

# Human rights in the African state

*Bonny Ibhawoh*

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The modern African state is in many ways a product of the post-Second World War universal human rights movement. The end of the war in 1945 marked the beginning of an era of renewed international emphasis on the themes of freedom, democracy, and fundamental human rights. These ideas had direct impacts on independence struggles throughout the continent. Although nationalist demands for independence had been mounting in many parts of the colonized world for several years, the Second World War made self-determination a living principle for many in the non-European world. The Allied Powers led by Britain and the United States proclaimed self-determination and other fundamental rights as universally applicable and the guiding principles of Allied policy. The war was presented as a struggle for the ideals of freedom, democracy, and self-determination against the oppression and tyranny of Nazism and Fascism. The Atlantic Charter issued by Prime Minister Winston Churchill and President Franklin Roosevelt in 1941 famously declared that both leaders “respect the right of all peoples to choose the form of government under which they will live” and that they wished to “see sovereign rights and self-government restored to those who have been forcibly deprived of them” (Atlantic Charter, 1941). In Africa as elsewhere in the colonized world, nationalists demanded that these ideals of freedom and self-determination used to justify Allied war campaigns in Europe be also extended to them.

After the war, this discourse of universal human rights anchored on political self-determination was reinforced with the establishment of the United Nations and, specifically, the provisions of the UN Charter and the Universal Declaration of Human Rights. The UN Charter endorsed the right of self-determination of peoples while the UDHR articulated common human rights standards which all nations and peoples were to strive to promote and respect. Heralded as “a magna carta for all humanity,” the adoption of the UDHR by the UN General Assembly in 1948 marked the international recognition of certain fundamental rights and freedoms as inalienable universal values to which all individuals are entitled simply by virtue of their humanity (UN 1997; Glendon 2002, p. 214).

The UDHR was significant in the global anti-colonial movements of the post-war period and, specifically, the emergence of independent states in Africa because it reinforced the right of self-determination. With its emphasis on political and civil rights and its affirmation that government should be based on the will of the people, the UDHR helped to legitimize long-standing

struggles against colonial domination. Anti-colonial nationalist movements across Africa drew on an emergent language of universal human rights and took advantage of the new international emphasis on the political right to self-determination to demand independence from European colonial rule.

### **Balancing individual and collective rights**

The dominant theme in anti-colonial nationalist discourse was the right to national self-determination which was seen as the starting point and indispensable condition for all other human rights and freedoms. Collective rights expressed in terms of the right of peoples to national self-determination took precedence over individual rights. The discourse on the collective right to self-determination which was instrumental to the nationalist struggle was less relevant to articulating individual rights within the context of the post-colonial state.

The assumption was that individual rights can only be fully achieved when the collective rights of nationhood and self-determination are attained. Nationalist movements in Africa as elsewhere in the colonized world tended to emphasize the collective rights of nations, ethnicities, and communities rather than individual human rights. In nationalist discourse, collective rights were often expressed in political rather than social or economic terms. Responding to critics who questioned his emphasis on political independence over economic and social development, Kwame Nkrumah the Ghanaian nationalist who became prime minister of the country urged his countrymen: "seek ye first the political kingdom and all other things shall be added unto you" (Nkrumah 1957, p. 146). The clear emphasis in anti-colonial nationalist politics was on collective political rights.

With independence in the 1950s and 1960s, however, the emphasis in human rights discussions in Africa began to shift from collective political rights to collective social and cultural rights. Once independence was attained, nationalists who became political leaders sought to articulate and practice both the collective rights of national peoples and the individual rights of citizens. However, many new governments stressed the collective right of the states and communities at the expense of individual political, social, and economic rights.

In practical terms, the central challenge was how to balance individual rights enshrined in international human rights regimes which these new countries had signed on to, and the collective rights of peoples which was considered crucial to nation building. There was recognition that national human rights standards had to be founded on universal human rights principles. But there was also awareness that in order to be relevant to the unique circumstances of new nations, universal human rights principles had to bear what one writer describes as the "African cultural fingerprint" (Mutua 2002, p. 2). An African cultural fingerprint would soften the rigid individualism of the international human rights regime by emphasizing the group, duties, social cohesion, and communal solidarity.

The quest for congruence or a common meeting point between cultural traditions and modern national and international legal standards has been a central question in legitimizing and enforcing human rights in the African state. In 1963, African leaders under the auspices of the Organization of African Unity (OAU) expressly affirmed their adherence to the UDHR in the OAU charter (OAU Charter, art. 2) and subsequently in the African Charter on Human and People's Rights. But in affirming this commitment, the African Charter also stresses the "duty" of the individual to serve his national community and "to preserve and strengthen positive African cultural values" (African Charter 1963, art. 29). This approach, which stresses both individual and collective rights and duties, is also evident in the legal and constitutional frameworks for human rights protection adopted by many African states.

