CHAPTER 5

A CONCEPTUAL CARTOGRAPHY OF HUMAN RIGHTS EDUCATION:

DISCOURSES AND NARRATIVES

5.1. Introduction

A heuristic map, i.e. conceptual cartography for human rights and HRE along the lines that Paulston (Paulston and Liebman, 1993) would suggest will always be tentative with a diverse set of narratives shifting around the various spaces that they occupy; and the constant oscillations and variances that are necessitated as narratives establish links with one another or as the meanings of 'new' narratives are 'uncovered'. This map is diagrammatically presented and discussed in section 2.6 and some of the narratives have been partially constructed in Chapters 3 and 4. Further, in Chapter 6 this map will, with qualifications, be formatted into tables as part of an analysis of the definitional framework and typological considerations of HRE. In this chapter more interrelated and overlapping narratives will be added to this map to complete, for the purposes of this study, the conceptual cartography of HRE. These include the *natural law and natural rights discourse, legal positivism and the utilitarian discourse, Dworkin's liberal discourse, the Critical Legal Studies Discourse, the Postmodern and Postcolonial Legal Narrative, the Political Narrative and the International Law Narrative.*

Himma (2001) provides a useful overview of the philosophy of law[32]. Similar accounts can be found in the writings of Lloyd (1991), Shapiro (2003), Knowles (2004) and Ward (2004). Fagan (2003) again presents an overview of the philosophical and theoretical framework of human rights along the lines of the work of Freeman (2002), Sweet (2003), Donnelly (2003) and Douzinas (2000).

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[32] See Paterson (2003) on the *Philosophy of Law and Legal Theory: An Anthology* for another useful overview in this regard.

For Himma (2001: 1) the main elements of the philosophy of law can be structured in the following way:

- *Analytic Jurisprudence*
    - *Natural Law Theory*
    - *Legal Positivism*
    - *Ronald Dworkin's Third Theory*

- *Normative Jurisprudence*
    - *Freedom and the Limits of Legitimate Law*
    - *The Obligation to Obey the Law*
    - *The Justification of Punishment*

- *Critical Theories of Law*
    - *Critical Realism*
    - *Critical Legal Studies*
    - *Law and Economics*
    - *Outsider Jurisprudence*

Fagan (2003) on the other hand provides a philosophical account of the concept of 'human rights' and presents the "interest theory approach" and the "will theory approach" as philosophical justifications of human rights. There are much broader typologies[33] under the rubric of legal theory that include: the natural law theory of Grotius, Locke and Hobbes (17th century); the legal positivism of Bentham, J.S. Mill and Austin (18th and 19th century) ; the sociological jurisprudence of Pound and Ehrlich (20th century), the economic approach of Marx and Posner (20th century); the new legal positivism of Hart (20th century); the Critical Legal Studies movement (20th century); and Dworkin's liberal theory (20th century). The following sections deal selectively with the broad ambit of legal theory and philosophical considerations relating to human rights; the politics and economics of human rights; the international law perspective; the justifications for human rights and focuses on their influences on the framing of HRE. Habermas's "reconstructive legal theory" and its concomitant notions on human rights is one example of a "justification for human rights" that influences the framing of HRE that is dealt with in this chapter.

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[33] See Edwards (1998: 36-267) for a comprehensive typology of legal theory.

5.2 The Natural Law and Natural Rights Discourse

In Chapter 3 the origins and development of HRE were discussed against the backdrop of a Stoic philosophy that is based on moral universalism. Stoic philosophy, as premised on the universality of human nature and the power of reason, argued that there exists a universal law of nature which can be discerned by reason. The spread of the Roman Empire (27 B.C-476 A.D) provided the vehicle for the dissemination of the "universalising doctrine of Stoic natural law … and the new universal faith of Christianity" (Lloyd, 1991: 78). Roman law, Greek philosophy and Christian theology thus joined together to spawn the "medieval scholastic doctrine of natural law" (*ibid*: 78) that formed the bedrock of the theory of natural rights of Grotius, Hobbes and Locke in the 16th and 17th century. These ideas were the precursors to the enlightenment thinking on human rights and law that was to follow.

The theory of natural law presupposes the existence of a natural moral code within which a set of objectively determined human goods can be identified. Access to these human goods is regulated through the notion of natural rights. These rights are entitlements independent of any political processes and they are thus not necessarily constituted through recognition by the state. "Within the bounds of the law of nature" (Locke, 2002: 2) given to humankind by a divine superior being, everyone is bound to preserve themselves within the broader scheme of a regulatory framework that can be described in the following way:

> *And that all men may be restrained from invading other's rights and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of nature is in that state … whereby every one has a right to punish the transgressors of that law to such a degree as may hinder its violation. For the law of nature would, as all other laws that concern men in this world, be in vain if there were nobody that, in the state of nature, had a power to execute that law, and thereby preserve the innocent and restrain offenders (ibid: 3-4).*

Both Thomas Hobbes (1588-1679) and John Locke (1632-1704), two important figures in 17th century English philosophy, ascribed to the primacy of the "state of nature" (Rohmann, 2002: 182 and 234) as the justification for rights. For Locke a person has rights in a state of nature and these rights are transferred to his or her citizenship in a social contract with governments as a form of political governance. For Hobbes there was both an "obligation under the law of nature and a natural right to preserve oneself" (Freeman, 2002: 19) distinctly not on the basis of theology but on the "individual's natural and civil state" (Ward, 2004: 78).

Hobbes did not subscribe to a conceptual link between rights and democracy and was in favour of the limitation of democracy and the restraint on rights by the 'social contract'. The social contract thus did not presuppose the protection of rights by the government but rather underscored and reasserted the power of a sovereign authority over individuals (*ibid*: 79) to regulate the transfer of natural rights to citizens. The "state" of the social contract which presupposes the institution of a government, was viewed as an evolutionary stage following the "state of nature". According to this Hobbesian logic, without the social contract societies will remain in the "state of nature".

Whilst Hobbes argued for a social contract that centralised power within a sovereign body, Locke on the other hand favoured a social contract in which power resides with the community. His notions of the separation of powers between the legislative, executive and judicial arms of the constitution provide for a social contract where government is directed to the "peace, safety and public good of the people" (*ibid*: 84). Despite these differences, both Hobbes and Locke viewed rights as possessed by individuals. Unlike Hobbes and Locke, Rousseau (1712-1778) (1998: 14-16) viewed the social contract and thus rights not in individual but in collective terms.

> *If, then, we set aside what is not of the essence of the social contract, we shall find that it is reducible to the following terms: 'Each of us put in common his person and his whole power under the supreme direction of the general will; and in return we receive every member as an indivisible part of the whole'.*

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Thus the social contract within natural law theory can be viewed as being applicable to both individuals and communities. In the aftermath of the political struggles (bourgeois revolutions) against absolutism in England, France and America, the doctrine of natural law shaped the first "modern" constructions of human rights. These constructions were articulated through the Bill of Rights following the Glorious Revolution in England in 1688; the French Declaration of the Rights of Man and the Citizen in 1789 following the French Revolution; and the American Declaration of Independence of 1779. Thomas Paine, "the most colourful and successful pamphleteer in the age of the American and French Revolution" (Fruchtman, 2003: vii) was of the view that "rights and liberties were the essence of a person's humanity" (*ibid*: xv). His account (Paine, 2003: 167) of natural rights theory reads as follows.

