

## A South African reflection on the nature of human rights

*Auwais Rafudeen*

Senior Lecturer, Department of Religious Studies and Arabic, University of South Africa

### Summary

*This article argues that continued structural inequality in South Africa should give us pause to reflect on the efficacy of the country's rights discourse. It is not so much concerned with the ineffective application of rights (particularly socio-economic rights) as with the actual nature of the rights. My argument is pursued as follows: The notion of 'right' as we have it today is rooted in the same paradigm that fosters commodification; this lends rights an inherent indeterminacy and they are deployed not only to challenge hegemonic interests, but to defend them as well. This indeterminacy is also tied to the fact that rights are really preferences that cultivate particular types of subjectivity. Such recognition of the nature of rights will generate, I believe, a more sober view of its potential to correct society's iniquities.*

**Key words:** *rights; South Africa; indeterminacy; autonomy; subjectivity*

### 1 Introduction

South Africa has been held up as the first state that is the virtual product of post-World War II's 'Age of Rights'. The country 'represents the first deliberate and calculated effort in history to craft a human rights state – a polity that is primarily animated by human rights norms'.<sup>1</sup> As such, the human rights discourse has been

---

\* BA MA PhD (Cape Town); rafudma@unisa.ac.za. I would like to thank my colleague, Professor Danie Goosen of the Department of Religious Studies and Arabic, UNISA, for his encouraging review of a draft of this paper – one that gave me confidence to pursue its publication. I would also like to thank the anonymous reviewers of this article for very valuable feedback. The usual disclaimers are in order.

1 M Mutua *Human rights: A political and cultural critique* (2002) 126.

employed as the predominant means by which South Africa seeks to transform the iniquities of the past.

However, while South Africans have now been afforded a wide range of civil liberties, the broadly-stated aims in the country's Constitution relating to social redress remain out of reach. Individual rights (freedom of expression, the right to a fair trial, and so on) abound but structural inequality persists. Significantly, even the provision of generic socio-economic rights in the Constitution seems to have had little impact on this inequality. For, while these individual and socio-economic rights are theoretically available to all, they are possessed in an asymmetrical social, political and economic order – an order, it must be emphasised, that has been, and continues to be, profoundly shaped by the systemic racism of colonialism and apartheid, and its attendant racialised poverty and dispossession.<sup>2</sup> And so, access to and the exercise of rights in South Africa are strongly inflected by race and class stratification and may paradoxically lend weight to this stratification. As Brown has indicated, the exercise of these rights can indeed augment the power of those who hold power in society.<sup>3</sup>

This abstraction of rights from these social realities gives the human rights discourse in South Africa a peculiar hollowness: It projects the image of a country with a 'vigorous human rights culture', but this very vigour obscures, to use a Marxist phrase, fundamental social contradictions. As Vally succinctly notes:<sup>4</sup>

Institutions such as the South African Human Rights Commission, the Commission for Gender Equality, the Public Protector and others, for all the good work some of them do, often disguise the vicious nature of the society we live in. The discourse of rights, championed as the mainstay of our public institutions and the Constitution has often served to promote a fiction. Acting as if certain rights exist for all in an equal way inhibits people's ability to recognise when they are in fact, illusory, and why society does not act to protect these rights. A single mother in Soweto compared to a suburban corporate executive cannot be said to have the same power of political persuasion or opportunity. These are real distinctions that give some people advantages and privileges over others. The fiction that promotes the view that real social differences between human beings shall not affect their standing as citizens, allows relations of domination and conflict to remain intact.

I would like to explore this tension between human rights and social redress in South Africa by examining the notion of a 'right'. I argue that the indeterminacy of human rights – the fact that, after all is said

---

2 See, eg, S Vally 'From people's education to neoliberalism in South Africa' (2007) 111 *Review of African political economy* 39. See also S Terreblanche *Lost in transformation* (2012) 1-5.

3 W Brown 'Suffering rights as paradoxes' (2000) 7 *Constellations* 232. For a nuanced discussion of how the exercise of these rights is profoundly shaped by very local contexts, see also T Madlingozi 'Post-apartheid social movements and legal mobilisation' in M Langford et al (eds) *Socio-economic rights in South Africa: Symbol or substance?* (2013) 92 ff.

4 Vally (n 2 above) 40.

and done, we construe as a right whatever we want to construe as a right – means that, elementally, the human rights discourse relies on the same logic that sustains the types of activity that may reinforce conditions of structural inequality. This is not the same thing as saying that such discourse does not play a role in ameliorating such inequality. It does, and indeed is quite critical to monitoring the injustices produced by prevailing arrangements.<sup>5</sup> Nor is my argument interested in the *motives* of human rights campaigners (and so I do not question these motives nor deprecate their efforts). Rather, my interest is in the formative ideas that went into the construction of the ‘right’ as we now have it, and in the *effects* this construction has produced. In my view such an examination can help shed some light on why human rights discourse, for all its ameliorative capacity, has not *innately* challenged structural inequality in South Africa in the way many would have hoped.

## 2 On the logic of autonomy

According to Asad, human rights proceed on the assumption that the human being has certain inalienable rights by virtue of being human.<sup>6</sup> In other words, an essence is ascribed to the human being which invests him and her with particular rights, irrespective of social obligations. A human being’s civil status – as citizen of the state – is distinct from his or her status as a human being – the status which has invested him and her with these inalienable rights. For Asad, this explains why the devastating social effects that followed the Asian economic crisis in the mid-1990s – a crisis explicitly precipitated by neoliberal policies – was not classed as a ‘human rights’ violation. Nothing of the human being’s essence was said to be violated if he or she suffered as a consequence of (in this case) market manipulation from beyond their own state. His or her suffering as a result of the crisis – in other words, as a citizen of a state – is to be distinguished from his or her suffering as a human being: ‘Human rights are only concerned with the individual in the latter capacity, with his or her *natural* being and not civil status.’<sup>7</sup>

Such a distinction between human being as human being and human being as citizen is, of course, untenable. In reality, and especially in the modern state, these are intertwined. Asad’s critique of this artificial division is useful for understanding why the deleterious consequences of South Africa’s Growth, Employment and Redistribution (GEAR) policy was not seen as a violation of human

---

5 For the necessity and value of legal strategies, even among ‘counter-hegemonic’ social movements, see Mandligozi (n 3 above). Brown has also observed that while rights serve as a mitigation, not a resolution of subordinating powers, ‘[i]f violence is upon you, almost any means of reducing it is of value’. Brown (n 3 above) 232.

