

# Cultural Relativism and Human Rights: Reconsidering the Africanist Discourse

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## Abstract

*Discussions about cultural relativism and the cross-cultural legitimacy of human rights have been central to contemporary human rights discourse. Much of this discussion has focussed on non-Western societies where scholars have advanced, from a variety of standpoints, arguments for and against the cultural relativism of human rights. Arguments for 'Asian Values' and lately, 'African values' in the construction of human rights have defined this debate. This paper reviews some of the major arguments and trends in the Africanist discourse on the cultural relativism of human rights. It argues the need to go beyond the polarities that have characterised the debate. It argues that while an Afrocentric conception of human rights is a valid worldview, it need not become the basis for the abrogation of the emerging Universal human rights regime. Rather, it should provide the philosophical foundation for the legitimisation of Universal human rights in the African context and inform the cross-fertilisation of ideas between Africa and the rest of the world.*

## Introduction

The debate over whether, and to what extent, human rights are universal or culturally relative was for the most part of the last two decades, the dominant theme in the global human rights discourse. The core of the debate is whether modern human rights conceptions are of a universal character and applicability or whether they are culturally relative – that is, dependent on sociocultural contexts and settings. Simply put: are human rights of universal viability and applicability or are they better understood and evaluated within specific social and cultural contexts? What level of cultural specificity can be accommodated within the emerging global human rights regime to accord it cultural legitimacy within various societies? This debate proceeds partly from the various international human rights documents, particularly the United Nations instruments on human rights, which, in spite of the obvious Western influence in their formulation, declare their contents to be universal, inalienable and cross-culturally valid. Also implicit in this debate is the tension between 'collectivist' theorists who place the community above the individual in their conception of human rights and the 'individualist' theorists who place the individual above the community.

The contending arguments in the universality *versus* cultural relativity debate have been quite extensively examined elsewhere and it would serve little purpose to restate them in detail here.<sup>1</sup> The object here is to broadly review the discourse on the cultural relativism of

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<sup>1</sup> Reference is made to some of the works on the theory of universalism and cultural relativism throughout this paper. For a general view, see Jack Donnelly, 'Cultural Relativism and Universal Human Rights', *Human Rights Quarterly*, Vol. 6, No. 4, 1984, pp. 400-419; Alison Dundes Renteln, 'The Unanswered Challenge

human rights and the relevance of the Africanist<sup>2</sup> contribution to this discourse within the context of the globalisation of human rights and the quest to enhance the cross-cultural legitimacy of the emerging universal human rights regime. This essay is not intended to be a comprehensive review of the existing literature. It seeks to outline some of the major arguments and trends in the Africanist discourse on cultural relativism with reference to their relevance in understanding the concept of human rights and its relationship with cultural orientations in particular societies, and specifically, the contemporary African State.

## I Rights, Dignity or Distributive Justice?

It is significant that our discourse on the cultural relativity of human rights begins with a contextual definition of the meaning of human rights, for without a well-defined concept of human rights, it is indeed difficult to proceed to analyse the concept. What precisely are human rights? Is the meaning that attaches to the term, definite or can it be validly subjected to varied interpretations without distorting its essence? Elementary as these questions may seem, they are at the core of most contemporary studies of human rights.

Some writers have argued that although the broadly defined humanistic values that underlie the concept of human rights may be universally shared, a distinction must be made between the moral standards of *human dignity*, which all cultures share, and human rights that are enforceable by individuals against the State. The concept of human rights, it is argued, is essentially a modern Western creation founded on historical developments of the Enlightenment period, the French and American Revolutions and ultimately, the Universal Declaration of Human Rights of 1948. Therefore, any reference to the concept of human rights before 1948 would be anachronistic.<sup>3</sup> Weston, for instance, believes that the term 'human rights' is actually quite new, having gradually emerged in everyday usage since the end of the Second World War and the founding of the United Nations.<sup>4</sup> Similarly, Bassam Tibi notes that many scholars tend to confuse '*human rights*' with '*human dignity*'. He states, that if one is talking about the latter, there is no doubt that fully developed notions of human dignity exist in many traditional non-Western cultures. However, the modern concept of human rights stems from the contemporary articulation of legal entitlements which

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of Relativism and the Consequences for Human Rights', *Human Rights Quarterly*, Vol. 7, No. 4, 1985, pp. 514-540; Lone Lindholt, *Questioning the Universality of Human Rights: The African Charter on Human and People's Rights in Botswana, Malawi and Mozambique*, Aldershot, Brookfield, Dartmouth, 1997; F. Teson, 'International Human Rights and Cultural Relativism', *Virginia Journal of International Law*, Vol. 25, No. 4, 1985, pp. 869-898; P. Berger, 'Are Human Rights Universal?', *Commentary*, Vol. 64, 1977, pp. 28-39; John Klenig, 'Cultural Relativism and Human Rights', in: Alice Erh-Soon (ed.), *Teaching Human Rights*, Australian Government Publishing Service, Canberra, 1981, pp. 111-118.

<sup>2</sup> In some social science and African studies literature, the term 'Africanist' is employed to refer to non-Africans who write about Africa and it excludes Africans, whether in Africa or abroad, who write on Africa. This is not the sense in which the term is employed in this essay as I find this distinction rather unnecessary. Here, the term is employed in the broader sense in which the term is also often employed - referring to both African and non-Africans writers who write on Africa.

<sup>3</sup> See Bassam Tibi, 'The European Conception of Human Rights and the Culture of Islam', in: A.A. An-Naim and Francis Deng (eds.), *Human Rights in Africa. Cross Cultural Perspectives*, The Brookings Institution, Washington DC, 1990, pp. 104-132; Rhoda Howard, *Human Rights in Commonwealth Africa*, Rowman & Littlefield, Totowa, N. J., 1986, p. 19; Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Human Rights Conceptions', *American Political Science Review*, Vol. 76, 1982, p. 303.

<sup>4</sup> B. Weston, 'Human Rights', *Human Rights Quarterly*, Vol. 6, No. 3, 1984, pp. 257-258.

individuals hold in relation to the State.<sup>5</sup> He goes further to point out that the absence of the concept of human rights in certain cultures and contexts is not peculiar to non-Western societies. Medieval Europe, like traditional African or Asian societies also had no inkling of human rights in the modern sense. The main argument here is that the idea of human rights, as rooted in modern society is an entirely new concept, distinct from previous notions of human dignity.<sup>6</sup>

Rhoda Howard, in response to arguments for an African concept of human rights, states quite categorically that the African concept of human rights is actually a concept of human dignity; of what defines the inner moral nature and worth of the human person and his or her proper relations with society. Human dignity and human rights are therefore not coterminous as dignity can be protected in a society that is not based on rights.<sup>7</sup> In her words:

‘There is no specifically African concept of human rights. The argument for such a concept is based on a philosophical confusion of human dignity with human rights, and on an inadequate understanding of structural organisation and social change in African society.’<sup>8</sup>

Jack Donnelly gives the debate a whole new dimension when he distinguishes between the concepts of *distributive justice* and human rights. He argues that distributive justice involves giving a person that which he or she is entitled (his or her rights). Unless these rights are those to which the individual is entitled simply as a human being, the rights in question will not be human rights. In traditional African societies for instance, rights were assigned on the basis of communal membership, family, status or achievement. These were therefore, strictly speaking, not human rights.<sup>9</sup>

Although it may be useful to distinguish between the abstract ideals of human dignity or distributive justice and the more precise legal principles of human rights, we must not overlook the close connection between these sets of concepts and the ways they reinforce each other. The problem, it seems, is simply one of ontology – of labels rather than the ideas that underlie the labels. Indeed, we may argue that the whole debate over the distinction between human rights, human dignity and distributive justice arises from a failure to appreciate and put in historical context, the evolution of the idea of human rights. There has been a tendency by some scholars to conceptualise human rights within the narrow sense of modern legal language, the emphasis being on the strict legal definition of the term rather than the idea that underlies it. This approach is problematic, because it tends to emphasise change while ignoring underlying continuities. A more historical approach to the study of the evolution of the contemporary concept of human rights will find no difficulty in drawing the link between traditional notions of human dignity or distributive justice and the modern idea of human rights which are in fact merely contextual reinterpretations of the age-long notions of defining human worth and value. The object is to understand and appreciate the distinct historical contexts in which this idea has become manifest.