> *Every history of the creation, and every traditionary account, whether from the lettered or unlettered world, however they may vary in their opinion or belief of certain particulars, all agree in establishing one point, the unity of man; by which I mean that men are all of one degree, and consequently that all men are born equal, with equal natural rights, in the same manner as if posterity had been continued by creation instead of generation.*

Thus on both sides of the 'western' Atlantic of the 18th century, natural rights theory contributed to human rights concerns in both the periods prior to and post the revolutions. However, the theoretical dependence of natural rights on the will of a superior authority of a divine nature could not be prolonged as a result of the securalization of the concept of natural rights throughout the 18th century. Justifying the logic of rights as predetermined within a natural order could therefore no longer be sustained. Within the context of the enlightenment, with its emphasis on rationality, the theoretical weaknesses of the natural law doctrine were exposed. The philosophical and theoretical basis for rights enunciation required a different kind of justification. This justification was found in Kant's (1724-1805) philosophy of moral reasoning which tried:

> *… to show that reason could justify a set of ethical and political principles based on the obligation to respect the dignity of other persons as rational and autonomous moral agents (Freeman, 2002: 24).*

Thus for Kant, human rights are constructions of reason and not articulations of the will of a supreme being. On this score, Kant assumed the existence of a universal community of rational human beings capable of developing their own moral principles. Human rights can thus be philosophically justified by appeal to the authority of reason and such reason allows human beings to act in accordance with "a maxim which all rational individuals are bound to accept" (Fagan, 2003: 5).

Despite the criticisms against the idea of natural law and natural rights in the 18th century, the dictum that nature provides an ideal standard still has its adherents in contemporary human rights theory. Kainz (2003: 19-25) for instance, documents the debate with Finnis and Grisez on natural law and natural rights that reflect their adherence to the "search for objective, non-relativistic ethical principles" in the same vein as those associated with traditional natural law theorists.

5.3 Legal Positivism and Utilitarian Discourse

Against the backdrop of the enlightenment and the dramatic technological and scientific progress, two important principles relating to the philosophical justification of human rights emerged. First, a clear demarcation between the laws of the physical universe and the norms of human conduct was instituted. Second, the principle of utility gained popular acceptance (Lloyd, 1991: 95-98).

With reference to the norms of human conduct and activity, legal positivists believe that it:

> *… is possible to establish principles of law independent of value judgements. The validity of such principles derives not from their moral force but from an objective criterion, such as Bentham's "greatest good for the greatest number' of Austin's "command of the sovereign", that is, the prerogative of lawful authority (Rohmann, 2002: 309).*

The rejection of value judgements as in the scientific endeavour of positivism was translated into a similar stance towards value judgements within legal positivism.

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According to legal positivists, establishing firm foundations rooted in principles or objective criteria, is one way of screening out value judgements. Austin's (1790-1859) objective criterion, the "command of sovereign", can be described as follows.

- *'Commands' involved an expressed wish that something must be done, and an 'evil' to be imposed if that wish is not complied with.*
- *Rules are general commands (applying generally to a class), as contrasted with specific or individual commands.*
- *Positive law consisted of those commands laid down by the sovereign (or its agents), to be contrasted to other law-givers, like god's general commands, and the general commands of the employer.*
- *The 'sovereign' was defined as a person (or collection of persons) who receives habitual obedience from the bulk of the population, but who does not habitually obey any other (earthly) person or institution.*
- *Positive law should also be contrasted with "laws by a close analogy" (which include positive morality, laws of honor, international law, customary law, and constitutional law, etc) (Bix, 2002: 4).*

It is possible, according to legal positivism and using Austin's principles, to create 'law-value' distinctions in similar vein to the positivist 'fact-value' distinction. Laws can thus be separated from religion and morality. Legal validity in turn is wholly dependent on this distinction. However, laws and morals are not unrelated and "the command of the sovereign" is simply a demarcation principle that distinguishes between laws and morals.

In classical consumerist terms, Jeremy Bentham's (1748-1832) principle of 'utility' refers to the usefulness of a product or commodity. Within this framework, laws are gauged by their applicability and their utility to lessen pain and increase pleasure. Utility thus refers to those processes and activities that serve to increase human happiness (Shapiro, 2003: 18-19). Stated differently, political actions must demonstrate a utility value before they can be justified. Likewise, laws can only be justified "if they add to the sum of human happiness, which can be calculated in terms of the greatest happiness of the greatest number" (Ward, 2004: 91). Bentham captures this notion of utility in the following way.

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and

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> *effects, are fastened to their throne…The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and law (Bentham quoted in Shapiro, 2003: 18).*

Bentham was convinced that the utilitarian constitution and application of the law could contribute significantly to progress and societal transformation. Apart from Bentham, James Mill and John Stuart Mill were the primary further exponents of utilitarianism and legal positivism. Utilitarianism rejects the notion of natural rights. Bentham in particular was savage in his critique of natural rights describing it as "simple nonsense, natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts" (Schultz, 2004: 44). This savaged critique of natural rights is buttressed by Bentham's conviction that within the spirit of the enlightenment and Comte's notion of positive science, the utilitarianists must try to develop law as a "positive, positivist science" (Lloyd, 1991: 108).

Legal positivism adheres to three theoretical commitments. First, the conventionality thesis holds that "legal validity can ultimately be explained in terms of criteria that are authoritative in virtue of some kind of social convention" (Himma, 2001: 3). Second, the social fact thesis (also know as the pedigree thesis) asserts that "legal validity is a function of social facts" (*ibid*: 3). Third, the separability thesis argues that law and morals can be separated from one another. Dworkin (1978: vii) refers to this version (of which he is extremely critical) of a liberal theory of law as "the ruling theory of law" that consists of legal positivism and utilitarianism. In defence of an alternative version of a liberal theory of law, Dworkin (1978) argued for a conceptual link between human rights and the liberal tradition and viewed legal positivism as an inadequate conceptual theory of law. Despite Bentham's rejection of the notion of human rights, J.S. Mill's notion of the "harm principle" provided a way of synthesizing rights and utility (Shapiro, 2003) and it is thus no surprise, as proven by Knowles (2004), that utilitarianism and human rights came neatly together under the conceptual umbrella of liberalism.