6 T Asad *Formations of the secular* (2003).

7 Asad (n 6 above) 129 (my emphasis).

rights. Despite exacerbating inequality and unemployment, increasing the cost of living for the poor, creating food insecurity and impeding access to housing, water and electricity,<sup>8</sup> GEAR was a state policy applied to the country's citizens in their capacity as citizens. And so the fact that its *effects* (not intent, of course) violated the provisions contained in the Bill of Rights (which enshrines equality and access to employment and services) does not formally register as a transgression of human rights. The suffering that resulted from this policy is only recorded after the fact and follows indirectly from a person's status as a citizen. It is only then (if at all) that individual cases of suffering can be registered as human rights violations.

Some distinctions need to be introduced here. The Bill of Rights provides for formal equality before the law (section 9(1))<sup>9</sup> – a comparatively straightforward matter, but the very next point states that '[e]quality includes the full and equal enjoyment of all rights and freedoms' (section 9(2)). However, if there are structural barriers to employment, or if there are obstacles to accessing essential services – all rights in the Bill of Rights – can such equality be said to have been optimally achieved? The equality spoken about here goes beyond the formal one stated in the first and speaks to a qualitative measure of living, namely, similar access to resources. But since access to such resources in South Africa – a country with one of the world's more acute Gini co-efficients<sup>10</sup> – varies wildly, such equality can hardly be realised. Indeed, as Vally intimates above, social disparity can hinder access to more formal rights as well. GEAR, then, has produced results that are inconsistent with the Bill of Rights.

However, a failure of economic policy is not conventionally seen as a human rights violation. It is seen as a failure of state policy that was applied to *citizens* which then may adversely affect them as *humans*. And it is only in relation to the latter that the human rights regimen comes into the picture. This time lag has an important consequence: Human rights cannot formally indict state *policy*. It cannot, in this example, pronounce, in any legally-enforceable way, on the broader issue of rising inequality and unemployment. It certainly recognises such systemic challenges, and is critical of them,<sup>11</sup> but its technical remit is restricted to investigating the human consequences that,

8 A Mngxitama & A Eveleth 'The widening gap between rich and poor' *Social Watch* (2003) <http://www.socialwatch.org/node/10861> (accessed 5 April 2016).

9 Bill of Rights, Department of Justice, South Africa <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng-02.pdf> (accessed 5 April 2016).

10 Eg, see G Keeton 'Inequality in South Africa' 3 November 2014 <http://www.ngopulse.org/article/inequality-south-africa> (accessed 5 April 2016).

11 The Commission admits as much: 'SA has laid important foundations for human rights in our Constitution; through international UN obligations such as CEDAW, progressive policies and laws, institutions supporting democracy such as the Constitutional Court, the South African Human Rights Commission and the Public Protector. Yet these advances have been undermined by macro-economic choices.' P Govender 'South Africa's democracy and human rights: progress and challenges' 3 October 2012 <http://www.sahrc.org.za/home/index.php?ipkArticleID=136> (accessed 8 September 2015).

among other things, follow from the implementation of state policy, not the policy itself.<sup>12</sup> Echoing Asad, it may be said that its focus is on the suffering and impairment to the dignity of the human being as human being, not as citizen. In a sense, it is left picking up the pieces after the damage to *citizenry* already has been done.

So, while human rights advocates, such as South African Human Rights Commission's Deputy-Chairperson Pregs Govender,<sup>13</sup> may correctly rail against the broader macro-economic framework,<sup>13</sup> the human rights regimen is designed, via the time lag, to work within the structure that sustains this framework. Of course, it is a countervailing force and performs a crucial ameliorative function, but it responds from within the same structure.

The implications of working within such structural limitations have been discussed by Bond in relation to the right to water in South Africa. Reflecting on a protracted dispute between rights activists and the City of Johannesburg surrounding the provision of water in the early 2000s, Bond asks:<sup>14</sup>

[B]y invoking the right to water and attempting to define it in the context of neo-liberal municipal management, does a generic commitment to rights trump the market? Or instead, does rights talk work *within neo-liberalism*?

In taking the matter to the courts, water rights advocates argue that across South Africa,<sup>15</sup>

the self-interest of powerful municipal constituents – large businesses, farms and rich ratepayers – was to keep water prices relatively low, which in turn required limiting provision in low-income neighbourhoods.

Rights advocates further accused the City of, among other things, (i) making water unaffordable after the provision of very small free basic supply (equivalent to roughly two flushes a day); (ii) disconnecting water to people requiring more than the free basic supply but too poor to pay for it; (iii) offering 50 free litres per *household* per day rather than the Reconstruction and Development Programme recommendation of 50 litres per *person* per day; and (iv) providing low quality sanitation and water (for example, shallow sewage systems).<sup>16</sup>

In court, rights advocates met with gradually diminishing success. In April 2008, a High Court ruled that the 'prepayment water system in Phiri township' was 'unconstitutional and unlawful', and ordered the City to provide each applicant and other residents with a 'free

12 See SAHRC website 'About the SAHRC', <http://www.sahrc.org.za/home/index.php?ipkContentID=122&ipkMenuID=1> (accessed 8 September 2015).

13 Govender (n 11 above).

14 P Bond 'Water rights, commons and advocacy narratives' (2013) 29 *South African Journal on Human Rights* 126.

15 Bond (n 14 above) 133.

16 As above.

basic water supply of 50 litres per person per day and the option of a metered supply installed at the cost of the City of Johannesburg'.<sup>17</sup> However, this judgment was overturned by the Supreme Court in 2009, which ruled that, although prepaid metres were 'unlawful', they could be 'legalised' by the City. In addition, it reduced the available consumption for individuals from 50 litres to 42, an order which Bond finds to be 'whimsical'.<sup>18</sup> Finally, when the matter was taken to the Constitutional Court, it confirmed a policy which granted individuals 25 litres per day, as well as finding that the use of prepaid meters was 'reasonable and lawful'.<sup>19</sup>

For Bond, the frustrating unfolding of this story should teach us the limitations of 'consumption-based rights demands'. The rights narrative is still trapped in the paradigm of commodification. Water is still demanded as 'an individualised consumption norm' in rights talk (a rights talk that is, in addition, shaped by the legalism of the courts), rather than a communally-shared resource. As such, 'the right to water' campaign tends to unwittingly reinforce corporatist models of water management. Bakker, as quoted by Bond, has pointedly outlined the general problems of 'rights talk' in relation to water:

