate" has become inconceivable. The main task would be to build out the lifeworld, to rethink and strengthen our movements, associations, organisations and academic institutions. The lifeworld would require innovative initiatives such as the Life, Knowledge and Action Programme at the University of Fort Hare, the public participation drive of PPEN and the agitation provided by our social movements.

76 Hebermas 1999:183.

South African society needs to work against the colonisation of the lifeworld and the encroachment of the systems world onto the lifeworld. Lifeworld deliberation is central to the development of nonlegal mechanisms of cooperation that may avoid the adversarial legal logic of human rights. This drive is even more imperative given the inadequate understanding of the complex relationship between law and social norms.[77] That the necessary interplay between law and social norms is absent in a society with such diverse sets of values and normative frameworks validates the efforts to build out the lifeworld. This diligence is probably South Africa's best option to deal with competing values, the crisis of values in education, prejudice, discrimination, inequalities and other societal ills.

77 Posner 2002.

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