The most widely entrenched contemporary version of legal positivism is represented by the work of H.L.A. Hart who has had several exchanges with Dworkin (1978). Hart

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adhered to the separability thesis (separation of law and morals) and the master rule of recognition (Blackman, 1988: 151). The rule of recognition asserts that the validity of a law is dependent on being recognised as a law within the discursive regime and practice of law itself … its existence is a matter of fact. Dworkin (1978), in rejecting the master rules of Austin, Bentham and Hart, furthered the belief that the basis of adjudication requires more than the legal standards of validity that reside in social facts. Adjudication, according to Dworkin (1978), requires a good dose of interpretation. Though some, like Himma, (2001) classified Dworkin's work as legal positivist, others such as Stavropoulus (2002) have developed solid arguments to place Dworkin's work within the realm of interpretivism, a position that views "propositions of law …as interpretive of legal history" (*ibid*: 7).

5.4 Dworkin's Liberal Narrative

As noted earlier, the legal positivist pedigree thesis asserts that the validity of legal statements is determined either by the Benthamian notion of the 'greatest happiness of the greatest number'; or Austin's 'command of the sovereign'; or Hart's 'rule of recognition'. Both the notions of Bentham and Austin were discussed in the previous section and as such this section will briefly turn to Hart's thesis. Hart grounds his rule of recognition "in the empirical fact of its acceptance by the officials of the legal system" (Edwards, 1998: 185). Dworkin (1978) rejects these three foundationalist principles as inadequate 'master tests'.

In his work *Taking Rights Seriously (*1978: 22), Dworkin makes a distinction between rules, principles and policies. Rules are legal codifications and using any one of the three positivists' master tests, other sorts of important standards such as principles and policies will be eliminated.

> *I call a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community. I call a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social*

> *situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.*

Dworkin's main critique against legal positivism is that the application of a master test to determine legal validity, such as Hart's 'rule of recognition', does not allow for other standards that are embodied in principles and policies to influence legal validity. In relation to human rights, legal positivists posit that rights are only those provisions that are accepted as legally codified rights. Though such a stance rejects the notion of pre-existing natural rights, it does provide for legally codified rights. Dworkin (1978: xii) argues that individuals may have rights "other than those created by explicit decision or practice". That is, people may have rights that are not necessarily legally codified.

Dworkin's notion of judicial interpretation allows for judges to view propositions of "law as interpretive of legal history…they are neither simply descriptive, nor simply evaluative" (Stavropoulos, 2002: 7). Thus Dworkin subscribes to the idea and process of 'constructive interpretation' with legal history as the entity or body of knowledge under interpretation. 'Constructive interpretation' consists of three phases (preinterpretive, interpretive and postinterpretive) and correlates with the conception of 'law as integrity' as opposed to conventionalism and legal pragmatism. Edwards (1998: 195) provides a useful summary of these three conceptions of law.

> *Suffice to say that once the adherents of 'conventionalism', easily identifiable as those who follow the path of positivism, enter into debate about the nature of law, they, as in the case with legal pragmatists and Dworkin himself, the proponent of 'law as integrity', are fully committed to the third stage of 'constructive interpretation', namely, the 'postinterpretive' or reforming stage. It is here that interpreters, or legal philosophers, wish to adjust their sense 'of what practice really requires so as better to serve the justification [they] accept at the interpretive stage.*

The adjudicative role of 'constructive interpretation' is also employed to develop an understanding of the conditions that may guide and constrain the power of government.

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> *Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified. The law of the community on this account is the scheme of rights and responsibilities that meet that complex standard: they license coercion because they flow from past decisions of the right sort. They are therefore 'legal' rights and responsibilities (Dworkin as quoted in Edwards, 1998: 195).*

Thus Dworkin provides the rights thesis as a basis to reject the separation between law and morals and invokes a definition of a 'principle' that allows it to act as a yardstick for justice, fairness or any other element of morality. For Dworkin the existence of and claims to legal rights are presupposed within the sociology of the community independent of legal codification. The role of 'constructive interpretation' in judicial processes is to identify these rights and their concomitant responsibilities. Consequently the hermeneutic stance permeates Dworkin's theory of law.

5.5 The Critical Legal Studies Discourse

Following the logical conclusions of a Foucauldian analysis, law is simply a system of regulation and an "expression and exercise of power" (Ward, 2004: 141) in the service of relations of domination. Based on this profound scepticism towards law, Critical Legal Studies (CLS) emerged in opposition to the ruling theory of law and liberal legalism. In a useful expose, Madlingozi (2003) explores the dangers and limitations of the human rights discourse for Africa from a CLS perspective[34]. He (*ibid*: 2-3) describes the main tenets of CLS as: an opposition to the incoherence of both liberal and conservative legal theories; a commitment to a philosophical position that views the legal system in relation to its contribution to social justice; a firm conviction that law and politics are inseparable; a principled position that views law as an instrument that sustains social, economic and political domination by reproducing asymmetrical power-relations; and an understanding that social change is a broad societal process in which law will play its necessary part.

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[34] See also Mutua (1997) *Hope and Despair for a New South Africa: The Limits of the Rights Discourse.*

For Van Blerk (1996: 86) "the main impulse of [CLS] is to challenge liberal legal theory by debunking its claim to determinacy, coherence and objectivity". In essence CLS views the legitimacy of liberal legal theory as a matter of ideological masking that "falsely persuades society that prevailing social arrangements are necessary and natural" (*ibid*: 86). CLS for Van Blerk (*ibid*: 91-92) has its roots in Amerian realism and Marxism whilst for Edwards (1998: 145) its roots lie within Marxism and interpretive sociology. Ward (2004: 145) views the attributions of CLS as being related to post-structuralism.

The critique of the liberal legal tradition is constructed along three themes. First, CLS rejects the determinacy associated with liberal legal thinking. That is, a set of legal rules does not necessarily determine a particular outcome or understanding within the adjudication process. Instead, many outcomes are possible and choices thus reflect certain ideological positions. This contradicts the liberal legalism of Hart and Dworkin who adhere to the idea that "rules and principles, as part of a legitimate normative mechanism, yield determinant and predictable results in their application in the juridical process" (Edwards, 1998: 151). Second, CLS rejects the notion of objective and impartial law. Within feminist jurisprudence for instance, there is no such thing as the "view from nowhere", … every understanding has a perspective. "This perspective influences it, and provides an interpretive field for whatever matters of fact there may be" (Burchard, 2004: 4). Third, liberal legal theory presents contradictory accounts of human society, "that is, the contradiction between individual autonomy present in dominant liberal thinking versus the notion of substantive altruism or communitarianism" (Van Blerk, 1996: 92). The CLS's notion of communitarianism refers to a

> *… commitment to the attainment of a higher level of altruism in society; a commitment to communal sharing, citizen participation in social decisions and an increased sense of voluntary care and co-operation among people (ibid, 92).*

The communitarian idea of a highly altruistic society is related to the communitarian theory that "the norms that function in any particular community are the only sources of what is to count as ethically or politically right" (Edgar and Sedgwick, 2004: 74). For

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instance, the notion of the 'common good' can only be understood within a "communal structure of meanings which a political community has" (*ibid*: 75). The logical conclusion of this stance, in alignment with the perpectivism of feminist jurisprudence as a branch of CLS, is that communitarian ideas exhibit some fundamental similarities with the views associated with postmodernism.