The adoption of human rights discourse by private companies indicates its limitations as an anti-privatisation strategy. Human rights are individualistic, anthropocentric, state-centric, and compatible with the private sector provision of water supply and, as such, a limited strategy for those seeking to refute water privatisation. Moreover, 'rights talk' offers us an unimaginative language for thinking about new community economies, not least because the pursuit of a campaign to establish water as a human right risks reinforcing the public/private binary upon which this confrontation is predicated, occluding possibilities for collective action beyond corporatist models of service provision.<sup>20</sup>

What Bakker and Bond are saying is that, at a profound level, 'rights' advocacy and commodification work within the same structure. This does not negate a real difference or opposition between them, but it does illuminate why human rights are limited from a paradigmatic standpoint. Human rights discourse has to respond from within the same paradigm that is responsible for the commodification of the water supply, and so it has to frame its demands in terms of the limits set by that paradigm. But why does human rights discourse not look beyond this paradigm to present its criticism of the state of affairs? I think it is incapable of doing this because, fundamentally, it shares the same view concerning the *self* as the forces that drive commodification. To understand this more fully,

---

17 Bond (n 14 above) 134.

18 Bond (n 14 above) 134-135.

19 Bond 135; see *Mazibuko & Others v City of Johannesburg & Others* 2009 3 BCLR 239 (CC).

20 Bond (n 14 above) 138.

we need to again turn to Asad and, in particular, his reflection on the genealogy of natural rights, the precursor to human rights.

For Asad, natural rights – rights believed to be intrinsic to a human being in a ‘state of nature’ – are closely connected to the concept of active rights – rights that are believed to inhere in a human being irrespective of social relationships. An active right is distinguished from a passive right – one that entailed the reciprocal duties and obligations of a social network. The idea of *liberty* is critical to the notion of an active right. The idea means that the human being is to be defined as a *sovereign* individual and not as an individual defined in terms of his or her social relationship. As an autonomous individual, he or she has inalienable rights, that is, human rights. But as an autonomous individual, he or she is also at liberty to pursue their self-interest. Human rights and the capitalist spirit are the two, admittedly opposing, faces of natural rights. But both emerge from, and are inscribed in, its logic of autonomy and inalienability.

To state the argument from a different angle: The notion of self-ownership – of the sovereign self – is critical to human rights. But it is equally critical to the pursuit of self-interest. At one level, they are in opposition to one another, and human rights perform a crucial ameliorative function in curbing the negative effects that arise from the pursuit of self-interest. But at a deeper level, human rights discourse partakes in the same paradigmatic view of the self that fosters, for example, a predatory capitalism. And so its response to the effects of such capitalism, while capable of being very critical, cannot overturn the paradigm itself: If pursued, it would negate the reason for its own being.

The paradigmatic affiliation of human rights with capitalism sheds light, I think, on another major characteristic of human rights, namely, its indeterminacy. Essentially, the question that arises is: Who makes up these rights? The content and scope associated with these rights, of course, have changed over time. They initially were confined to civil liberties: They now extend to social, economic and environmental rights. The first declarations – the forerunners to today’s human rights – excluded non-whites and women: This has now been expanded. So, rights are in an incremental but continuous process of change. And so, how do we know which rights are inalienable? The question was already posed during the emergence of natural rights, and the answer, as Tuck points out, is as follows:<sup>21</sup>

Anything which it was reasonable to want, could now be construed as an inalienable right, the recovery of which was entirely justifiable: It was unlikely that any rational man would renounce his rights to such reasonable gratifications.

So rights could essentially be anything we want it to be. This underlying sensibility was imported into human rights and lends it a

---

21 As quoted in Asad (n 6 above) 133-134.

profound indeterminacy – it can be used to challenge hegemonic interests but it can also be employed to promote such interests.<sup>22</sup> It is to this theme that I now turn.

### 3 State, indeterminacy and preference

The earlier question still remains: Who decides what gets constituted as a right? In other words, on what authority are autonomous decisions – ‘rights are whatever we want them to be’ – crafted into a legally-binding form? The answer, in short, is through the state.

It is the state that through its law enforces human rights. Even when human rights are passed by transnational bodies, they need to be ratified by the state. And even if the state does ratify international human rights treaties, it does not necessarily enforce their provisions.<sup>23</sup>

It is through the constitutional basis of the state that human rights discourse acquires its inalienable authority in practice. As Nicol points out, human rights are accorded a ‘fundamentality’ that transcends the ‘ordinary’ laws of parliament.<sup>24</sup> Human rights are construed as such because they are seen as something owed to a human being by virtue of them being human. But – and here Nicol makes a very crucial point – what one believes is owed to a human being is not an ideologically-neutral construction, but it is an ideologically-driven one. It is informed, he says, *by one’s vision of the good life*. And so, if, for example, business rights are seen as being integral to that ‘good life’ then they, too, are accorded fundamentality. He writes:<sup>25</sup>

I would argue, therefore, that what makes a right a human right is actually constitutionalisation, that is, the decision to make something supra-legislative, to elevate it to the constitutional plane and to that extent to disable the legislature. It is precisely because business rights are conceived as basic rights owed to human beings that these rights are accorded a fundamental status.

We may, says Nicol, *label* something as a human right or *label* something as competition law, but if a decision is made to fundamentalise a business right, then that right – the rights pertaining to competition law, for example – becomes a human right as it

22 See Mutua (n 1 above) 126.

23 E Posner ‘The case against human rights’ *The Guardian* 4 December 2014 <http://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> (accessed 6 April 2016).

24 D Nicol ‘Business rights as human rights’ in T Campbell et al (eds) *The legal protection of human rights: Sceptical essays* (2011) 229-243. I differ from Nicol in that I give less prominence to the influence of supranational bodies. While such bodies certainly have tremendous leverage, particularly over weaker states, this leverage still has to be mediated through the legal structure of a particular state.

25 Nicol (n 24 above) 233.

'presupposes that that right is an essential element of human existence'.<sup>26</sup>

And while human rights 'proper', in the popular imagination, may be granted greater legitimacy than neoliberal-inspired economic rights, from the judicial perspective it makes no substantive difference what their origins are. As supranational rights, they need to be applied and upheld regardless of their popular legitimacy. In court, they are all seen as fundamental and constitutional and not bound by 'ordinary' law.

This notion of fundamentality, I believe, is central to understanding why human rights are so indeterminate. This indeterminacy lies not in the outcome of a human right, but in the way they are constructed. They fundamentally proceed from the belief that human rights are whatever we want them to be, making them amenable to vested economic interests as well.