Seen from this perspective, it becomes difficult to accept the view that the concept of human rights is a notion created only three centuries ago by philosophers in Europe and

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<sup>5</sup> Bassam Tibi, *loc.cit.* (note 3), pp. 104-132.

<sup>6</sup> A summary of Bassam Tibi’s arguments is presented in the introduction in: An-Naim/Deng, *op.cit.* (note 3), p. 3.

<sup>7</sup> See, for example, Rhoda Howard, ‘Group *versus* Individual Dignity in the African Debate on Human Rights’, in An-Naim/Deng, *op.cit.* (note 3), pp. 159-183; and Howard, *op.cit.* (note 3), p. 19.

<sup>8</sup> See for instance, the definition provided in Howard, *op.cit.* (note 3), p. 23.

<sup>9</sup> Donnelly, *loc.cit.* (note 3), p. 303.

given a stamp of universal legitimacy in 1948. Rather, it becomes apparent that what was unique about the Enlightenment and the writings of the French and American was not the idea of human rights itself, but the discussion of human rights in the context of a formally articulated philosophical system. The argument that human rights are enforceable whereas the entitlements that derive from principles of human dignity are not, also fails to recognise the need to place the idea and meaning of rights in a social and historical context. In most traditional African societies for example, there were no clear cut distinctions between religious values, moral precepts and laws. Therefore, the question of legal entitlements as distinct from moral and religious considerations could not have arisen. These were all interrelated parts of a more or less homogenous cosmology. However, such traditional societies had their own legal institutions and law enforcement procedures which, though different from those of present day States, were nonetheless effective within their social and political contexts. Thus, the rights and obligations that derived from such religious, moral and cultural values associated with human dignity in traditional society, (which were enforced for the benefit of both the community and the individual), can validly be considered the contextual equivalents of the modern concept of legal rights. This approach to conceptualising human rights can provide a basis for the cross-cultural understanding of the contemporary meaning of human rights.

## II Human Rights and Cultural Relativity

The philosophy of cultural relativism is neither new nor peculiar to the human rights discourse. While several philosophers have argued the 'ethical relativity' of human nature, social anthropologists for the most part of the last century were preoccupied with the discourse on the cultural relativity of social values, precepts and norms.<sup>10</sup> In general, the doctrine of cultural relativity holds that moral codes and social institutions reflect a vast scope of cultural variability and that such variations should be exempt from outside criticism. The doctrine is founded on the notion of communal autonomy and self-determination which holds that there is infinite cultural variability in human society and no absolutes. In specific relation to human rights, the doctrine of cultural relativism holds that different societies within different social and historical contexts have evolved unique attitudes to the concept of human worth, human dignity or human rights.<sup>11</sup>

Claims of cultural relativism, however, show a great diversity in meaning and substance. Therefore, any evaluation of such claims must be sensitive to this diversity. In general, however, proponents of the cultural relativity of human rights argue that human rights as conceived in the West are not necessarily applicable to Third World and non-Western societies, because their philosophical bases not only differ but indeed oppose each other. Whereas Western conceptions are based on the notion of the autonomous individual, many non-Western conceptions do not know such individualism.<sup>12</sup> It has been frequently stated by cultural relativists, that the classical Western liberal notions of human rights<sup>13</sup> emphasise the

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<sup>10</sup> Some earlier major works which dealt with the concept of cultural relativism from philosophical and anthropological standpoints include Ruth Benedict, *Patterns of Culture*, Houghton Mifflin Company, Boston, 1934; Edward Westermarck, *Ethical Relativity*, Greenwood Press, New York, 1960; and Merville Herskovits, *Cultural Relativism: Perspectives in Cultural Pluralism*, Random House, New York, 1973.

<sup>11</sup> See Donnelly, *loc.cit.* (note 1), pp. 400-419.

<sup>12</sup> Issa Shivji, *The Concept of Human Rights in Africa*, Codesria, London, 1989, p. 16.

<sup>13</sup> The reference to 'Western notions or traditions' here and elsewhere in this work is merely for the purpose of clarity and to keep our discourse within a specific scope. We recognise that to talk of a 'western tradition

primacy of individual political, civil rights while most non-Western, Third world traditions place greater emphasis on the community basis of human rights and duties, on economic and social rights and on the relative character of human rights. Marxist/socialist ideas on the other hand, highlight economic and social rights and duties that are grounded on collectivist principles. The cultural diversity reflected in these categories has proved a vexing issue for those approaching the study of human rights from a global comparative perspective. For instance, Makau wa Muta makes the point that the ascendancy of the language of individual rights has a specific historical context in the Western world. The rise of the modern State in Europe and its monopoly of violence and instruments of coercion gave birth to a culture of rights to counterbalance the invasive and abusive State. For this reason, the 'transplantation of the narrow formulation of Western liberalism cannot adequately respond to the historical reality and the political and social needs of Africa'.<sup>14</sup>

Beyond the simple universalist/cultural relativism debate, however, the theoretical questions on the universality of human rights have been approached by different scholars from a vast array of historical and legal perspectives. Lone Lindholt has categorised the discourse on the universality or cultural relativity of human rights under various schools according to geographical and cultural boundaries.<sup>15</sup> She contends that the tendency toward the more radical theory of universalism can be found among the Americans. Rhoda Howard, whom she identifies as a representative of the American school, claims with particular reference to the African context, that human rights ought to be universal, although she also admits that seen in an empirical perspective, 'cultural variations do indeed affect people's perception of human rights'.<sup>16</sup> James Nickel in his theoretical study of the concept of human rights, similarly concludes that the claims of universality and inalienability of human rights are plausible for some specific rights, but that strong claims of universality and inalienability were not valid for many other rights.<sup>17</sup>

Many who oppose arguments for the cultural relativism of human rights, fear that a relativist position condones or even approves of customs such as female genital operations, the subordination of women and minority groups, arbitrary killings, torture and trials by ordeal. It is also feared that recognising the legitimacy of the cultural relativity of human rights will undermine the entire universal human rights movement. These fears have largely informed the tension between the doctrine of cultural relativity and international human rights.

Against this background, Donnelly has categorised the doctrine of cultural relativism into *strong cultural relativism* and *weak cultural relativism*. Strong cultural relativism holds that culture is the principal source of the validity of a moral code or rule. The presumption is that rights and other social practices, values and norms are culturally determined, but the universality of human nature and rights serves as a check on the potential excesses of relativism. Weak cultural relativism on the other hand, holds that human rights are *prima facie* universal, but recognises culture as an important source of exceptions in the

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of human rights' is to indulge in a degree of ideological generalisation. Human rights traditions in the 'West' vary not only from one geographical location and/or historical period to another, but also from one social class/group to another. Our reference to 'Western traditions' may therefore actually mean no more than the standpoints of the dominant classes in the West.

<sup>14</sup> Makau Wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Rights and Duties', *Virginia Journal of International Law*, Vol. 35, No. 2, 1995, pp. 341-432

<sup>15</sup> Lindholt, *op.cit.* (note 1), p. 26.

<sup>16</sup> Howard, *op.cit.* (note 3), p. 12.