Bentham's harsh response to natural rights as nonsense on stilts is almost analogous to the CLS response to human rights as 'illusions' and 'myths' (Ward, 2004: 145). For CLS human rights are constructions that fit the liberal conception of law. Within the orientation of liberal theory, individuals are separated from their communities and fictional divisions in communities are created. Rights are thus counterproductive to collective action. Madlingozi (2003) shows how the liberal conception of rights with its emphasis on individualism is of limited applicability to African nations because of African conceptions of 'community' and 'personhood'. Using the development of the notion of 'color blindness' in American jurisprudence, Madlingozi (2003: 14) argues that it is a good example of how "dangerous the language of rights is … it exposes the fact that 'neutral', 'necessary' and 'progressive' concepts, like 'non-racism' or 'non-sexism', can be used not only to maintain the status quo, but also aggravate the victim's position". He argues further (*ibid*: 15) and develops the proposition that the legal and the rights discourses create "false consciousness and thus hinder genuine democracy and justice" because "people are fooled into believing that what should be, already is" (*ibid*: 23)[35].

Unger, a leading CLS proponent, proposed a 'reconstructive' strategy for an alternative society within which four types of human rights play an important role:

- *Immunity rights ensure security against the states and permit individual zones of privacy.*
- *Destabilizing rights allow people to demand the disruption of institutions and social practices that perpetuate the divisions the society wants to avoid.*
- *Market rights provide a conditional and provisional claim to divisible portions of social capital.*

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[35] See Kennedy (2002) for a critique of rights within CLS

- *Solidarity rights endorse legal entitlements to communal life and foster mutual reliance, good faith, loyalty and responsibility.*
  (Edwards, 1998: 147)

Some analysts questionably view Posner's arguments on law and economics as a branch of CLS (Himma, 2001). In consonant with the central notion of CLS about the impossibility of objective law, Posner argues that economic analyses of law will reveal that "common law can be explained in terms of its tendency to maximise preferences" and that common law is best explained as a "system for maximising the wealth of society" (Himma, 2001: 13). This argument relates closely to Habermas's contention that:

> *The dominant discourse in contemporary legal thought has become that of 'private' right, essentially a right to property and commerce, rather than 'public' democracy. Accordingly, law has been recast in specifically economic, rather than political or moral terms (Ward, 2004: 70).*

Posner also argues for the importance of social norms in legal thinking since social norms contribute to social welfare. He views legal rules as "efforts to harness the regulatory power of social norms" and (2002: 8) further argues that "legal analysis should take account of complexities of non-legal regulation more often than they do" (*ibid*: 169).

5.6 The Postmodern and Postcolonial Legal Narrative[36]

Chapter 4 engaged with the postmodern as a cultural-historical moment and a sceptical intellectual mood towards foundationalism. This forms the basis for a discussion on postmodern legal thought. In addition, postcolonial legal thought will be discussed in a joint deployment with postmodern legal thought. Following Bhabha and Spivak as two eminent postcolonial theorists, Lenta (2001:175), gives a joint account of the legal theory of postmodernism and postcolonialism but treats them as distinct positions with a high level of congruence.

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[36] See Douzinas (2000), *The End of Human Rights* which is a useful treatise on jurisprudence and insightful critiques of mainstream constructions of law and human rights from a postmodern perspective.

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Edward Said's work on *Orientalism* (1978) is generally regarded as the 'beginning' of the postcolonial tradition (Viruru, 2005: 8; Harris, 2000: 2; Kumar, 2003: 2) though postcolonial intellectual injunctions such as those of Frantz Fanon (1963) have been made prior to the writings of Said. Drawing on the analysis of 'discourse' in the work of Foucault, Said (1978: 69) views the systematic writings about the Orient as a discourse:

> *My contention is that without examining Orientalism as a discourse one cannot possibly understand the enormously systematic discipline by which European culture was able to manage – and even produce – the Orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively during the post-Enlightenment period.*

Stemming from Orientalism as a discourse and thus a regime of truth, the West constructs the Orient as the 'other' in relation to itself. This self-construction of the West is impossible without reference to the 'negative other' and this 'other' includes the Orient and the cultures of colonised people such as those in India and Africa. Thus postcolonial studies focuses on the othering of the colonised cultures; the "oppressed consciousness of the colonised subject"; the cultural bias "inherent in particular forms of European discourse"; and the continued influence of colonialism on the identity of the "post-colonial subjects and their cultures" (Edgar and Sedgwick, 2004: 291).

Bhabha (1999: 189) views the postcolonial as interventions in the "ideological discourses of modernity" within the broader context of a "colonial contramodernity". For Bhabha (*ibid*: 190) postcolonial thinking forces us to "confront the concept of culture … as an uneven, incomplete production of meaning and value, often composed of incommensurable demands and practices, produced in the act of social survival". The otherness that is constituted within these cultures is a central focus of postcolonial studies. 'Otherness', 'alterity' and the 'subaltern' are thus fundamental concepts within postcolonial theory. "Driven by the subaltern history on the margins of modernity", Bhabha (*ibid*: 193) tries to rename the "postmodern from the position of the postcolonial". Again, for Spivak, this subaltern history should not be articulated within the power-language frame of the dominant culture, but be represented and enunciated by the subalterns themselves (Rohmannn, 2000: 310).

Postcolonial legal theory questions the space and status of the subalterns within the context of law and human rights. Bhabha (*ibid*: 193) for instance refers to rights and obligations as central "to the modern myth of a people". As a result of this critical posture, postcolonial legal theory deals with the relationship between law and the postcolonial; the role of law in the West's relationship with its 'other'; the critique of the international human rights discourse; law as a tool of colonialism; the way in which colonial politics affect legal rights (Kumar, 2003: 4-5); and "deciphering systems of representation designed to validate the institutional subordination…of the colonised" (Lenta, 2001: 185).

Following the discussion in Chapter 4, postmodernism rejects the notion of universality; focuses on the situatedness and locality of the subject; opposes all notions of objective truths; adheres to the social construction of reality; discards any totalising narrative; celebrates difference, tolerance and contingency; insists on the plurality of power-discourses; and subscribes to the ambiguity and ambivalence of meaning. Analogous to this, postmodern legal theory rejects the notion of universal justice; opposes the notion of objective legal truths; confirms the social construction of legality; discards the totalising narrative of liberal legalism; and views law as a vehicle of power.

Postmodern legal theory is sceptical towards liberal law and asserts that "law's creation of legal subjectivity may be deconstructed to reveal subjects who have rights but lack equality and material well-being" (Lenta, 2001: 184).