There is a reason for such interests constitute business rights as human rights and this, Nicol says, is related to the type of society that the hegemonic elites seek to create. If human rights are seen as the rights we are owed by virtue of being human, and if these hegemonic forces feel we are owed business rights, then the values to which such forces aspire are those of market liberalism. In the current neoliberal European construct, says Nicol, 'democracy was not intended to be the highest value'. Nicol concludes:<sup>27</sup>

At base a 'human right' is a right which is considered of the first importance, because it constitutes an essential element of the way life should be lived. However, judgments regarding the way in which life should be lived are not arrived at by some universalist alchemy. They are made by those who enjoy ideological hegemony in a given era, and for the past thirty years it is neoliberals who have enjoyed this hegemony.

A South African example of constituting a business right as a human right can be seen in the response of the Consumer Goods Council (CGSA) to a call on major retailers in this country not to stock Israeli products in the wake of Israel's 2014 assault on the Gaza Strip. The CGSA – which represents these retailers – declared that not stocking Israeli products would violate the 'right to free and fair trade'. A CGSA statement on 7 August 2014 reads:<sup>28</sup>

The conflict in the Middle East has resulted in some of our customers and certain retail members, including Shoprite, Massmart, SPAR, Woolworths and Pick-n-Pay, being approached, sometimes in an aggressive and confrontational way, to remove products sourced from Israeli manufacturers from their shelves. *This infringes on their rights to free and fair trade as enshrined in the country's Constitution.* South Africa is a fully constituted democracy that respects law and order. There are channels

---

26 As above.

27 Nicol (n 24 above) 243.

28 Consumer Goods, Council of South Africa 'Conflict in the Middle East – Statement from the CGSA' <https://www.cgcsa.co.za/resources/press-office/press-releases/statement-from-cgcsa> (accessed 7 August 2014) (my emphasis).

provided by our respective members for complaints and grievances to be lodged if a consumer is dissatisfied with a particular product. This is also contained in the Consumer Protection Act. Our position, as an industry, is that we recognise the right of consumers to exercise freedom of choice with regard to the products that they purchase. In line with this we believe that the industry's role is to ensure that the products sold in our member's stores, are marked with legislated descriptive information that includes the country of origin. This enables consumers to make informed buying decisions that are aligned to the personal perspectives that they might hold.

Apart from the fact that it effectively claims a 'human right' to trade in Israeli products, what is remarkable about this statement is the way it abstracts, the way it separates, the 'right to free trade' from a volatile and unequal conflict where a great number of civilian deaths have clearly been caused by one party; where the chief United Nations (UN) human rights commissioner stated that Israeli military actions in the Strip may amount to war crimes;<sup>29</sup> where the internationally illegal dispossession and settlement of Palestinian land by the Israeli government lies at the heart of the conflict. In other words, it depoliticises this right to free trade, creating an illusory moral equivalence between the two parties and then leaving consumers, in a liberal individualist manner, with a 'choice' to buy or not to buy – the whole notion of a 'right to choose' only arises because the 'right to free trade' is depoliticised. Market capitalism extends its ideology by its pretence to be apolitical and non-ideological.

There is nothing, then, *innate* in human rights that challenge the economic *status quo*. This is, of course, not saying that human rights discourse does not challenge inequality or acts of injustice. It indeed does and is crucial, as I have pointed out before, in its ameliorative function. But I am simply pointing out that, since they can also be used to protect what many would see as a problematic *status quo*, they are not *innately* driven to question such. Rather, they are innately indeterminate.

But why are rights innately indeterminate? Why can they also be used to protect the interests of a hegemonic class? As Kennedy points out, the answer lies in the fact that, for all their objective veneer, rights are really preferences. Kennedy's analysis of this notion, I believe, deepens our understanding of fundamentality and indeterminacy associated with rights. In particular, he shows us how this indeterminacy works in the actual unfolding of the law.

Kennedy argues that rights discourse assumes a fundamental distinction between factual, empirical discourse and one based on value judgments and preferences. However, rights are seen to contain elements of both: They are preferences, but preferences that are justified in a supposedly rational manner. Like values, they proclaim

---

29 N Pillay 'UN: Israel assault in Gaza may be a war crime' *Aljazeera* 23 July 2014 <http://www.aljazeera.com/news/2014/07/un-israel-assault-gaza-may-be-war-crim-e-201472394058635836.html> (accessed 11 August 2014).

what 'ought' to be; but like a fact it is a value that 'is' evident to all after rational discussion. Rights, then, mediate between the domains of values and facts. And once a right is acknowledged, the same rational process will guide its application. In Kennedy's terminology, it is a 'factoid'.<sup>30</sup> Consequently, according to Kennedy, rights can be said to possess two qualities. First, as a 'rational' preference, it can claim to be universal. Second, as a 'factoid', it finds instantiation in social and legal rules in a fairly objective and determinate manner.<sup>31</sup>

So rights are in the first instance 'outside' the legal framework. It is constitutional law that enacts rights within the law and then applies rights as rules within that framework. (Here we are reminded, of course, of Nicol's notion of fundamentality.) When rights are outside the framework, arguments from rights mediate between value judgments (preferences of groups) and 'facts' (what is already within the law). When rights are already enshrined within the law, such arguments mediate between legal argument (the duty to show interpretive fidelity) and legislative argument (the values of a political community).<sup>32</sup>

Kennedy points out two interesting corollaries associated with this outsider/insider character of constitutional law. When the law incorporates outside preferences into the law as is, it is in reality casting the preferences of a group as the preferences of the whole polity. But the reason these preferences can be incorporated in an almost seamless manner is because they are cast as *rights* and so viewed as rationally grounded (as a 'universal'). Those who reject such rights are not merely selfish, but *wrong*. And so – and this is the other corollary – rights talk becomes a discourse: 'a way of talking about what to do that includes a vocabulary and a whole set of presuppositions about reality'.<sup>33</sup> It projects itself, like the internal discourse of legal reasoning, as a discourse of reason and necessity, not mere preference.

In other words, it projects itself as a view of reality, as a theology. But just as one can have faith in such a theology, one can *lose* faith in the rational basis of rights and in the legal reasoning that follows from the acceptance of this basis. The result is cynicism. Kennedy writes:<sup>34</sup>

Cynicism means using rights talk (or legal reasoning) as no more than a way to formulate demands. They may be 'righteous' demands, in the sense that one believes strongly that they 'ought' to be granted, but the cynic has no belief that the specific language of rights adds something to the language of morality or utility.

---

30 D Kennedy 'The critique of rights in Critical Legal Studies' in W Brown & J Halley (eds) *Left legalism/left critique* (2002) 184.