## Human rights in the post-colonial state

In the quest for congruence between universal human rights and local cultures, one goal of the national constitutions and applicable human rights laws in many African countries has been the establishment of a regime of minimal universal human rights standards founded on the diverse cultural and religious orientations of the people. Questions remain, however, as to how best to strike the delicate balance between the individual human rights standards guaranteed by the state and the collective cultural rights claimed by groups. Implicit in this is the tension and, sometimes, contradictions between the national human rights standards of state law and policies on one hand and the objective sociocultural traditions of peoples on the other. One instance of this is the conflict between the constitutional guarantees of gender equality in national constitutions and the traditional status of women in many African cultures. Another is the conflict between the constitutional guarantees of children's rights and pervasive cultural attitudes which condone early marriages, forced marriages, and child labor. Yet, a complementarity, if not an absolute congruence, of state laws and cultural norms is required if national human rights regimes are to gain grassroots acceptance.

There is an assumption that insofar as national human rights standards enshrined in national constitutions reflect the collective national conscience, they present a higher order of human aspirations with a more effective mechanism for promotion and enforcement. They also provide a higher set of standards by which the various cultural traditions can be judged. For this reason it is understandable that national human rights laws take precedence over customary or cultural practices, at least in theory. The principle of the supremacy of national constitutions ensures that in legal interpretation national human rights guarantees take precedence over any other laws or customary practices. This position is made clear in the South African Constitution, which provides expressly that "no law, whether as a rule of common law, customary law or legislation, shall limit any right entrenched in [the Constitution]" (South African Constitution, ch. 2, sec. 36.) Similar provisions of constitutional supremacy exist in other African constitutions.

The reality, however, is not quite as simple. Sometimes the constitution gives no indication whether fundamental rights supersede customary law or vice versa. For instance, previous or current versions of the Constitutions of Zimbabwe, Swaziland, and Botswana provide that the application of African customary law is not subject to the prohibition on discrimination contained in the constitution (Bennett 1995, p. 28). Thus, ambiguities remain over how to uphold national human rights standards in practice against the background of the prevalence and dominance of customary practices which conflict with these standards. It may be possible to talk about the complementarities between universal human rights standards and local cultural traditions where there are no direct conflicts between them. However, in cases where local cultures explicitly and fundamentally contradict universal human rights standards, the quest for congruence or complementarities becomes problematic.

National human rights provisions have not had full effect in many African states partly because cultural practices persist that have great limitations on constitutional human rights guarantees. Constitutional and legal forms for recognizing and protecting human rights manifest shortcomings that result from the continuing conflicts with "traditional" cultural definitions and practices. One possible explanation for this may be that the development of national human rights regimes in Africa has not often been grounded on cultural traditions. Therefore, we must seek further explanations in the continent's history.

To understand the social and political dynamics of the human rights experience in the post-colonial African state, it is necessary to begin in the colonial setting. It is within the colonial

setting that the contemporary idea of legal rights as entitlement, which individuals hold in relation to the state, first emerged. In his study of human rights in Africa, Claude Welch argues that a number of political constraints on the exercise of human rights, which currently manifest in African states, can be attributed directly to the imposition of external rule. He identifies three main features of colonial rule that tended to hinder human rights (Welch 1984, p. 13).

First, the basic shapes of the states themselves were the consequence of European administrative convenience or imperial competition. Colonialism created states in which the promotion of self-government was, at most, a minor priority for the ruling powers until the last years of the colonial interlude. Little opportunity existed even after independence for redrawing the boundaries, helping to set the stage for political conflicts, ethnic tensions, and later attempts at secession. Second, an authoritarian framework for local administration was installed, reducing most indigenous rulers to relatively minor cogs in the administrative machinery and leaving until the terminal days of colonialism the creation of a veneer of democratization. Colonial administrative apparatus failed to foster the kind of inclusive and consultative governance that is the foundation for sustainable democracies. Third, European law codes were introduced and widely applied, notably in the urban areas, while traditional legal precepts were incompletely codified, relegated to an inferior position in civil law, and applied particularly in the rural areas. The result was a bifurcated state cut along the lines of urban-based, rights-bearing "citizens" on one hand and custom-bearing rural "subjects" on the other (Mamdani 1996, p. 19).

Legal recognition and protection of rights in the colonial states of Africa was belated and inadequate, with constitutions hastily created at independence being in many cases the first significant expression of them. Specific provisions dealing with human rights tended more or less to be importations of Western European models with scant attention paid to the need to focus on local initiative and input. In many African states, initial constitutional provisions were drawn overwhelmingly from patterns familiar to the departing colonial power, hence reflecting assumptions far more common in the metropolises of Europe than in particular African societies. Being externally imposed, some of these constitutions lacked popular support and legitimacy.

Based on all these factors, some writers have suggested that the roots of the dismal human rights records of contemporary African states, particularly at the formal public level, should be sought partly in their colonial experiences. Critics argue that the imposition of colonial rule and the authoritarianism that characterized it distorted the recognition and protection of human rights in traditional African societies (Adegbite 1968, p. 69; Wai 1980, pp. 115ff.). Their cultural traditions, they contend, remain relevant to the quest for a viable human rights regime in the continent. On the other hand, some have also suggested that the European colonial powers introduced new and more appropriate human rights norms, which suited the transition from the old feudal order to modern multi-ethnic nation states. While these contentions remain open to debate, it is helpful to note that the framework of law and rights brought by colonialism reflected Western liberal assumptions that often conflicted with traditional cultural orientations, such as those about the responsibilities of chiefs and the nature of judicial settlement. In many cases, these conflicts between colonial standards and local expectations were further amplified by the sheer diversity of the cultural orientations of the constituent ethnic nationalities being lumped together under single administrative units.