> *In fact, far from ensuring freedom, the rules, structures and mechanisms of legal modernism, such as rights litigation and the rule of law, are revealed by postmodernism often to be conduits of power and mechanisms of subjection and domination…Rights discourse has not only often failed historically to deliver on its transformative promises, but it also ignores the institutionally pervasive and systemic nature of oppression (ibid: 184-185).*

Employing the views of Foucault, Lyotard and Derrida, Lenta (2001) provides a useful postmodernist critique of South African legal theory[37] and suggest ways in which postmodern strategies may be employed: "to elucidate colonial modes of thoughts…in South African law"; "to recuperate agency for the subaltern"; and to deconstruct the constitutional texts in order to fracture the "current forms of legal knowledge and social identities authored and authorised by Western modernity" (*ibid*: 186). Following Alasdair McIntyre and Michael Walzer, postmodern legal theory views justice as contingent and particular and relative to social meanings (*ibid*: 183). Lenta's analysis is even more important given the fact that South Africa's history has become the grand narrative as an interpretive tool as it relates to constitutional jurisprudence (De Vos, 2001). How and by whom this history is constructed become important questions from both the perspectives of postmodern and postcolonial legal theory.

According to Derrida the law is deconstructible and deconstruction is justice (Bohler-Muller, 2002: 629). In similar vein Ward (2004: 167) views deconstruction as jurisprudence and ethics because it seeks to address the concerns related to justice but this justice is defined within the locality and situatedness of the 'violated' and not in terms of universal constructs. The construction of justice is not finite but fluid and open in similar trajectory to the postmodern thesis of the ambivalence of meaning that may change and shift at any time. Thus, whilst modern jurisprudence is concerned with the past, "postmodern jurisprudence embraces the future" (Ward, 2004: 169). Postmodern legal theory may be regarded as a natural evolution from CLS since they share a profound scepticism towards modernity (Ward, 2004: 171). Within postmodern legal theory deconstruction is ethics and justice and law is an aesthetic phenomenon. Therefore the deconstruction of legal texts represents the main interpretative strategy (Douzinas, 1991) whilst ethics and aesthetics remain central to postmodern legal theory. These notions are well represented in Douzinas's version of postmodern legal scholarship in *The End of Human Rights (2000).*

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[37] Bohler-Muller (2002) provides an account of *postmodern feminist legal theory* in South Africa; De Vos, (2001) shows how South African history is used as *the grand narrative in legal interpretation;* Lenta, (2004) is critical of *rainbow jurisprudence* in relation to the judgements of the South African Constitutional Court and Boshof (2004) also uses postmodern insights to discuss *law as dialogical politics.*

Douzinas's postmodernism wants to retain a radicalism for human rights that is rooted in dissent and rebellion similar to Lenta's (2001) contentions about the transformative potential of postmodern legal theory. The potential for radicalism resides in the anti-foundationalism of postmodernism in the way that Giroux (1997: 195) would argue. Consequently postmodernists try to rearticulate human rights from the perspective of the subalterns where the "human rights imaginary" gives way to the notions of humanity and humanism within which the "nature of love and affection, pity and friendship" are viewed as political concepts (Ward, 2004: 172). Human rights, and by extension HRE, must thus reclaim its position as a critical approach to law and in service of a critical view on social justice. But this notion of human rights, according to Rorty (1999: 77) is a non-foundational one…it is a "human rights of consciousness" (Ward, 2004:179).

5.7 The International Law Narrative

This narrative is closely linked to the notion of declarationism that has been developed in earlier parts of this study. It is also intrinsically linked to the legal discourse and constitutes the most dominant framework for engaging with human rights and HRE. The basis for this narrative has been formulated since 1948 first with the adoption of the Universal Declaration of Human Rights and subsequently the adoption of the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966). This trio is regarded as the International Bill of Human Rights.

Flowing from this, an array of declarations, conventions and covenants were developed as part of either binding international law or part of the international normative framework for human rights. There are now more than 200 binding legal instruments on an international and regional level. Some examples that are regionally focused are those that cover the Americas, Africa and Europe. On the basis of themes and vulnerability, there are instruments that focus on women; race; religion; children; minorities and indigenous people; asylum and refugees; non-nationals and stateless persons;

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development; education; employment; the judiciary, law enforcement and legal profession; treatment of offenders; juvenile justice; victims of crime; torture and extra-legal execution; capital punishment and international crimes.

For Evans (2001: 7-8) the legal discourse can be divided into two broad areas.

> *The first involves disagreements over the nature and status of international law in a world where sovereignty, non-intervention and domestic jurisdiction remain the guiding principles…The second broad focus for international law concerns questions to do with the internal elegance of the law, its coherence, extent and meaning, which the application of legal reason discovers.*

The legal discourse on human rights has been widely documented[38]. It is at present also the most dominant influence on the framing of HRE[39]. On this score HRE is merely a disseminating channel for popularising these international instruments. The legalization of HRE itself is dependent on these frameworks and thus it is a matter of international law legalizing its own popularization, education and training.

5.8 The Political Narrative

> *The abstract, moral, utopian approach of philosophy, which allows us to glimpse a better future, fills us with hope, while the empirical, neutral, norm-driven approaches of international law reassure us that international society has taken firm action on human rights. Together these two discourses conspire to marginalise the political discourse, and thus exclude consideration of prevailing economic, social and political structures and practices that support particular interests while sustaining the conditions for continued human rights violations (Evans, 2001: 10).*

Though Evans (*ibid*: 10) would warn us against conflating legal, philosophical and political norms in human rights argumentations, Ricoeur (2000: 1) argues that when it comes to human rights, the juridical or legal cannot be distinguished from the moral and anthropological. And when Shapiro (2003) provides a treatise on *The Moral Foundations*

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[38] See Melander and Alfredsson (1997), Freeman (2002) and Donnelly (2003) for examples.
[39] See discussion on the UNESCO discourse on HRE in Chapter 3.

of Politics that is infused with human rights discourses, the distinctions between the legal, philosophical (including the moral) and political are further blurred. Knowles's (2001) journey through *Political Philosophy* further blurs these distinctions as he negotiates the notions of human rights, democracy and politics.

However, for the purposes of this study it is useful to understand the political narrative of human rights as a discourse that interprets human rights against the notions of power, hegemony, democracy, globalization and the political economy of rights generation and practices. Far from viewing human rights as utopian, the politics of human rights explores the ways in which human rights are aligned to already existing relations of power and interests. The political narrative of human rights forwards a number of theses.

First, Mutua (2002: 15) argues that the obsession to universalize human rights stems from the 'impulse to universalise Eurocentric norms and values by repudiating, demonizing, and 'othering' that which is different and non-European'. Mutua constructs an argument on the basis of human rights as a metaphor that includes the metaphors of the savage, the victim and the saviour.

> *The grand narrative of human rights contains a subtext which depicts an epochal contest pitting savages, on the one hand, against victims and saviours, on the other (ibid: 10)*

The upshot of Mutua's argument is that the human rights discourse in relation to Third World countries is built around the tendency of displacing the other. The displacement of the other was first operationalized through the practices of the Christian missionary of the previous era who has been replaced by the human rights zealot of the modern era.