31 Kennedy (n 30 above) 184-185.

32 Kennedy 185-188.

33 Kennedy 190.

34 As above.

Consequently, one starts experiencing legal argument as mere 'rhetoric'. It is crucial to emphasise here that Kennedy does not mean that such argument is 'wrong' or 'meaningless'. Rather, one experiences it not as an instantiation of objective judicial reasoning, but as an outcome that follows from how one manipulates the material at one's disposal. The following statement by Kennedy is rather telling in this regard:<sup>35</sup>

Loss of faith is a loss, an absence: 'Once I believed that the materials and the procedure produced the outcome, but now I experience the procedure as something I *do to* the materials to produce the outcome I want. Sometimes it works and sometimes it doesn't, meaning that sometimes I get the outcome I want and sometimes I don't.' Loss of faith is one possible resolution of the tension or cognitive dissonance represented by bad faith. One abandons the strategy of denial of the ideological, or subjective, or political, or just random element in legal reasoning. One lets go of the convention that outcomes are the consequences of 'mere' observance of the duty of interpretive fidelity.

The fact that material and procedures – legal rules – can be manipulated means that legal reasoning is indeterminate: Different sides can use such reasoning to arrive at opposing positions. And by extension, rights arguments, which are contained in legal rules, can be employed by individuals and groups with radically different persuasions. Again, I must emphasise that Kennedy sees nothing wrong in all this *per se*. But he wants us to get away from the notion – indeed the theological belief – that judicial reasoning is somehow an impersonal exercise that leads to its own conclusions. Rules and rights do not spring from faith in the blind force of judicial reasoning; they are informed, as just stated, by ideological, subjective, political or plain random considerations.

Such considerations come to the fore when the court needs to balance one right (for example, an owner's property rights) against another (in this case, a tenant's rights). This balancing does not take place purely in the realm of the positivist law, but involves policy considerations as well. As stated by Kennedy:<sup>36</sup>

According to the critique, what determines the balance is not a chain of reasoning from a right or even from two rights, but a *third* procedure, one that in fact involves considering open-textured arguments from morality, social welfare, expectations, and institutional competence and administrability.

In turn, the resolution adopted is naturally determined by ideology. To a large extent it is the subjective and political commitments of the judge that have the final say, not the detached deployment of rights arguments.<sup>37</sup>

---

35 Kennedy (n 30 above) 191.

36 Kennedy 196.

37 Kennedy 198.

I think Kennedy's point is implicitly admitted even by those who would champion the transformative potential of liberal constitutionalism. For example, Michelman makes a considered defence of such constitutionalism in the South African context in light of what he calls 'social liberalism'. Such liberalism, inspired by figures such as John Rawls, distinguishes itself from classic liberalism in not seeing the right to property as a basic right in itself, but as a right that serves the more fundamental ones of freedom, security, privacy, equality, legality and, above all, dignity. When the right to property is seen in this way, then the court is not duty bound to uphold the formal protection of property irrespective of the social consequences involved, but indeed can evaluate individual claims in light of such consequences and the values (dignity and its correlates) that they may impinge upon.<sup>38</sup>

However, Michelman, himself, tempers his social liberal outlook in a way that echoes the indeterminacy noted by Kennedy. Towards the end of his essay, he asks of his approach:<sup>39</sup>

How much of a dent, though, does all of that really make on South Africa's post-apartheid legacy of poverty and dispossession? Dispossession, say, of the land and everything that it means in regard to not just to wealth but to power, status, and dignity? And not just of the land as land or natural resource but the land as capital input to housing? [...] To questions such as those, I think social liberals must choose between two lines of response. The first would be that we don't know until we really try, and we have not yet really tried. Maybe, with wisdom concertedly applied to issues of time, terms, trade, and taxation, there is a workable way to acquire land for redistribution that liberal equality and dignity can accept. That is a line that social liberals should not easily give up. *The other response-line would be that, alas, we cannot get there from here by a liberal/postliberal constitutionalist path.*

In other words, there appears little in the social liberal approach that *compels* the transformation of a problematic *status quo*. Choices are available, but we cannot be sure whether these choices will lead to socially-desirable outcomes (or, given the reasonable assumption that not all judges will be socially liberal, that they will be chosen at all). Sibanda, in his critique of Michelman, echoes this sentiment when he notes that 'transformative constitutionalism becomes susceptible to the charge that it promises more than it can actually deliver where the requisite shared transformative consciousness is not in fact in place'.<sup>40</sup>

Similarly, O'Connell argues that human rights are capable of challenging the pernicious effects of neoliberalism. Human rights activists, he suggests, should recognise that neoliberal globalisation is not value-neutral but based on hegemonic interests. As such, a

38 F Michelman 'Liberal constitutionalism, property rights and the assault on poverty' (2011) 3 *Stellenbosch Law Review* 706.

39 Michelman (n 38 above) 722-723.

40 S Sibanda 'Not quite a rejoinder: Some thoughts and reflections on Michelman's "Liberal constitutionalism, property rights and the assault on poverty"' (2013) 2 *Stellenbosch Law Review* 332.

commitment to human rights would entail a commitment to fighting such globalisation and embracing alternatives such as subaltern globalisation.<sup>41</sup> And there is no doubt that his project, as well as Michelman's social liberalism, may have considerable ameliorative effects in situations of social injustice.<sup>42</sup> As such they are important strategies and endeavours. But they do not address the structural issue at play: What is the relationship between the undoubted liberal origins of human rights and neoliberalism – that is, the fact that they are both rooted in the notion of the autonomous self, as noted earlier in this essay? Michelman is careful to distinguish social liberalism (one more conducive to social justice) from classic liberalism (one that is amenable to neoliberalism). But surely this is a difference of degree, not of kind? Choosing to enact social justice instead of protecting a vested interest is still cast as a *liberal* value. O'Connell takes neoliberalism to task for its normative view of the individual as atomistic and self-serving. He contrasts this with the human rights view where this individual is urged to act towards others in the spirit of brotherhood and where he or she finds fulfilment through duties to their community.<sup>43</sup> But what of the conception of the autonomous 'individual' itself? If the individual autonomously makes decisions – and human rights discourse fundamentally accepts this – what would *compel* him or her not to act in an 'atomistic, self-serving' way?