<sup>17</sup> James Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights*, University of California Press, Berkeley, 1987, p. 44 ff.

interpretation of human rights.<sup>18</sup> Donnelly's conclusion is that rather than a wholly universal approach, human rights discourse should apply what he terms 'weak cultural relativism' – where culture is an important consideration without omitting the aspect of universality.<sup>19</sup> In the same vein, Tevoedjre declares that there are certain universally acceptable norms for the protection of peoples' rights and that these universal norms form a fundamental core of human rights.<sup>20</sup> On their part, Lars Adam Rehof and Tyge Trier argue that empirically, there exists a core of universally applicable basic principles that govern the relationship between the State and its citizens. To that extent, we can talk about some basic universal standards of human rights. At the same time however, they recognise that different human rights are considered important and fundamental at different points in time and under different circumstances.<sup>21</sup>

As may be expected, the debate on the universality of human rights principles has more often than not, centered on the Universal Declaration of Human Rights (UDHR) and its subsequent Covenants. While the ideological presumption of the universality of human rights principles may be the subject of contention, there seems to be more agreement on the point that certain human rights concepts have assumed universal validity with the introduction of the UDHR in 1948. However, even this assumption has its critics, perhaps the most famous of which is the American Anthropological Association which, in its oft quoted reaction to the draft proposal for the Universal Declaration of Human Rights in 1947 held that:

'Standards and values are relative to the culture from which they derive (...) [such] that what is held to be a human right in one society may be regarded as antisocial by another people (...). If the [Universal] Declaration must be of world wide applicability, it must embrace and recognize the validity of many different ways of life (...) The rights of man in the Twentieth Century *cannot be circumscribed by the standard of any single culture, or be dictated by the aspirations of any single people.*'<sup>22</sup>

This position has since been echoed by several scholars.<sup>23</sup> Antonio Cassese, in his incisive theoretical discourse on the universality of human rights in relation to the UDHR, argues that the Universal Declaration and the two international Covenants do establish human rights rules in universal scope, but that since human rights are both conceived and observed differently, universality is, at least for the present, a myth.<sup>24</sup>

<sup>18</sup> These positions, though not necessarily his, are outlined in Jack Donnelly, *loc.cit.* (note 1), pp. 400-419, at p. 401. However, in his arguments for the doctrine of weak cultural relativism, Donnelly contends that 'radical relativism and radical universalism are misguided' and argues instead for a weak cultural relativist approach to human rights. This is an approach that views human rights as *prima facie* universal, but recognises culture as a limited source of expectations and principles on interpretation.

<sup>19</sup> *Ibidem*, pp. 401-402.

<sup>20</sup> Albert Tevoedjre, *Human Rights and Democracy in Africa*, Annual Lecture Series, United Nations University Press, Tokyo, 1986, pp. 8-11.

<sup>21</sup> Lars Adam Rehof and Tyge Trier, *Menneskeret*, Jurist-og Økonomforbundts Forlag, København, 1990, p. 52.

<sup>22</sup> Statement on Human Rights by the Executive Board, American Anthropological Association, *American Anthropologist*, Vol. 49, 1947, pp. 539- 543 [emphasis added].

<sup>23</sup> Raimundo Pannikar argues that '[n]o culture, tradition, ideology, or religion can today speak for the whole of mankind, let alone solve its problems. Dialogues and discourse leading to a mutual fecundation are necessary'. Raimundo Pannikar, 'Is the Notion of Human Rights a Western Concept?', *Diogenes*, Vol. 120, 1982, p. 75

<sup>24</sup> Antonio Cassese argues that because of the 'profound divergences in the philosophical conception of human rights', the search for universality is vain. 'Not only are human rights observed differently – certainly to different degrees – in different countries; but they are also conceived differently'. Antonio Cassese, *Human Rights in a Challenging World*, Temple University Press, Philadelphia, 1990, pp. 50-51.

What is evident from the trend of the discourse on the universality and cultural relativity of human rights is that it reflects the diversity of the views of scholars and writers. The debate spans from arguments for an ideal, if not utopian notion of absolute universalism, to arguments for a purely relativist view. Most writers have found it more useful to adopt a middle course. On the one hand, it is recognised that universality exists to some extent, at least in relation to some basic human rights concepts and principles, particularly those which border on the sanctity of human life and dignity. On the other hand, it is also accepted that some space must be left to allow for cultural variations and adaptations of human rights norms. In effect, the legitimacy of the different human rights and the priorities claimed among them is necessarily a function of context.

This appears to be the most reasonable option. To enhance its legitimacy, the emerging universal human rights regime must draw upon the cultural peculiarities of each society. In one culture, the individual may be venerated as the primary bearer of rights, while in another, individual rights may be harmonised with that of the community. Yet, underlying these two conceptions must be a recognition of the intrinsic value of the human being within the society. Thus, because different people in different parts of the world both assert and honor different human rights demands, the question of the nature of human rights must, to some extent, ultimately depend on the time, place, institutional setting and the other peculiar circumstances of each society.

### III 'African Values' and the Cultural Relativism of Human Rights

The developing world has set its imprint on human rights thought in the 1990s, both by making human rights more socially oriented and also by questioning the focus on the individual that has characterised human rights discourse in the West. The arguments for the cultural relativity of 'Asian values' and lately, 'African values' in the conception and interpretation of human rights have been central to this trend.<sup>25</sup> Although trends in recent scholarship suggest the declining justifiability of cultural relativism, it is still necessary to look at the major cultural variables that are said to account for differences among human rights concerns when we seek to understand Africanist viewpoints.<sup>26</sup> Indeed, the discourse on the cultural relativity of human rights from the Africanist perspective has attracted considerable attention although there remain differences of opinion on the articulation of the Africanist position in relation to the contemporary human rights corpus.

Issa Shivji, in one of the earlier Africanist contributions, argued that one can hardly talk of an African philosophy of human rights, because there is very little written by African and non-African Africanists on the conceptual and philosophical foundations of human rights in Africa. What exists is simply an *African ethno philosophy* of human rights. In his view, the philosophical discussions which may be of certain relevance to Africa are largely Western

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<sup>25</sup> The Asian values debate has focused on arguments by some writers that Asia has its own distinctive historical and cultural values which may differ from the 'universal' human rights norms promoted by the West. For a more incisive exposé on the Asian values and human rights debate, see Bilahari Kausikan, 'Asia's Different Standard', *Foreign Policy*, No. 92, Fall 1993, pp. 24-41; William Theodore De Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective*, Harvard University Press, Cambridge, MA, 1998; Xiaorong Li, "'Asian Values' and the Universality of Human Rights', *Philosophy and Public Policy*, Vol. 16, No. 2, 1996, pp. 18-22; Joanne R. Bauer, Daniel A. Bell (eds.), *The East Asian Challenge for Human Rights*, Cambridge University Press, Cambridge, New York, 1999.

<sup>26</sup> Ronald Cohen, Goran Hyden and Winston P. Nagan (eds.), *Human Rights and Governance in Africa*, University Press of Florida, Gainesville, 1993, p. 13.

viewpoints and their Marxist critiques.<sup>27</sup> Josiah Cobbah expresses the same view when he argues that despite the increase in the discussion of human rights in Africa, very little exists in the form of literature that approaches the idea of human rights from an African perspective. He insists that what most Africans have written on the subject tends to be attempts to either show that the Western concept of human rights exists in African cultures, or reflect Western-style condemnation of the abuse of human rights in Africa.<sup>28</sup>

It is significant to point out, however, that the position regarding the literature has changed dramatically since Shivji wrote in 1989 and Cobbah in 1986. Quite a number of works have recently been done by African and non-African Africanists on the philosophy of human rights in Africa.<sup>29</sup> Besides, even the so-called discourse on an 'African ethno philosophy of human rights' has over the years provided a fitting basis for the articulation of what can appropriately be described as an African philosophy of human rights. Several scholars have advanced from a range of interdisciplinary perspectives arguments for a distinctive Africanist perspective on the discourse on the cultural relativity of human rights.

The central themes in these arguments have dwelt on the philosophical foundations of the African concept of human rights and how this concept contrasts with western notions and institutions which were subsequently extended to the continent in the colonial era. To understand the Africanist discourse on the cultural relativity of human rights in Africa, however, it is necessary to draw attention once again to the argument by some writers that the contemporary concept of human rights is a modern development which has its roots in the Universal Declaration of Human Rights and was thus alien to traditional societies in Africa or elsewhere.<sup>30</sup> Some of these writers have suggested that the concept of human rights as legal entitlements which individuals hold in relation to the State simply did not exist in traditional African societies. As indicated earlier, they argue that what is usually put forward as human rights concepts in traditional Africa is nothing more than the notion of *human dignity and worth* which exists in all pre-industrial societies.