Second, Marx's critique of rights focuses on its individual nature. Verma (2000: 69) argues that Marx's notion of rights can be summarised as follows:

- *The notion of rights presupposes a model of man as the egoistic individual of civil society.*
- *The notion of rights is limited to political emancipation.*

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- *The notion of rights cannot be fully realized in bourgeois society by all classes.*

Some argue that Marx was against the very notion of legal rights as "being the artefact of a defective mode of production" (*ibid*: 76) whilst others are of the opinion that Marx provide an alternative theory of rights "that is non-possessive and non-absolutist' (*ibid*: 77). Other theorists have developed a Marxist theory on collective human rights that is based on the following contradiction in human rights theory:

> *On the one hand, human rights, can provide a fairy-tale façade which serves to disguise the often vicious nature of class society. Acting "as if" certain rights are true (equality, freedom, etc.) inhibits people's ability to recognize when they are, in reality, false, and when society does not protect these rights. On the other hand, there are many positive and progressive qualities found within conceptions of human rights (Felice, 1996: 131).*

Within this mode of thinking, employing Marxist notions to re-interpret human rights within the framework of class, power and privilege that "incorporate respect for individual freedom with a desire to end group suffering" (*ibid*: 130) might be a more viable option in developing a society based on human dignity.

Third, in *Power, hegemony and the universalization of human rights,* Evans (1998) contends that an exploration of power within the human rights discourse demonstrates that human rights are on the one hand seen as empowering and on the other as subjugating. The practice of human rights has elements of exercising power over people such as the exclusionary practices that mainstream some forms of human rights understandings whilst rejecting others (see Mutua, 2002). The deeper meaning of power in the Foucauldian sense has even wider implications because truth cannot be spoken in the absence of power and thus the power that is exercised within the human rights discourse creates its own "political economy of truth" (Foucault, 1994: 131). What counts as human rights truths are thus determined by the nature of power-relations as they play themselves out on the human rights landscape.

Bent Flyvberg (2000) builds this argument further by arguing against Habermas' consensus-seeking philosophy as idealistic and that the notions of democracy, and by extension human rights, cannot be understood within this consensus paradigm. Rather, he (2000: 29) argues, Foucault's understanding of democracy and of human rights that places conflict and power at its centre is a better explanatory framework than that of Habermas. The logical conclusion of Flyvberg's argument is that democracy and administration are beset by conflict and power that in turn permeate the administration of human rights. Thus, following Foucault, rather than turning to a framework of 'consensus' as an explanatory tool, HRE practitioners should embrace the Foucauldian framework of 'conflict and power'[40].

"The term 'hegemony' is derived from the Greek *hegemon,* meaning leader, guide or ruler" (Edgar and Sedgwick, 2004: 164) and later interpreted by Gramsci to refer to the need "to rule by consent" (*ibid*) and the "legitimation of intellectual and moral leadership" (Evans, 1998: 5).

> *Hegemony is exercised in two ways: externally by influencing behaviour and choice through rewards and punishment and internally by shaping personal beliefs, opinions and values that reflect prevailing interest (ibid).*

Using the concept of hegemony as an analytical tool, Evans argues that the United States of America (USA) has used the language of human rights to further its own political, economic and cultural interests. In similar vein, Chomsky (1998: 51) chides the USA for its human rights hypocrisy[41] describing its internal record as "shameful" and its record abroad as a "scandal"[42]. Similar sentiments are expressed by Said (2001: 411-435).

Fourth, the relationship between *human rights, globalization and markets* is a central constitutive part of the political discourse on human rights. The modern world shows up

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[40] See Langlois (2001: 10) who argues for a political model as a theory for human rights that acknowledges that "it is part of the human condition that there will be disagreement, power plays, authority relations, conflict and antagonism".

[41] See Shivji (2003) on *Law's Empire and the Empire's Lawlessness* on the hypocrisy and double standards of the West in relation to human rights.

[42] See Arundhati Roy (2004: 44-65) on the contribution of Noam Chomsky in exposing the hypocrisy of the USA in *The Loneliness of Noam Chomsky.*

two distinct features. On the one hand there is the "growing interpenetration of states, markets, communications, and ideas across the borders" (Brysk, 2002: 1) which is globalization, and on the other there exists a burgeoning international normative framework for the promotion and protection of human rights. Falk (2002: 61-76) argues that there are grounds on which to "reconsider the presumed contradiction between market forces and human rights" (*ibid*, 73) and this relationship needs to be viewed with scepticism. He agitates for a wider conception of human rights that includes social and economic rights and the right to development by which to provide counter-hegemonic practices to the neo-liberal tendencies of globalization. This argument resonates with Vally's analysis (2002: 6) of human rights and neo-liberalism in the South African context.

Baxi's (2002: 119-131) metaphorical notion of 'human rights markets' posits that

> *Human rights markets consist of a network of transactions that serve the contingent and long-term interests of investors, producers and consumers. These transactions rely upon the availability, which they in turn seek to reinforce, of symbolic capital in the form of international human rights norms, standards, doctrines, and organisational networks. Since grids of power are globalized, human rights markets also create and reinforce global networks, each of which seeks to influence the patterns of compliance and violation of human rights norms…Human rights markets thus share salient features of global service industries.*

Though Baxi acknowledged some difficulties with the human rights market metaphor, the shift from this metaphor to the "commodification of human suffering" (*ibid*: 125) is a powerful analytical tool for reflecting on the relationship between human rights and industry markets[43]. He argues that human suffering needs to be commodified and packaged according to market requirements for human rights entrepreneurs to flourish.

> *Human suffering must be packaged in ways which the mass media markets find it profitable to bear overall…Injustice and human right*

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[43] For instance, see Tomasevski, (2005 [a]) for a comprehensive analysis on *Education as a Human Right or as a Traded Service*. Also note Tomasevski's (2005 [b]: 237) conclusion on her reflections as the UN Special Rapporteur on the Right to Education from 1998 to 2004…the World Bank is the lead agency in education and does not recognise education as a human right.

> *violations is headline news only as the pornography of power, and its voyeuristic potential lies in the reiterative packaging of violations to titillate and scandalize, for the moment at least, the dilettante sensibilities of the globalizing classes (ibid: 125).*

The commodification and marketization of human rights and human suffering thus follow similar patterns than those displayed by the globalization of markets and industries and the commodification of social services. Human rights and human suffering, from this perspective, has become a regulated service industry.

Sixth, Evans's (2001) treatise of the *Politics of Human Rights* highlights the centrality of politics and power in human rights talks within the context of the post-Cold war era and in the age of globalization and exposes the possibilities for understanding rights "as both sustaining existing forms of dominance and providing a powerful tool with which to challenge those forms" (*ibid*: 34). He further articulates the shortcomings of a fixation with international human rights law (*ibid*: 55) and demonstrates that human rights are often violated in the "cause of trade" (*ibid*: 77) and that "people who stand in the way of trade-related business 'routinely' lose the right to self-determination and to 'freely pursue their economic, social and cultural development'" (*ibid*: 78). He (*ibid*: 101) further probes the link between human rights and democracy[44] and concludes the following.