A similar problem besets Davis and Klare's argument for transformative constitutionalism in South Africa.<sup>44</sup> For Davis and Klare, the background rules (norms and values) that inform any legal procedure need to be put into the foreground and made a conscious aspect in cultivating the transformative constitution. They argue that formalist approaches to the law in any case are informed by such background rules – there is nothing intrinsic in the text of the law itself that leads to determinate outcomes. The law itself is indeterminate and is made determinate by the norms and values of those who use the law. While their legal realism effectively shows up the formalist fallacy of a supposedly objective law, it begs the question of the nature of these norms and values themselves – in our case, the nature of rights – norms and values that the authors appear to take for granted. Why, for example, by their own admission, does the court show more of its transformative tendencies when it comes to 'softer' rights, such as freedom of expression and sexual orientation, but is more recalcitrant when it comes to the harder right of economic redress?<sup>45</sup> Why does an anti-formalist approach appear to sit easier in

---

41 P O'Connell 'On reconciling irreconcilables: Neo-liberal globalisation and human rights' (2007) 3 *Human Rights Law Review* 483.

42 Michelman (n 38 above) 706-723.

43 O'Connell (n 41 above) 496-498.

44 D Davis & K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *South African Journal on Human Rights* 403.

45 Davis & Klare (n 44 above) 414 480.

one realm than the other? And while, as both of them remind us,<sup>46</sup> the South African Constitution is more receptive to social rights than a purely liberal, individualist one, why is such social consciousness (*ubuntu*) so difficult to translate into economic practice? Such questions beg a deeper exploration of the notions of rights, autonomy, freedom and dignity that typically accompany the judgments in these spheres.

So, despite the welcome emphasis on background rules, it is quite disappointing that Davis and Klare do not feel the need to pursue the metaphysical basis of such notions. Norms and values cannot be divorced from reflection on this basis. I cannot agree with them when they say that their thesis concerning legal indeterminacy is a 'modest' one that needs to be kept separate from a metaphysical one 'about the inherent qualities of language, reason and texts'.<sup>47</sup> Since both formalists (implicitly) and anti-formalists (explicitly) are shaped by their norms and values, both are ultimately informed by a vision of 'the good life' in formulating their judgments.<sup>48</sup> A vision of the good life necessarily entails specific conceptions of reason and language. After all, what is good can obviously be seen in a variety of ways. When background rules come to the forefront, so do metaphysical claims. We cannot thus ignore the question regarding the underlying world view of rights discourse.

This brings us to a final theme. What kind of citizen does the deployment of rights discourse in South Africa seek to construct? If my argument is correct, and rights are at the end of the day ultimately preferences based on an implicit metaphysic, what type of subjectivity – whether intentionally or not – does the state produce? What, in other words, are the effects of portraying rights discourse as the solution to the country's ills?

#### 4 Rights and the creation of post-1994 South African subjectivity

The answer to these questions is necessarily partial, since the state's multiple interventions in the lives of the citizenry occur at different levels, and sometimes contradictory ones at that. The legal domain of rights is one such crucial – perhaps the most crucial – intervention in this regard, but I certainly do not wish to imply that this is the be-all and end-all of the state's interaction with its citizenry. Indeed, the South African government has shown some remarkable sensitivity in dealing with diverse constituencies, and has resisted pressure to

---

46 Davis & Klare 413.

47 Davis & Klare 437.

48 Davis & Klare 408.

automatically impose liberal democratic sensibilities.<sup>49</sup> But still, these sensibilities, via rights, play a critical role in cultivating a particular type of subjectivity characteristic of the post-1994 citizen.

One of the more obvious outcomes of these sensibilities was to let the citizen invest fully in the notion of rights themselves. Access to rights was now almost crafted as the panacea to a citizen's woes. As long as one had access to one's rights, one's material needs would be facilitated. And so, a preponderant emphasis is placed on rights rather than the needs themselves. This becomes problematic, as Pieterse argues, when, despite access to such rights, material needs remain unfulfilled.

Reflecting on why the socio-economic rights in the Constitution have not been translated tangibly into gains on the ground, Pieterse argues that the Constitutional Court has focused on the 'reasonableness' of enforcing these rights, rather than looking at the content aimed at by those rights.<sup>50</sup> The Court, consequently, ends up focusing on procedure rather than directly addressing the need – 'sandwiches, tablets and tents' – itself.<sup>51</sup> Material needs are rendered 'extraneous to the inquiry into constitutional compliance with socio-economic obligations'.<sup>52</sup>

Pieterse then raises the important question of whether such abstraction (abstracting the law from the direct need) is not 'inevitable'. Following Gabel, he argues that rights discourse creates the illusion that gaining a right is equivalent to achieving the need that gave birth to that right in the first place.<sup>53</sup> There is a difference between the 'meaning of verbal concepts and the qualitative or lived milieu out of which they arise'.<sup>54</sup> In other words, needs are assuaged by the granting of rights – but this granting is in reality a verbal assurance, not a fulfilment of the need.

This disjuncture between word and need is rather amenable to the *status quo*. And so when, for example, housing and medicine (a need) are demanded as a right (called act 1), the state may concede that right without necessarily fulfilling that need. If it is taken to court for

---

49 So, eg, government has resisted pressure by women's rights activists to enact the proposed Muslim Marriages Bill in its current form due do the Muslim community's internal debate about the implications of its provisions. See M Harrington-Johnson 'Muslim marriages and divorce' (2015) *De Rebus* 9 <http://www.derebus.org.za/muslim-marriages-and-divorce/> (accessed 6 April 2016); T Tlali 'Muslim Marriages Bill - Submission dates for comments extended, media statement, Department of Justice and Constitutional Development' 18 March 2011 <http://www.gov.za/muslim-marriages-bill-submission-date-comments-extended> (accessed 6 April 2016).

50 M Pieterse 'Eating socio-economic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) 29 *Human Rights Quarterly* 796-822.

51 Pieterse (n 50 above) 822.

52 Pieterse 812.

53 It is crucial to note here that neither Pieterse nor Gabel is saying that rights are unimportant and they both recognise their substantial value.