It is argued that all human societies including those in Africa, have gone through a stage when, because of the low level of productive forces, collective ownership of the means of production and the communal organisation of society were necessary for subsistence.<sup>31</sup> This communal social structure naturally allowed for the development of humanistic ideals, which did not necessarily equate with modern conceptions of human rights. Any argument for a traditional pre-colonial concept of human rights is therefore only a question of confusing

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<sup>27</sup> *Idem.*

<sup>28</sup> Josiah Cobbah, 'African Values and the Human Rights Debate: An African Perspective', *Human Rights Quarterly*, Vol. 9, No. 3, 1987, pp. 309-310.

<sup>29</sup> See for instance, An-Na'im/Deng, *loc.cit.* (note 1); Tunji Abayomi (ed.), *Human Rights and Democracy in Africa*, Human Rights Africa, Lagos, 1993; and Makau Wa Mutua, *op.cit.* (note 14). Also see Mutua, 'Limitations on Religious Rights: Problematizing Religious Freedom in the African Context', *Buffalo Human Rights Law Review*, Vol. 5, 1999, pp. 75-105.

<sup>30</sup> The term 'traditional' has been widely abused in African Studies. It has been suggested that what often appears traditional or portrayed as traditional are, in fact, practices and ideologies invented at specific moments in the recent past. Besides, the term 'traditional Africa' can be problematic. If the term refers to the pre-capitalist, communal stages of slave and feudal modes of production, the historical attributes which we identify as being traditionally African may not be peculiar to Africa after all, since this stage of social development has been common to many other societies. The conceptualisation of African traditions here therefore, is in a dynamic sense. It refers not only to the social attributes of the pre-modern and pre-capitalist stages of development, but also the more modern socioeconomic and political changes and continuities in African cultures and social orientations.

<sup>31</sup> Osita C. Eze, 'Is the Protection of Human Rights and Democracy strange to African Traditions?', in: Abayomi, *op.cit.* (note 29), p. 82.



'human dignity' with 'human rights'. Even at that, it has been further suggested that, to the extent that modernisation or Westernisation has reached into, and transformed traditional communities in Africa, traditional approaches to guaranteeing human dignity for all their worth would seem objectively inappropriate for the modern African nation State. To continue to base human rights policy on the communal model of traditional Africa would be to ignore the changes that have occurred and are occurring in the way Africans live.

Another variant of this school is the argument that traditional Africa as, indeed, most pre-modern agrarian societies did not evolve perceptions of human rights, because these societies did not recognise the concept of a 'human being' as a descriptive category to which some inalienable rights were attached. Instead, persons were defined by social status or group membership. Thus, traditional societies generally did not recognise rights held simply because one is a human being.<sup>32</sup> The kind of social relationship between the State and the individual on which the concept of human rights is based was therefore never created within the context of such traditional societies.<sup>33</sup> Human rights were thus alien to traditional African societies (as they were to feudal Europe), until Western modernising incursions dislocated community and denied newly isolated individuals access to the customary ways of protecting their lives and human dignity.<sup>34</sup> Indeed, human rights as defined by many liberal scholars, are understood as individual claims against the State as founded in the Universal Declaration of Human Rights and in this sense, there is only one conception of human rights and that is Western.<sup>35</sup>

In contrast to these positions, several African and Third World writers have argued that the philosophy and conceptions of human rights are neither exclusive to Western liberal traditions nor relevant only with reference to post-1948 developments. They reject the notion that the concept of human rights, having been originated, developed and refined in the West, was thereafter 'transplanted' to Africa and the rest of the world. This view has been variously described as paternalistic, inherently ahistorical and philosophically bankrupt.<sup>36</sup> S.K.B. Asante for instance, rejects the notion that human rights concepts are peculiarly or even essentially bourgeois or Western, and without relevance to African and other non-Western traditions.<sup>37</sup> Such a notion confuses the articulation of the theoretical foundations of Western concepts of human rights, with the ultimate objective of any philosophy of human rights,

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<sup>32</sup> Donnelly, *loc.cit.* (note 3), pp. 303-316.

<sup>33</sup> This point and others that have been advanced by writers who oppose the argument for an African concept of human rights are summarised in Mutua, *loc.cit.* (note 14), pp. 337-339.

<sup>34</sup> Howard and Donnelly have suggested that pre-industrial African societies did not generate the complex process of human rights. Donnelly specifically dismisses the notion that pre-colonial societies knew the concept of human rights, an argument he thinks moot because communitarian ideals had not been destroyed and corrupted by the money economy and Western values. See Howard, *loc.cit.* (note 7), pp. 159-183. Also see Donnelly, *loc.cit.* (note 1) pp. 410-412, and Jack Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca, 1989, pp. 118-119.

<sup>35</sup> Quoted in Shivji, *op. cit.* (note 12), p. 11.

<sup>36</sup> See, for example, El-Olaïd Ahmed El-Obaid and Kwadwo Appiagyei-Atua, 'Human Rights in Africa: A New Perspective on Linking the Past to the Present', *McGill Law Journal*, Vol. 41, 1996, p. 819; C.C. Mojekwu, 'International Human Rights: The African Perspective', in: J. L. Nelson and V. M. Green (eds.), *International Human Rights: Contemporary Issues*, Human Rights Publishing Group, Stanfordville, N.Y., 1980, pp. 85-97; A. Legesse, 'Human Rights in African Political Culture', in: K.W. Thompson (ed.), *The Moral Imperatives of Human Rights: A World Survey*, University Press of America, Washington DC, 1980, pp. 125-128.

<sup>37</sup> S.K.B. Asante, 'Nation Building and Human Rights in Emerging African Nations', *Cornell International Law Journal*, Vol. 2, No. 1, 1969, pp. 11-15. A synopsis of Asante's argument is presented in Hurst Hannum, 'The Butare Colloquium on Human Rights and Economic Development in Francophone Africa: A Summary and Analysis', *Universal Human Rights*, Vol. 1, No. 2, 1990, pp. 63-87.

which is simply the assertion and protection of human dignity on the basis of the intrinsic worth of the individual. This philosophy is an eternal and universal phenomenon that is as applicable to western traditions as it is to African and other non-western traditions.

Mahmood Mamdani and Paulin Hountondji both share this view. Mamdani argues generally that wherever oppression occurs – and no continent has had a monopoly over this phenomenon in history – there necessarily comes into being a conception of rights. This is why in his view, it is difficult to accept that the concept of human rights is a theoretical notion created only three centuries ago by philosophers in Europe.<sup>38</sup> What was unique about the Enlightenment, and the writings of the French and American Revolutions (to which the origin of the contemporary concept of human rights is often ascribed), was the discussion of human rights in the context of a formally articulated philosophical system. As Paulin Hountondji puts it:

‘[Western philosophers] produced not the thing but discourse about the thing, not the idea of natural law or human dignity but the work of expression concerning the idea, the project of its formulation, explanation and analysis (...) in short, a draft of the philosophy of human rights.’<sup>39</sup>

The Africanist approach to the discourse on the cultural relativism of human rights can therefore be broadly divided into two broad schools. The first of these is the less radical approach which is ideologically closer to the dominant universalist schools of the West. Proponents of this school, while arguing the validity of a uniquely African concept of human rights, also recognise the universality of a basic core of human rights. Kofi Quashigah for instance, concludes that human rights concepts that are rooted in certain social facts that are peculiar to particular societies, cannot be expected to be universal. At the same time, he acknowledges that certain basic needs are ‘indisputably universally ascribable to persons of every historical, geographical and cultural background’.<sup>40</sup>

The second school is in more radical opposition to the universalist approach. It seeks to fundamentally challenge the Western-oriented State-individual thinking that otherwise dominates human rights. The main argument here is rooted in a belief in the distinctively different philosophical basis and worldviews of Western European and African societies, with a particular emphasis on the collectivist rather than individualistic nature of the concept of rights and duties in Africa. Yougindra Khasalani,<sup>41</sup> Dunstan Wai,<sup>42</sup> Lakshaman Marasinghe,<sup>43</sup> Okey Martin Ejidike,<sup>44</sup> Kwasi Wiredu<sup>45</sup> and Makau Wa Mutua<sup>46</sup> are some of

<sup>38</sup> Mahmood Mamdani, ‘The Social Basis of Constitutionalism in Africa’, *The Journal of Modern African Studies*, Vol. 28, No. 3, 1990, p. 360.