> *Given the argument that the spread of the democracy idea, as is currently promoted, relates more to economic growth and development, the interests of global capital and finance and the conditions for globalization, than with human rights and human security, the popular assumption 'if democracy then human rights' is at least questionable.*

The overall thesis of Evan's exposé is captured in his understanding that human rights practitioners should neither be overly pessimistic or optimistic about the utility of the human rights discourse but rather explore how relations of domination are sustained and reproduced within the language and practice of human rights and at the same time exploit the possibilities of a transformative practice that is locked into and resident in this same discourse. A critical theoretical stance is thus evident in Evan's analysis.

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[44] See Henriquez (1999) on *Human Rights: An Approach to a Political Issue.*

Seventh, in the *Political Philosophy of Needs* Hamilton (2003) argues that the contemporary significance of human rights should be reduced to a secondary status in relation to a "theoretical conception that better articulates the larger material and ethical concerns of practical politics" (*ibid*: 2).

> *A political philosophy founded on rights is illusory, and in practice it often acts counter to some of its own intended goals. This is the case because thinking about modern politics in terms of rights is a crude means of political explanation or ethical assessment and proposal, not least of all because rights, I claim, are in fact retrospective and impede change and evaluation. This is partly due to the fact that rights are meta-political: they naturalise and hierarchise political and ethical means and ends prior to any contextual political process of evaluation. They are the outcome of an attempt to provide secure conditions for a particular kind of political rule and order, but when stipulated in the form of rights these conditions depoliticise politics (ibid: 3).*

He further argues that human rights are inherently conservative and tend to entrench the status quo because of their historicity. Linking the natural law theory of Grotius, Hobbes and Locke of the 17th, 18th and 19th centuries with the discourse of modern human rights, he (*ibid*: 4) argues that both provided an overarching ideological framework and moral code for guiding the exploitation of territories and peoples. Natural law theory provided such a framework and code to legitimise the imperialism of countries like Spain, France, Holland and England in the 17th, 18th and 19th centuries. In similar form modern human rights (and current HRE practice) provide a framework and moral code in relation to the exploits associated with the globalization of the 20th and 21st centuries.

Coupled with the inherent conservatism of rights, Hamilton (*ibid*: 5-6) argues that contrary to particular dominant convictions, rights are not "free-standing, self-evident, universally accepted material requirements or moral elements of universal nature or existence". They are contingent on wider social frameworks and political organisation. He thus argues for a *Political Philosophy of Needs* that is focused on "the urgent distribution of resources and requirements for human functioning under conditions of non-agreement" (*ibid*: 8) to which human rights may or may not be a secondary

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framework. He maintains that the conception of needs is more motivational and objective than the current conception of rights (*ibid*: 9).

> *In retaining a significant motivational element, this approach to needs provides an improved means of capturing some of the claims people bring to the political arena, and of understanding and explaining a common language of politics. For it is an empirical fact that the terms 'need' and 'needs' are constantly employed in practical politics.*

Eight, in *Human Rights as Politics and Idolatry,* Ignatieff (2001) shows how the legitimacy of human rights is undermined by the inconsistent application of its provisions by the most powerful Western Countries. He further argues that the efforts to elevate human rights into a universal secular religion, translates into humanism worshipping itself, i.e. human rights idolatry. Both the inconsistent political application of human rights and its construction as a universal secular religion negate the legitimacy of human rights within the contextual framework of the non-West. In *The Warrior's Honor* he (1999) further argues for the development of altruism in relation to our moral obligation to do "something" beyond our tribe, nation and family (*ibid*: 4). And again, in *The Rights Revolution* he (2000: 23) is in agreement with Evans (2001) on the necessity of the centrality of agency in the human rights discourse.

The political narrative on human rights provides a rationale for HRE to move beyond the political literacy and declarationist approaches. It shows how power, hegemony, needs, economics, politics and the globalization, commodification and marketization of human rights all influence the meaning of human rights and HRE. Further, it provides the basis for HRE to reconstruct itself as a critical theoretical and practical endeavour to contribute to developing agency and transformative human rights practices. More so, it points to different ways in which the anti-educational potential of HRE can contribute to human suffering and the reproduction of inequality and the possibilities to counter such tendencies.

5.9 The Justification of Human Rights

In the previous sections the various strands of the legal philosophical discourse have been explored including the natural law justification, the foundationalist master rule of legal positivism, the constructive interpretivism of Dworkin and the perspectivism of CLS and postcolonial and postmodernist legal thought. In addition a number of narratives and discourse and their influences on the meaning of HRE have been explored. This section deals with the different approaches to justifying human rights as a basis to take up the implications of these approaches and philosophical arguments around the notions of law and rights for an understanding of the practice of human rights education.

Knowles (2004: 155-176) provides a useful typology of rights justifications. First, Lockean natural law thinking asserts that people have natural rights derived from natural or God's law. In an effort to ground human rights, Locke put forward the idea that people own themselves and that wealth or objects generated by the people thus belong to them. Knowles calls this the "Thesis of Self-Ownership". People have rights through self-ownership and rights claims are justified on the basis of such self-ownership. Second, rights are justified on "grounds that they advance autonomy" (*ibid*: 160) within the context of freedom. Third, rights may be justified because they embody such important interests that they require protection, such as Mill's notion that a "right is a valid claim on society for protection" (*ibid*: 165). Fourth, for interests to be protected, a rights codification that is based on utilitarian calculations is required (*ibid*: 169). Fifth, the 'no-theory' theory asserts that "if rights are claimed, acknowledged and respected amongst a community, no further argument is needed to establish its provenance" (*ibid*: 175), in similar vein to Luhman's (Deflem: 1996: 10) understanding about law as an autopoietic system in modern societies that "no longer need any justification in terms of normative points of view".

Fagan (2003: 13) points out that the validity and justification of rights cannot reside in its legal codification since rights have to be "demonstrated as valid norms and not facts".

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Following a similar trajectory as Knowles' notion of 'interest', Fagan (*ibid*: 13) argues that the 'interest approach' views human rights as having the principle function to protect and promote human interest. The 'will theory approach' links with Knowles's second point and 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 is the "logical corollary of recognising oneself as a rationally purposive agent" (*ibid*: 15-16).

Freeman (2002) argues that a human rights theory must be focused on the justification of rights. He (*ibid*: 60-75) presents the various arguments forwarded by Donnelly, Dworkin, Nussbaum, Gewirth, Walzer, Rawls and Rorty for justifying human rights. According to him (ibid: 75), 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.*

Hannah Arendt (1906-1975) thought that the idea of humanity might replace the 18th century notion of nature as a justification for human rights. But since no law of humanity exists, the need to protect human rights is not grounded in any principle (Cotter, 2005: 20). Though Arendt resisted aligning herself to any philosophical justification for human rights, she urged that:

> *…we need to recognise that rights are conventions, the product of collective agreements, and, thus, part of the human artifice. They are only possible and, indeed, only necessary because of the human condition of plurality. Arendt concludes that "The concept of human rights can again be meaningful only if they are redefined as a right to the human condition itself, which depends upon belonging to some human community, the right never to be dependent upon some inborn human dignity which de facto, aside from its guarantee by fellow-men...does not exist"...That rights rely on human agreement and not on natural rights, indicates the inherent*

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fragility of all rights and of any product of human agreement; it also indicates the grave responsibility we all have to establish and maintain such an agreement (Cotter, 2005: 21).