54 Pieterse quoting Gabel (n 50 above) 816.

not fulfilling the need, it may indeed be compelled in this regard if the court finds that the state is in a 'reasonable' position to comply with its obligations (act 2). But, crucially, the court's adjudication is based on the presumption of reasonableness associated with applying the right, not addressing the direct need. And since in any case these needs may not be addressed even after a favourable verdict, such victories are empty in that they present the possibility of changing the *status quo* without actually doing this (act 3). This is more or less what occurred in the *Grootboom* and *Treatment Action Campaign* cases, as described by Pieterse.<sup>55</sup> Even though both parties had taken the state to task on the basis of rights (to adequate housing and healthcare, respectively) (act 1), and both had the court rule in their favour (on the basis of 'reasonableness') (act 2), there was limited and grudging state compliance with the order (and thus the maintenance of the *status quo*) (act 3). The perceived granting of 'hard rights' is instrumentalised as the simultaneous fulfilment of urgent needs. Pieterse writes:<sup>56</sup>

Gabel's theory reveals an obvious fault line in the narrative that critics of the Constitutional Court's socio-economic rights jurisprudence all too easily overlook – the hollowness of the rights at the centre of the jurisprudence. For while myself and other commentators typically blame the empty victory in act 3 of the drama on the Constitutional Court's ingrained ideological sensibilities, its formalistic approach to adjudication and its remedial timidity, Gabel reminds us that the Court comes into play only in act 2, after the battle has, for all practical purposes, already been lost. Instead, Gabel directs our attention to the opening sentences of act 1 – more specifically, to the moment that member/citizen is misled to demand the right to have her need satisfied rather than to insist on the actual satisfaction of that need. When state/society eventually responds to this new demand, it does so in terms that, while ostensibly meeting the new demand, allow for the nonfulfilment of the original need. By requiring observers to shift their focus thus, Gabel's account reveals socioeconomic rights (at least in the manner they have been articulated in sections 26 and 27 of the South African Constitution) to be accomplices to, rather than casualties of, the judicial and political sidelining of the needs they represent.

It is such disjuncture between word and need that, to return to a point made in the introduction, helps foment the impression that South Africa has a vigorous human rights culture while beset by social contradictions that reflect problematically on its success.

Pieterse's crucial observation that the citizen is 'misled' to demand the right to have his or her need satisfied rather than the satisfaction of the need itself recalls Bond and Bakker's earlier point about operating within the hegemonic paradigm. One is never truly challenging that paradigm itself, but responding to it and acting in its

55 Pieterse (n 50 above) 808-809. For the *Grootboom* case, see *The Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC). For the *TAC* case, see *Minister of Health & Others v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC).

56 Pieterse (n 50 above) 818.

shadow. And this is the kind of subjectivity cultivated by the state: that the citizenry frames both their problems and the solutions to these problems in terms of the rights afforded by the state. The Bill of Rights becomes the framework by which to both raise questions pertaining to individual and society and through which one responds to these.

What is the effect of filtering society's agenda through the Bill of Rights? The effect, Neocosmos intimates, is to create a somewhat disembodied citizenry: a citizenry that via the law and new modes of statist discourse is increasingly removed from direct democratic participation.

Neocosmos argues that human rights discourse is built on a theoretical foundation that sees people only as individual victims and not as the 'collective subjects of their own liberation'. These victims can only find recourse in the law. And so it is only those who are schooled in this law – the government, the non-governmental organisations (NGOs), the multinational agencies – that can save the victim.<sup>57</sup>

How does this happen? Neocosmos explains that in constructing indices that 'measure democracy' politics becomes technical and quantitative. Democracy, and politics as a whole, thus are reduced to a technical process that is taken away from popular control. 'Human rights lawyers', 'social entrepreneurs', 'governance professionals' and 'gender mainstreamers' 'staff an industry whose tentacles hold up the liberal global hydra of the new imperial 'democratising mission' on the continent. Rather than a transition from authoritarianism to democracy, what occurred on the African continent during the 1990s can more profitably be understood as a 'process of systematic de-politicisation, a process of political exclusion'.<sup>58</sup>

He continues:<sup>59</sup>

More specifically this reversal consists of a political process whereby those same people are to be convinced – through the deployment of national legal strategies- that they really are clearly victims of violence, that they therefore could not have undertaken anything significant, new or different after all, despite what they may or may not have thought, as it would have

---

57 M Neocosmos 'Transition, human rights and violence: Rethinking a liberal political relationship in the African neo-colony' (2011) 2 *Interface: A Journal For and About Social Movements* 362.

58 As above.

59 Neocosmos (n 57 above) 363. Vally has also shown how this, eg, occurred in the case of education. In the 1980s, '[p]eople's education was seen as a vehicle for conscientisation, promoting critical thinking and analysis and alternative governance structures in education'. However, '[l]iberal views on education gained cachet from the beginning of negotiations between the ANC and the apartheid regime in the early 1990s. The role of civil society organisations and even the language of people's education became increasingly marginal to the overall project of education change. The discourse and content shifted substantially from radical demands which focused on social engagement and democratising power relations, to one which emphasised performance, outcomes, cost effectiveness and economic competitiveness.' Vally (n 2 above) 42-44.

all happened anyway and that in any case their suffering is now (largely) over. Everyone should return to their allotted place in the social structure and vacate the field of politics, leaving it to those who know how to follow unquestioningly the rules of the game (of the state): the trustees of the excluded. In fact if historicist categories are preferred, this process could be described as a never ending 'transition' from the inventive politics of popular agency to the oppressive technicism of state and imperial power.

And so, in Neocosmos's view, NGOs and the state, employing the mechanism of a technicist law, are jointly responsible for solidifying the *status quo*. Once popular struggles and grievances are depoliticised by putting them through the judicial mill; '[e]veryone should return to their allocated place in the social structure and vacate the field of politics'.

But there is a deeper implication to this process of depoliticisation, and Neocosmos perceptively explores this angle. Having neutralised, via the law, the challenges to its hegemony, the state now dictates the playing fields, the terms of reference in which discussion around society takes place. And so a hegemonic analysis visualises the world through state categories such as 'governance, civil society, power, interests, democracy, law, reparations' to the extent that 'state thinking becomes constructed as natural and the immutability of place as an incontrovertible fact evident to all'. The state is also in the business of creating subjects who are taught to regard this state of affairs as natural and immutable so that the 'inevitable conclusion is that there can indeed be no alternative to the politics of the state'.<sup>60</sup>

In support of his argument, Neocosmos cites the example of the Truth and Reconciliation Commission which transformed political agents – the agents in a mass popular uprising against apartheid – into victims of human rights abuses. In other words, popular political agency was closed down in favour of state politics – a state politics that does not see human rights discourse as a threat but indeed as a means of sustaining its power.