<sup>39</sup> Paulin J. Hountondji, ‘The Master’s Voice – Remarks on the Problem of Human Rights in Africa’, reprinted by the University of Benin, quoted in Mamdani, *loc.cit.* (note 38), p. 360.

<sup>40</sup> Kofi Quashigah, ‘The Philosophical Basis of Human Rights and its Relation to Africa’, *Journal of Human Rights Law and Practice*, Lagos, Vol. 1, Nos. 3: 2, 1 and 2, 1991, pp. 7-20.

<sup>41</sup> See Yougindra Khushalani, ‘Human Rights in Asia and Africa’, *Human Rights Law Journal*, Vol. 4, No. 4, 1983, pp. 404-442.

<sup>42</sup> Dunstan M. Wai, ‘Human Rights in Sub-Saharan Africa’ in: A. Pollis and P. Schwab (eds.), *Human Rights: Cultural and Ideological Perspectives*, Praeger, New York, 1979, pp.115-144.

<sup>43</sup> L. Marasinghe, ‘Traditional Conceptions of Human Rights in Africa’, in: C.E. Welch, Jr. and R.I. Meltzer (eds.), *Human Rights and Development in Africa*, State University of New York Press, Albany, 1984, pp. 32-45.

<sup>44</sup> Okey Martin Ejidike, ‘Human Rights in the Cultural Traditions and Social Practices of the Igbo of South-Eastern Nigeria’, *Journal of African Law*, Vol. 43, No. 1 1999, pp. 71-98.

<sup>45</sup> Kwasi Wiredu, *An Akan Perspective on Human Rights*, in: An-Na’im/ Deng, *op.cit.* (note 3), pp. 243-260.

<sup>46</sup> Mutua, *loc.cit.* (note 14), pp. 339-380.

the writers in this category.<sup>47</sup> Most of these writers subscribe to the argument articulated by Prakash Sinha that non-Western notions of human rights differ fundamentally from dominant Western conceptions. In his discourse on the 'Non-Western viewpoint of human rights', Sinha argues that the current formulation of human rights contains three elements which reflect Western values and makes it ill suited to some non-Western societies. Firstly, the fundamental unit of the society is conceived as the individual, not the family. Secondly, the primary basis for securing human existence in society is through rights, not duties. Thirdly, the primary method of securing rights is through legalism where rights are claimed and adjudicated upon, not through reconciliation, repentance or education.<sup>48</sup>

Against this background, Keba M'Baye points out that traditional or pre-colonial Africa knew of human rights adapted to the political and social situations existing in that epoch. These rights as recognised and protected must be looked at within the context of societies that were atomised and rendered hierarchical by a caste system, and at the same time unified by mythological beliefs. Within these societies, the object of law was to maintain society in the State in which it was handed down by the ancestors. The concept of human rights within such social context was thus necessarily communal and humanist, fostering mutual respect and recognition of the rights and liberties of each individual within the wider context of the community.<sup>49</sup> To demonstrate this, Okey Martin Ejidike points out that traditional Igbo society recognised certain rights and accepted philosophical principles similar to, but necessarily different from, those underlying the present international human rights.<sup>50</sup>

Makau Wa Mutua's position is a similar one. He argues that an examination of the norms governing the legal, political and social structures in pre-colonial African societies demonstrates that the concept of rights informed the notion of justice which, though community centered, also supported a measure of individualism.<sup>51</sup> He argues further that in traditional Africa, the concept of rights was founded not on the individual but on the community, to which the individual related on the basis of obligations and duties. Rights in this context included but were not limited to the right to political representation which was often guaranteed by the family, age groups and the clan. The society developed certain central social features which tended to foster the promotion of both individual and collective rights. These included deference to age, commitment to the family and the community, and solidarity with other members of the community. The dominant social orientations toward rights emphasised groupness, sameness and commonality, as well as a sense of cooperation, interdependence and collective responsibility.

These ideals served to strengthen community ties and social cohesiveness, engendering a shared fate and a common destiny. In these circumstances, the concept of human rights did not stand in isolation. It went with duties. For every right to which a member of society was

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<sup>47</sup> For a discourse on the main ideas of some of these Africanist writers, see Shivji, *op.cit.* (note 12).

<sup>48</sup> S. Prakash Sinha, 'Human Rights: A Non-Western View Point', *Archiv fur Rechts-und Sozialphilosophie*, Vol. 67, 1981, p. 77.

<sup>49</sup> Keba M'Baye, 'Organization de L'Unité Africaine', in: *Les Dimensions Internationales des Droits de l'Homme*, UNESCO, Paris, 1987, p. 651.

<sup>50</sup> Ejidike, *loc.cit.* (note 44), pp. 71-73.

<sup>51</sup> Mutua points out that the contemporary human rights corpus shares with pre-colonial Africa, the importance of personal security rights. The right to life, for example, was so valued in Akan and Akamba societies that the power over life and death was reserved for a few elders and was exercised only after an elaborate judicial procedure with appeals from one court to another and often only in cases of murder and manslaughter. See Mutua, *loc.cit.* (note 14), *passim*. Also see Makau Wa Mutua, 'Limitations on Religious Rights: Problematising Religious Freedom in the African Context', *Buffalo Human Rights Law Review*, Vol. 5, 1999, pp. 75-105.

entitled, there was a corresponding communal duty. Expressed differently, 'the right of one kinship member was the duty of the other and the duty of the other kinship member was the right of another'.<sup>52</sup> Although certain rights attached to the individual by virtue of birth and membership of the community, there were also corresponding communal duties and obligations. This matrix of entitlement and obligations, which fostered communal solidarity and sustained the kinship system, was the basis of the African conception of human rights.<sup>53</sup>

It has been pointed out that the philosophy behind this concept of rights and duties is based on the presumption that the full development of the individual is only possible where individuals care about how their action would affect others. Thus, in contrast to the Western conception of rights which conceives rights in terms of abstract individualism without corresponding duties,<sup>54</sup> the dominant African conception of human rights combines a system of rights and obligations which gives the community cohesion and viability. As Mutua observes, this conception – that of the individual as a moral being endowed with rights but also bounded by duties actively uniting his needs with the needs of others, was the quintessence of the formulation of rights in pre-colonial African societies and can provide a fitting basis for the construction of national human rights regimes in contemporary African States.<sup>55</sup>

These arguments for a peculiarly communal African concept of human rights, however, are confronted with their own theoretical and empirical limitations particularly in their relevance to contemporary African societies. Rather than the persistence of traditional cultural values in the face of modern incursions, the reality in contemporary Africa, as in the rest of the developing world, is a situation of disruptive and incomplete Westernisation, 'cultural confusion', or even the enthusiastic embrace of 'modern' practices and values. In other words, the ideals of traditional culture and its community-centered values, advanced to justify arguments for the cultural relativism of human rights in the African context, far too often no longer exist. In fact, E.A. El-Obaid and K. Appiagyei-Atua argue that the much vaunted communal concept of human rights never existed in traditional African communities in the ways that it has been presented. They posit that the African notion of human rights does not over-emphasise the community, as 'most African leaders and writers would have us believe'. Rather, traditional African rights models primarily emphasised individual rights and there was always a balance between individual and the community rights.<sup>56</sup> Timothy Fernyhough also expresses serious doubt whether the 'myth of Merrie Africa' is as valid as theorists and ideologues suggest. He acknowledges that group-centered life is heavily accented in African traditions. He adds however, that the individual person and his or her dignity and autonomy are carefully protected in African traditions, as are individual rights

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<sup>52</sup> Cobbah, *loc.cit.* (note 28), p. 321.