Arendt's notion of human agreement represents another form of justifying human rights. The idea of human dignity which Arendt rejects as a grounding for human rights, became the basis for Nussbaum's justification of human rights. Her notion of capabilities is deeply rooted in the idea of human dignity (Garret, 2004: 3). Further, the Nussbaum capability approach that is derived from Sen's[45] (2005) articulation of human development in terms of capabilities and freedoms, translates human rights into a moral principle that frames the minimum threshold of capabilities in human rights terms (Garret, 2004: 6). These capabilities are central to human existence and on this basis the justification for human rights is formulated.

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, I. M. (1990) all have implications for the justification of human rights. Some of these will be discussed in Chapter 7. For now it suffices to note that Gewirth's principle of morality, i.e. the Principle of Generic Consistency (PGC), forms the basis for his theory of morality as a theory and therefore a justification of human rights. Given that ethics directs attention to people's own reflexivity towards the intentions and consequences of their action, Gewirth's ethical rationalism presents the PGC as the principal moral principle that is authored by the nature and structure of human agency that is engaged in a necessary dialectical form of argumentation. Consequently human agents are engaged to act in accord with their own rights and the generic rights of others as an ethical consideration of the consequences of their action. Human rights are thus justified within this ethical rationalism with the PGC as the prime post-metaphysical moral principle.

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[45] See Unterhalter (2003).

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. From this then he builds his reconstructive theory of law and the procedural strategy of discourse ethics to determine the validity of postitive law and human rights.

> *Discourse ethics, sometimes called "argumentation ethics," refers to a type of argument that attempts to establish normative or ethical truths by examining the presuppositions of discourse (Wikipedia Encyclopedia, 2005: 1).*

The validity of law and thus human rights for Habermas (Rasmussen, 1996: 28) resides within the "mediation between philosophical claims for justification and the sociological accounts of institutionalization". Habermas's discourse ethics puts forward a procedure to determine the validity of laws and rights. The validity of norms is derived through the approval of "all affected in their capacity as participants in a practical discourse" (Habermas quoted in Deflem, (1996: 9). Habermas (Deflem: 1996: 10) agrees with CLS that law and morality are closely related but CLS 'scholars have generally argued against the possibility of rationally reconstructing law's moral grounding in terms of a universal procedure of discourse". For Habermas, modern law:

> *…can be morally grounded. Law can be legitimate in terms of moral-practical discourse, not because it incorporates concrete, ethically right values, but because it relies on a procedurally conceived notion of rationality realized by democratic principles in legislation, jurisprudence and legal administration (ibid: 12).*

Law is a regulatory system that maintains society through coercion. But this law needs legitimacy for it to employ its coercive force. In the absence of a natural law grounded in religion or metaphysics and in the absence of a post-traditional morality, "the democratic procedure for the production of law evidently forms the only postmetaphysical source of legitimacy" (Habermas, 1996: 136).

> *But what provides this procedure with its legitimating force? Discourse theory answers this question with a simple, and at first glance unlikely,*

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> *answer: democratic procedure makes it possible for issues and contributions, information and reasons to float freely; it secures a discursive character for political will-formation; and it thereby grounds the fallibilist assumptions that results issuing from proper procedure are more or less reasonable (ibid, 1996: 136).*

The democratic process and procedure thus houses 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. It is also not reliant 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" (*ibid*: 137). Consequently human rights are discursively grounded within a "procedure of presumptively rational opinion and will-formation" (*ibid*: 144). For Habermas there is thus an internal relation between human rights and popular sovereignty.

> *…the sought-for internal relation between popular sovereignty and human rights consists in the fact that the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalised (Habermas: 1999: 64).*

Human rights, for Habermas, are not only central to providing the facilitative framework for rational political will-formation, but also central to will-formation itself. They are constituted by the democratic legislative procedure and as such meet the approval of those affected. As such human rights are oriented towards the common good.

The justifications of human rights are multi-faceted[46] and are constituted by a diverse range of macro and mini-narratives. Natural law theory holds that natural rights are justified on the basis of the laws of nature which represent the laws of the deity. The legitimacy of positive law and natural rights are dependent on its congruence with natural law. Legal positivists argued that human rights are only those rights that are legally codified and such codification is justified on the basis of an objective criterion that might include Austin's "command of the sovereign", Bentham's "utility principle", and Hart's

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[46] For example, see Freeman (2004) on Donnelly's and Gewirth's efforts at justifying human rights and Orend (2002) on *Do we need to justify human rights at all?*

"rule of recognition". The validity of human rights is thus tied to its codification in a law that meets the requirements of such objective criteria. Dworkin believes that people may have rights that are not legally codified and that these rights are presupposed within the sociology of the community. These rights are identifiable through "constructive interpretation" within the hermeneutic tradition.

Whilst Kant grounds human rights in reason and the rationality of the autonomous individual, Habermas contends that human rights are discursively grounded and justified on the basis of the democratic legislative procedure. In direct contrast to efforts at justifying human rights, MacIntyre believes that all attempts at justifying human rights have failed… "the reason for not believing in rights is the same reason for not believing in witches and unicorns" (Walters, 2003: 187)[47]. CLS also rejects the liberal legalism of Dworkin and legal positivism and views human rights as illusions. For CLS human rights are constructions that fit the liberal conception of law and because it creates false consciousness, it is 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" or as a "human rights imaginary" that are in fact conduits of power and domination. Universal human rights are logical impossibilities within the context of postmodernism and postcolonialism and HRE is merely seen as a pedagogical tool aimed at legitimating the human rights imaginary.

5.10 Conclusion

The implications of all these narratives and discourses for the concept of HRE are discussed in the next chapter. This chapter has demonstrated, in alignment with Chapter 4, that human rights is a contested concept and that such contestations have a material impact on how HRE is conceptualised. The variety and fluidity of meanings of HRE that have emerged from the 'woodwork' of the conceptual map enriched the conceptual cartography of HRE. It provides the basis for the necessary constant and perpetual critical reflexivity that should inform the conceptual structure of HRE. It also highlights the

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[47] See Chapter 7 for more on McIntyre's argument.

fallacy that HRE is an 'objective' practice based on consensual human rights universals and illustrates that all formulations of HRE are guided by particular stated and un-stated interest and theoretical assumptions. Further, Chapter 6 explores the definitional and typological considerations that have been thrown up by the concept analysis, the conceptual historical analysis and the conceptual cartography.