Human rights discourse is not so much concerned with the inclusion in the field of politics of the excluded as with legal redress. It is not so much concerned with encouraging militancy (or even less radically with enabling an 'active citizenship') as with producing the political passivity of victims: It privileges state solutions and, through prioritising the law, reduces all political thought to state subjectivity. In this manner, people become transformed from subjects of history to victims of power.<sup>61</sup>

For Neocosmos, then, the state creates the docile, depoliticised subject who – and this is an implication of Pieterse's analysis as well – is trained to think via specific categories. Human rights discourse is integral to constructing those categories and the state, through its law, embeds them into the broader social consciousness. Personally, I

---

60 Neocosmos (n 57 above) 364.

61 Neocosmos 365.

do not believe that any of this is a pre-determined strategy. And the state quite clearly has not *successfully* produced the docile subject – numerous ‘service delivery’ protests are testimony to this. But it has certainly produced, via its technicist structures, a subject with far less political agency. And the effect of the discourse has undoubtedly been to create a particular type of citizenry – a citizenry trained to both pose questions and answers through the Bill of Rights; a citizenry made to depend on state categories of thought. Echoing Foucault, we can say that human rights discourse plays a central role in post-1994 South African ‘governmentality’.

## 5 Conclusion

The article has pursued the following train of thought: Human rights discourse partakes of the same paradigm that supports commodification. This lends this discourse an indeterminate character and, as such, it can be used to both challenge and protect hegemonic interests. This indeterminacy is rooted in the fact that human rights are, when all is said and done, essentially preferences; preferences are underwritten by a way of seeing the world – a vision of the good life – and so in its statist articulation cultivates a particular type of subjectivity amongst the citizenry. In saying this, I join others mentioned in this article in challenging a number of popular suppositions: that human rights represent an innate challenge to social injustice; that they rest upon some sort of objective foundation; that they represent a natural aspiration rather than a particular view of the good and of subjectivity.

At the same time, I am not calling for an abandonment of human rights or human rights discourse. On the contrary, as I stated a number of times in the article, human rights perform a crucial ameliorative function and indeed are indispensable in the fight against social injustice. Rather, I want to highlight two things: first, that a more considered view of the paradigm underlying human rights and its associated limitations and indeterminacy should compel us to be much more suspicious about its potential to enact change. The question should not be: Why is structural inequality still an issue *despite* our human rights framework? It should be: What is it *within* this framework that encumbers us from achieving this equality? A human rights framework should not be considered the automatic panacea to the country’s woes. So, in step with others, this is a call to be more critical regarding that framework, not merely in terms of its application, but in terms of examining the nature of ‘right’ itself. And so it is a call to be more critical regarding the very fundamentals of that framework.

A more suspicious view of the liberal rights framework would also allow us, I think, to be open to what Brown and Sibanda have called other ways of imagining society.<sup>62</sup> And this is the second thing I want to highlight. If the current discourse of human rights does not innately challenge structural inequality because it partakes in a paradigm of commodification, what are the alternative paradigms – alternative imaginations – available? In the case of water rights, Bond and Bakker have helpfully suggested a commons model, where water is shared and sustainably preserved by a system of communal ownership. Water is not a private right, but rather partakes in an *ubuntu* culture of sharing that Bond says, ‘cuts against the grain of individualised liberties and their potential co-optation within a green economy [corporate green] regime’.<sup>63</sup> The commons model, of course, can be applied to other areas as well. But whatever the area, a move to such a model would mean employing a very different concept of rights – one which is *not* based on constituting a right ‘as anything one would reasonably want’. Rather, it would mean a return to a more passive concept of rights, one where the individual is defined in terms of his or her social relationships.<sup>64</sup> But such a move, which involves rethinking the nature of right itself, would also imply an interrogation of the enlightenment view of the ‘self-owning individual’. And the critique of the sovereign individual, in turn, as Brown has pointed out, presupposes a critique of our own desires – of ‘what we really want’.<sup>65</sup> In other words, and to revert to the point made by Nicol earlier in this article, the question becomes: What is our vision of the good life? It is perhaps in such fundamental questions that the heart of the discussion around rights lies.<sup>66</sup>

But transitional considerations are important. In the absence of consensus on a clear alternative, and given the hegemony of the rights based paradigm, I believe that a critical question would be: How do we mitigate the more pernicious effects of this paradigm? For if there is agreement around something (and this among leftists as well as classical conservatives), it is that the neoliberal model – whose rapacious individualism is somewhat unwittingly underpinned by the classical liberal notion of the sovereign individual – cannot and should not be sustained. In my view, a transitional step would be to give more purchase to rights schemes which are uncomfortable with the liberal individual model. There are various alternative rights schemes which appear to be more amenable to fostering communal values as well as tempering the individualist ethos – the sense of self-ownership

---

62 Brown (n 3 above) 231; Sibanda (n 40 above) 340.

63 Bond (n 14 above) 138.

64 To reinforce this point: We are, of course, not dismissing the notion of ‘right’ altogether, but rather calling for a different way in which we look at rights. Glendon makes a similar call to look at a different tradition of rights in the preface to *M Glendon Rights talk: The impoverishment of political discourse* (1991).

65 Brown (n 3 above) 240.

66 For a probing analysis of such metatheoretical questions, see D Goosen *Oor gemeenskap en plek* (2015).

– that lies at the heart of liberal human rights. The African Charter on Human and Peoples' Rights (African Charter) is an example in this regard.<sup>67</sup> According to Adjovi, the African Charter was flouted to address perceived gaps, from an African perspective, in other universal rights schemes. And so, the Charter (i) enshrined second generation rights (socio-economic rights), thereby recognising the collective rights of the community, and not just first generation individual rights; (ii) not only are such second generation rights recognised in the Charter, but they are juxtaposed with political and civil rights and thus the whole complex of rights is seen as indivisible and interdependent; (iii) the African Charter explicitly incorporates duties and not just rights; (iv) there is a specific emphasis on development, decolonisation and racial discrimination.<sup>68</sup>

In forging the way ahead, there is a need to take such rights schemes more seriously<sup>69</sup> as transitional steps towards imagining a new politics. And such rights schemes, of course, cannot remain static, but will have to interrogate the notion of 'right' itself in order to ensure that communal rights, or even the notion of duty, are not unwittingly instrumentalised in the service of a neoliberal hegemony. As such, they have to radically relook at the notions of the self-owning human (and by extension liberty) and commodification (and by extension, property) that, at root, inform this hegemony. In the absence of such fundamental interrogation, such rights schemes will only inscribe rather than present a paradigmatic challenge to the status quo.

---

67 See African Charter on Human and Peoples' Rights <http://www.achpr.org/instruments/achpr/> (accessed 30 June 2014).

68 R Adjovi 'Africa: Understanding the African Charter on Human Peoples' Rights' *Think Africa Press* 5 November 2012 <http://allafrica.com/stories/201211061322.html> (accessed 31 March 2016).

69 Of course, the African Charter is recognised by the South African government, but has hardly the same purchase as the more liberal conception of rights embedded in the Constitution.