<sup>53</sup> This position of the Africanist philosophy on the communitarian nature of the traditional African society has been made the cornerstone of the African Charter on Human and Peoples' Rights which stipulates certain rights as being the rights of the people as a community. Some writers contend that this emphasis on group rights in the African Charter derogates from the more familiar notion of individual rights. See Howard, *op.cit.* (note 3), p. 16.

<sup>54</sup> The argument here is that Western liberal thought firmly holds that rights attach to the individual rather than the organised society. The individual constitutes both the primary unit of organised society and the primary holders of rights. The autonomous individual exists, independent of organised society and comes into it with his rights.

<sup>55</sup> Mutua, *loc.cit.* (note 14), p. 363.

<sup>56</sup> El-Obaid and Appiagyei-Atua, *loc.cit.* (note 36), p. 819.

to land, individual competition for public office, and personal success.<sup>57</sup> Similarly Cohen argues that the image of the capitalist West as the bastion of unrestricted individualism with no concern for group rights and social justice is a 'distorted caricature'.<sup>58</sup>

Although scholars have been at the forefront of exploring the cultural relativism of human rights in the African context, the assertion of 'African values' gains prominence when it is articulated in the political rhetoric of African leaders and elite. It has been suggested that in asserting these values, leaders from the continent find that they have a convenient tool to silence internal criticism and to fan anti-Western nationalist sentiments.<sup>59</sup> Some writers have even suggested that the picture of an idyllic traditional communitarian society has been presented by African rulers and elite 'from Kaunda to Nyerere' only to hide and rationalise their own unbridled violations of human rights. In the scathing words of Rhoda Howard:

'Some African intellectuals persist in presenting the communal model of social organization in Africa as if it were fact, and in maintaining that the group oriented, consensual, and re-distributive value system is the only value system and hence it ought to be the basis of a uniquely African model of human rights. These ideological denials of economic and political inequalities assist members of the African ruling class to stay in power.'<sup>60</sup>

In a similar vein, Jack Donnelly has pointed out that arguments for the cultural relativism of human rights within the African context, are far too often made by urban economic and political elites that have long left traditional culture behind. Their appeal to cultural practices is often a mere cloak for self-interest and arbitrary rule. In traditional cultures, communal customs and practices usually provided each person with a place in society and a certain amount of dignity and protection. This traditional protection has largely been undermined by rulers in the continent such that the human rights violations of most African regimes are as antithetical to the cultural traditions which they idealise as they are to the 'Western' human rights conceptions which they despise. Donnelly therefore cautions that

'(...) we must be alert to a cynical manipulation of a dying, lost or even mythical cultural past. We must not be misled by complaints of the inappropriateness of "western" human rights made by repressive regimes whose practices have at best only the most tenuous connection to the indigenous culture; communitarian rhetoric too often cloaks the depredations of a corrupt and often westernised or deracinated elite. In particular, we must be wary of self-interested denunciations of the excessive individualism of "western" human rights.'<sup>61</sup>

Howard and Donnelly were clearly, and perhaps quite justifiably suspicious of the political elite of African countries who use the constant references to communal society and the

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<sup>57</sup> Timothy Femyhough, 'Human Rights and Pre-Colonial Africa', in: Goran Hyden and Winston P. Nagan (eds.), *Human Rights and Governance in Africa*, University Press of Florida, Gainesville, 1993, pp. 39-73.

<sup>58</sup> Roland Cohen, 'Endless Teardrops: Prolegomena to the Study of Human rights in Africa', in *ibidem*, p. 14.

<sup>59</sup> This point has also been repeatedly made with reference to the argument for 'Asian values' in the discourse on the cultural relativism of human rights. See Xiaorong Li, *loc.cit.*, (note 25), pp. 18-22.

<sup>60</sup> Howard, *op.cit.* (note 3), p. 25. Also see Rhoda Howard, 'Is There an African Concept of Human Rights?', in: R.J. Vincent (ed.), *Foreign Policy and Human Rights: Issues and Responses*, Cambridge University Press, Cambridge, 1986, pp. 11-32; and Rhoda Howard, 'Evaluating Human Rights in Africa: Some Issues and Implicit Comparisons', *Human Rights Quarterly*, Vol. 6, No. 2, and May 1984, pp. 160-179.

<sup>61</sup> Donnelly, *loc.cit.* (note 1), p. 411. Donnelly cites several examples of African rulers who have employed appeals to traditional practices as a justification for arbitrary rule. In Malawi, President Hastings Banda utilised 'traditional courts' in order to deal with political opponents outside the regular legal system. In Zaire, President Mobutu created the practice of *salon go*, a form of communal labor with supposedly traditional basis. In fact, it had little or nothing in common with indigenous traditional practices, rather it was more or less a revival of the colonial practice of *corvee* labor.

primacy of socioeconomic well-being over civil and political rights, to mask systematic violations of human rights in the interest of the ruling elite.

Indeed, the main interests served by the appeal to 'traditional communal African values' in the human rights discourse are predominantly masculine and patriarchal, with a notable concern over the control of women. Okey Martin Ejidike notes for instance, that a discussion of the rights and roles of women in traditional Igbo society in Nigeria involves the 'conspiracy of law and customary usage to underpin and continue palpable discriminatory mores' against women.<sup>62</sup> Another recent study on the cultural legitimacy of human rights in Africa demonstrates how the debate has been dominated by urban-based male elites whose perception of 'cultural legitimacy' focuses on the idealised and *invented traditions*<sup>63</sup> of collectivism, definitive gender roles, and conservative male dominance and interpretation of moral values.<sup>64</sup> These patriarchal notions of cultural legitimacy contrast significantly with those of rural and urban women's groups and non-governmental organisations working for women and minority rights. These latter groups argue for the implicit individualism of human rights and reject a notion of cultural legitimacy that promotes culture-based gender inequalities. In their conception of cultural legitimacy, they focus on themes such as traditional methods of conflict resolution, the centrality of the family, and the reciprocal relationship between rights and duties rather than patriarchal hegemony. Thus, while they subscribe to the view that universal rights be given some form of cultural interpretation, they use the global human rights debate in criticising present cultural practices which infringe on human rights.

#### IV Challenging the Extremities

From the foregoing, we can identify three levels of arguments in the Africanist discourse on the cultural relativity of human rights. At the first level is the debate as to whether or not the roots and foundations of human rights conceptions are also to be found in the African historical experience. On this, it is difficult to escape the conclusion that the extreme Africanist argument for a distinctively communitarian African concept of human rights which stands in contrast with the concepts and traditions of the West or the rest of the world, has its limitations. If anything, the notion of the absolute cultural relativism of human rights

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<sup>62</sup> Ejidike, *loc.cit.* (note 44), p. 91.

<sup>63</sup> See Bonny Ibhawoh, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State', *Human Rights Quarterly*, Vol. 22, No. 3, 2000, pp. 838-860. Several writers have drawn attention to the historical process of the 'invention' of customs and traditions by dominant groups in African societies through colonial social and legal restructuring. In his seminal work on the invention of tradition in colonial Africa, for instance, Terence Ranger argues that, 'once the traditions relating to community identity and land rights were written down in the court records [by the colonial authorities] and exposed to the criteria of the invented customary model, a new and unchanging body of tradition was created'. These traditions were thus invented because, by documenting them as written laws, they were denied of the flexibility and fluidity that characterised their operations in traditional societies. See Terence Ranger, 'The Invention of Tradition in Colonial Africa', in: Terence Ranger and E. Hobsbawm (eds.), *The Invention of Tradition*, Cambridge University Press, Cambridge, 1983, p. 251. Other significant works which address the construction of tradition and customs in Africa are Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia*, Cambridge University Press, Cambridge, 1985. For a forceful repudiation of this thesis, see Caroline Hamilton, *Terrific Majesty: The Powers of Shaka Zulu and the Limits of Historical Invention*, Harvard University Press, Cambridge Mass., 1998; and Sally Falk Moore, *Social Facts and Fabrications 'Customary' Law on Kilimanjaro, 1880-1990*, Cambridge University Press, Cambridge 1996.

<sup>64</sup> Ibhawoh, *loc.cit.* (note 63), pp. 838-860.

comes through as a misunderstanding inspired by cultural nationalism. Those aspects which its proponents see as radically distinctive communitarian African traditions and conceptions, also clearly possess ideals which are universal. Many of the humanistic and communitarian values which have been exclusively ascribed to African societies, also generally apply to most pre-industrial societies in Europe or Asia.<sup>65</sup>

On the other hand, it is difficult to accept the equally extremist critique of some Western liberal writers of Africanist cultural relativism, to the effect that human rights are inherently universal concepts which have found expression only in the post-feudal State (in the case of Africa, the post-colonial State), or that the concept of human rights was alien to specific pre-capitalist traditions in pre-colonial Africa. This monolithic interpretation of human rights is problematic. While there may be a core of universal values which reflect inherent human worth in various societies, the broad expression of these values necessarily vary, not only in accordance with historical circumstances, but also from one social context to another. The central difference may lie in the question: 'What is the basic unit of society?' Westerners would answer that it is the individual while most Africans may answer that it is the extended family.<sup>66</sup>

Human rights are the heritage of all mankind and the concept of human rights has been developed, struggled for and won by different people in different historical, political, social and cultural contexts. These struggles and victories should combine to give our contemporary understanding of human rights its essence and universal validity. There is hardly any basis or need for the rather sweeping assertion that traditional Africa or indeed any 'pre-modern' society for that matter, has made no normative contribution to the contemporary human rights corpus. As M. Haile has argued, the fact that human rights have been part of western philosophic tradition from early times does not imply that non-western societies have no equivalent conception of human rights. Written treatises on natural law or natural rights were no prerequisites to conception about or commitment to human rights elsewhere in the world.<sup>67</sup>

## V The 'African Cultural Fingerprint'

The second level of the Africanist discourse on the cultural relativism of human rights relates to the questions that have been raised over the validity and applicability to the African context, of modern human rights conceptions, as developed and interpreted in the West. In other words, even though the modern thrust and substance of human rights may have their philosophical roots in Western societies, are they definitely applicable to contemporary African States and societies?

Several liberal scholars contend that since all African countries have been, or are modernising on a western model which gives priority to the individual, the only conception of human rights which exists [*i.e.*, the western one] is of equal application to African societies whatever their historical antecedents or cultural circumstances may be. Some

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<sup>65</sup> It is significant to note that most of the attributes that are now frequently ascribed to the West, as 'Western values' are in fact, relatively recent developments in the West. Democracy and universal adult suffrage and the full range of individual-centered political and civil rights, were not instituted in many parts of Europe until the middle of the last century. Only a century back, many of the communal attributes now described as Asian or African values, could also easily have applied to societies in Europe and North America.

<sup>66</sup> Cobbah, *loc. cit.* (note 28), p. 319.

<sup>67</sup> M. Haile, 'Human Rights, Stability and Development in Africa: Some Observations on Concept and Reality', *Virginia Journal of International Law*, Vol. 204, No. 3, 1984, p. 575.

Africanists and proponents of cultural relativism have tended to agree with this. Edward Kannyo for instance, contends that to the extent that the Western model of the State has spread to other parts of the world, the factors which gave rise to the need for constitutional guarantees and led to the evolution of the philosophy of human rights in the west have become equally relevant in other parts of the world.<sup>68</sup>

However, some Africanists insist that in order to make it relevant to the circumstances in the continent, the content of universal human rights has to be tempered by specific African cultural experiences. Essentially, this means that the content of human rights has to bear what Makau Wa Mutua has described as the 'African cultural fingerprint' which emphasises the group, duties, social cohesion and communal solidarity as opposed to rigid individualism.<sup>69</sup> This appears an eminently reasonable and practical approach to the issue, for indeed one of the inadequacies of Western concepts and institutions uncritically adopted by most African States at the dawn of independence was that they borrowed little or nothing from existing traditional norms and values. For this reason, some of these colonial-engineered concepts and institutions have continued to bear little or no relevance to the distinctive needs of the post-colonial African State. Claude Welch has argued that a number of political constraints on the exercise of human rights that are currently manifest in African States can be attributed directly to the process of colonial restructuring. He identifies three main features of colonial rule, which tended to hinder human rights. First, the basic shape of the States themselves was the consequence of European administrative convenience or imperial competition. Secondly, an authoritarian framework for local administration was installed, reducing most indigenous rulers to relatively minor cogs in the administrative wheel, and leaving until the terminal days of colonialism the creation of a veneer of democratisation. Thirdly, European law codes were introduced and widely applied, notably in the urban areas, while traditional legal precepts were incompletely codified and relegated to an inferior position in civil law, particularly in the rural areas.<sup>70</sup> The task of redressing this situation calls for a regime of human rights founded on the basic universal human rights standards but enriched by the African cultural experience.

Pertinent as this observation is, it needs to be emphasised that there are substantive human rights limitations even in well-established cultural practices. Cultural practices which were acceptable in times past under different social and historical contexts, cannot always be expected to conform with established modern human rights orientations. For example, while slavery and trials by ordeal have been customary in many societies in Africa as in other parts of the world, today these are cultural practices that cannot be justified on any grounds. The same applies to the practices of discrimination on the basis of sex, social status, caste or ethnic group which were widely practiced, but are indefensible today. Yet, cultural relativism is a fact of human rights discourse and the peculiarities in cultural and ethical orientations invariably influence peoples' conceptions of rights and duties. For this reason, cultural differences may justify some deviations from universal human rights standards. However, cultural relativism must function as an expression and guarantee of local self-determination

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<sup>68</sup> Edward Kannyo, *Human Rights in Africa: Problems and Prospects*, A Report Prepared for the International League for Human Rights May 1980, p. 4. Jack Donnelly makes this same point when he argues: 'To the extent that modernization or Westernization has reached into and transformed, traditional communities, traditional approaches to guaranteeing human dignity seem objectively inappropriate; traditional limits to power are unlikely to function effectively in modern conditions'. See Donnelly, *loc.cit.* (note 1), p. 406.

<sup>69</sup> See Mutua, *loc.cit.* (note 14), pp. 339-380.

<sup>70</sup> See Claude Welch and Ronald Meltzer (eds.), *Human Rights and Development in Africa*, State University of New York Press, Albany, 1984.



rather than as an excuse for arbitrary rule and despotism. Cultural derogation from universal human rights standards<sup>71</sup> must be founded on an authentic cultural basis with adequate alternative constitutional and other legal provisions for guaranteeing basic human dignity where cultural orientations themselves fall short of these standards.<sup>72</sup>

## **VI Reconsidering the ‘Full Belly Thesis’**

The third level of the argument in the Africanist discourse on the cultural relativism of human rights stems from the tendency of some Africanists and African elite to stress the priority of social and economic rights over political and civil rights. The point of emphasis here is the Africanist angle to this debate, which seeks to justify the curtailment of civil and political rights in the interest of the collective social and economic development within the context of the postcolonial State. Julius Nyerere, the former president of Tanzania, puts this position across quite graphically when he asks:

‘What freedom has our subsistence farmer? He scratches a bare existence from the soil provided the rains do not fail; his children work at his side without schooling, medical care or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced, will his existing political freedom become properly meaningful and his right to human dignity becomes a fact of human dignity.’<sup>73</sup>

Another African leader, Colonel Acheampong of Ghana, expressed a similar view when he opined: ‘one man, one vote is meaningless unless accompanied by the principle of one man one bread’.<sup>74</sup> The hub of these expressed sentiments is that given the peculiar constraints of poverty and underdevelopment in Africa, economic and social rights must take precedence over civil and political rights or the State-individual thinking that otherwise dominates Western notions of human rights. This argument is often advanced as part of the larger thesis on the relativity of human rights.

However, some Western liberal scholars in disagreement with this position have argued that political and civil rights are of as much significance as economic and social rights. They disagree with the argument that political and civil rights should wait until basic needs are secured. This is because civil and political rights are needed in order to implement reasonable development policies, secure equitable distribution of wealth as well as promote economic growth. Civil and political rights are also needed in order to guarantee social and cultural rights and the maintenance of a stable social order necessary for society itself to exist. Rhoda Howard has referred to the arguments for the primacy of economic rights by some Africanists as the ‘full belly thesis’. The full belly thesis is that a man’s belly must be full before he can indulge in the ‘luxury’ of worrying about his political freedoms.<sup>75</sup>

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<sup>71</sup> By the term ‘universal human rights standards’ reference is made here to the human rights obligations of States enshrined in the Universal Declaration of Human Rights and the related international human rights covenants.

<sup>72</sup> The question of how the dominant cultural orientations within the African State may be regulated by national constitutional human rights provisions in the State without jeopardising existing cultural diversity and integrity is the subject of recent study. See Ibhawoh, *loc.cit.* (note 63), pp. 838-860.

<sup>73</sup> Julius Nyerere, ‘Stability and Change in Africa’, *Africa Contemporary Record*, Vol. 2, 1969-1970, pp. 31-32. Quoted in Shivji, *loc.cit.* (note 12), p. 26.

<sup>74</sup> See Rhoda Howard ‘The Full Belly Thesis: Should Economic Rights take Priority over Civil and Political Rights? Evidence from sub Saharan Africa’, *Human Rights Quarterly*, Vol. 5, No. 4, 1983, p. 467.

<sup>75</sup> *Ibidem*, p. 469.

The 'full belly thesis' is however, in my opinion, a less than fair representation of the arguments of writers like Julius Nyerere. The reference point here is not so much a *full belly* as it is an *empty belly*. A person's belly need not be full for him or her to be concerned about his or her political and civil liberties, but it is important that it is not empty either. Political and civil rights can best be guaranteed in a situation of relative economic and social stability where the people are guaranteed a basic level of well-being. This is particularly evident from the experiences in many post-colonial African States where the level of poverty is so severe and the standard of living so low that it often undermines the democratic electoral process. In some African countries, it has become common for poverty stricken rural voters to sell their votes for as little as a handful of salt or rice. For this category of Africa's poorest, the need for immediate survival surpasses any other long-term political or civil rights considerations.<sup>76</sup>

This, however, is not to suggest that political and civil rights are less significant than economic and social rights or that economic and social rights parameters should solely define the human rights aspirations of African States. The point being made is that the economic versus political rights debate in relation to Africa may not be quite as simplistic as Rhoda Howard and other writers portray it with reference to the 'full belly thesis'. The post-colonial African State manifests certain developmental limitations and other peculiar characteristics that must be taken into account in any study that seeks broad interpretations of the conditions and prospects for human rights in the continent. For one, it is useful to recognise that unlike in the West, the African State commands overwhelming power and influence which stands in rather marked contradistinction to the non-State sphere consisting of a largely undifferentiated and vulnerable peasantry. Under such circumstances, there are significant limitations to the level of political influence which civil society can or is in a position to wield without significant social and economic uplift.

At some point in the discourse, the arguments for and against the Africanist positions on the cultural relativism of human rights become something of a vicious circle, very much like the classical riddle of the chicken and the egg – which came first? Just as one may ask: political rights and economic rights – which comes first? Or individual rights and communal rights: which should take precedence over the other? It is perhaps in the nature of the discourse that these questions will never be conclusively answered. Yet, as indicated earlier, one approach to addressing these questions would be to perceive human rights as a holistic and integrated concept in which civil, political, social and economic rights constitute complementary aspects of the same broad concept. It is useful to realise that like individual and communal rights, both political rights and economic rights are interactive, interrelated and interdependent, not sequential.<sup>77</sup>

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<sup>76</sup> A number of writers has drawn attention to the limitations that the peculiar economic and social conditions in Africa place on democratisation and the electoral process. Brendalyn P. Ambrose in her work on democracy and human rights in Africa, has argued for instance that western style liberal democracy is not suitable to Africa's economic and social heritage. She posits that protecting human rights requires empowering people and reducing want and ignorance at the grassroots rather than tinkering with the parliaments and courts. See Brendalyn P. Ambrose, *Democratization and the Protection of Human Rights in Africa: Problems and Prospects*, Praeger, Westport, Conn., 1995; Andrew Reynolds, *Electoral Systems and Democratization in Southern Africa*, Oxford Studies in Democratization, London, 1999.

<sup>77</sup> Howard, *loc.cit.* (note 71), p. 470.

## **Conclusion**

An Afrocentric conception of human rights is a valid worldview. Its significance to the discourse on the cultural relativism of human rights, however, demands careful consideration. Rather than being the basis for abrogating or de-legitimising the emerging universal human rights regime, it should inform the cross-fertilisation of ideas between Africa and the rest of the world. It can also provide the moral and philosophical basis for the legitimisation of universal human rights in the African context. The present challenge for Africanist human rights scholars generally is to articulate for the international human rights community, an African sense of human rights or dignity, which flows from the African perspective and one that the rest of the international community can also use. With the sanctity of Western individualist paradigms of human rights being increasingly questioned, the African sense of community obligation that goes beyond charity has much to offer in the international discourse on human rights and particularly, in the promotion of social and economic rights.

Cultural relativism is a fact of human rights discourse and the peculiarities in cultural and ethical orientations invariably influence peoples' conception of rights and duties. To this extent, cultural differences may justify some deviations from universal human rights standards. However, cultural relativism must function as an expression and guarantee of local self-determination rather than as an excuse for oppression, arbitrary rule and despotism.

In reality, the construction and definition of human rights norms is a continuous and dynamic process. As a dynamic process, the cultures and traditions of the world must compare notes, come to some agreement on what constitutes human rights, and seek how best these values can find some form of cross-cultural and universal legitimacy. The arguments for the cultural relativism of human rights are therefore useful to the extent that they call attention to the need for cross-cultural understanding and the tolerance of differences. The great task that confronts the international human rights movement is how to explore and build upon the age-long processes by which different cultures have satisfied needs that we have come to identify as necessary for the nurturing of human dignity and human rights. By drawing from these varied cultural traditions, the emerging international human rights regime may be expanded and its claim to universality vindicated in an increasingly pluralistic world order.

In the final analysis, it is significant to note that the universalism versus cultural relativism debate over the legitimacy and priorities of human rights can be misleading. It is useful in so far as it calls attention to the ways in which the notions of liberty and individualism can be, and have been used to rationalise the abuses of capitalism. It is also useful in so far as it highlights how notions of equality and collectivism can be, and have been used as excuses for arbitrary and authoritarian governance. However, it also risks obscuring the essential truths that must be taken into account if contemporary studies of human rights are to be objectively understood and applied. Thus, in spite of the vast theoretical and conceptual divergence on the theme, it is useful to realise that the object of human rights discourse should be the quest for a reasonable and balanced approach to human rights that recognises the interplay between various cultural factors in the construction and constitution of human rights. There remains an urgent need to adopt a broader view of human rights incorporating diverse concepts, and moral experiences. It will be easier to find some harmony around the globe under a particular human rights rubric once the existence of human pluralism has been

recognised, understood and accepted. The hope is that greater cross-cultural understanding will shed light on a common core of universally acceptable rights.<sup>78</sup>

In closing, I find Raimundo Panikkar's metaphor of the window particularly appropriate in illustrating the main points articulated in this paper:

'Human rights are one window through which one particular culture envisages a just human order for its individuals. But those who live in that culture do not see the window. For this, they need the help of another culture which sees through another window. Now, I assume that the landscape seen through the one window is both similar to and different from the vision of the other. If this is the case, should we smash the windows and make of the many portals a single gaping aperture – with the consequent danger of structural collapse – or should we enlarge the viewpoints as much as possible and, most of all, make people aware that there are – and have to be a plurality of windows?'<sup>79</sup>

The latter choice, it seems to me, would much better serve the cause of the global human rights movement.

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<sup>78</sup> Alison Dundes Renteln, 'The Unanswered Challenge of Relativism and the Consequences for Human Rights', *Human Rights Quarterly*, Vol. 7, No. 4, 1985, p. 540.

<sup>79</sup> Raimundo Panakker, 'Is the Notion of Human Rights a Western Concept?', *Diogenes*, Vol. 120, 1982, pp. 75-102.