Since independence, many African countries have attempted to reverse these trends. Old colonial-engineered constitutions have been revised and, in some cases, entirely new ones drawn up to meet new national realities. Particular attention has been given to human rights. The human rights provisions in these new constitutions are often a reflection of the UDHR, the African Charter on Human and Peoples' Rights, and other international human rights covenants. In some cases, as in Burundi, the constitution goes as far as to declare that the rights and duties

proclaimed and guaranteed by the UDHR, the international pacts relative to human rights and the African Charter are an integral part of the Constitution (Burundi Constitution 2005, art. 12).

However, the broadening of the scope of constitutional human rights guarantees has not adequately addressed the continuing tensions and conflict between these guarantees and prevalent customary practices that are inconsistent with them. On the one hand we have national human rights ideals eloquently articulated in national constitutions – sometimes in exactly the same words as the UDHR and other international human rights instruments. On the other hand we are confronted with cultural practices and notions of rights that reflect local world views (or at least those of the dominant groups within the society), which in turn conflict with national human rights standards.

### National constitutions versus cultural traditions

In addressing the apparent tension between cultural traditions and state human rights aspirations, one approach adopted in many African countries' constitutions has been to make express provisions guaranteeing collective cultural and family rights alongside basic individual rights. The African Charter for Human and People's Rights exemplifies this trend. Apart from its provisions for individual duties, one of the unique features of this Charter is its articulation of the right of peoples to their cultural development. The Charter proclaims that individuals have a duty to preserve and strengthen African cultural values in their relations with other members of the society (African Charter, art. 15). Similar provisions exist in several African countries' constitutions. The Ethiopian Constitution, for example, declares that the state has a responsibility to preserve the nation's cultural legacies and to support "cultures and traditions that are compatible with ... democratic norms" (Ethiopia Constitution 1995, art. 41[9]). In Ghana and Uganda, the constitutions guarantee that every person is entitled to enjoy, practice, profess, maintain, and promote any culture *subject to the provisions of the Constitution* (Ghana Constitution 1992 ch. 5, sec. 26[1]; Uganda Constitution 1995, ch. 4, sec 37). In some cases, as in Ghana and Nigeria, the constitutions further spell out the cultural objectives of the state under the ambiguous heading of "Directive Principles of State Policy" (Nigeria Constitution 1999, ch. 2).

Besides guaranteeing cultural rights and duties, a related feature of many African constitutions adopted since independence is that they also seek to expressly prohibit cultural practices that conflict with national or applicable international human rights standards. The Ghanaian Constitution makes a proviso, under the same section that guarantees the right of individuals to profess and promote their culture, that "all customary practices which dehumanize or are injurious to the physical and mental well-being of a person are prohibited" (Ghana Constitution 1992, ch. 5). This is a reflection of the ways in which some African nations have attempted to grapple with the challenge of finding a balance between protecting collective cultural rights while still upholding national human rights standards. However, the articulation of cultural rights in national constitutions and the prohibition of some customary practices that conflict with national human rights standards has had only limited effect in actually resolving the inherent conflicts between national human rights aspirations and some dominant cultural traditions.

The conflict continues in the practice of forced marriages and child marriages, despite national legislation that guarantee children's rights and the right to freedom of association. It manifests in the dominant cultural notions of gender roles. In particular, it appears in the different forms of cultural prejudices against women, in spite of national constitutional guarantees of gender equality and state ratifications of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN Declaration on Minorities.

Those often at the center of this conflict are women and children, the most vulnerable groups in any society. Indeed, as the African preparatory meeting for the Beijing Women's Conference concluded in its report on the conditions of women's rights, "constitutional rights [in Africa] are abrogated by customary and/or religious laws and practices" (UN 1994). Perhaps the most prominent manifestation of this is the practice of "female genital mutilation (FGM)" or "female circumcision," which remains quite prevalent in many new African nations despite extensive national and international legislation against the practice.

### **Differing paradigms of cultural legitimacy**

Social anthropologists have long identified the ambivalence of cultural norms and their susceptibility to different interpretation as one of the defining features of culture. In his conflict theory of culture, Ralf Dahrendorf posits the existence of more than one consensus or value system in a culture. Dissent, conflict, and change are as much a part of the essence of culture as are integration and consensus; either set of characteristics becomes dominant or more evident under certain historical conditions (Dahrendorf 1959, p. 235). Typically, dominant groups or classes within a society seek to maintain perceptions and interpretations of cultural values and norms that are supportive of their own interests and reinforce their positions, proclaiming them to be the only valid view of that culture. Such powerful groups and individuals tend to monopolize the interpretation of cultural norms and are able to manipulate them to their advantage. In contrast, dominated groups or classes may hold, or at least be open to, different perceptions and interpretations of culture that are helpful to their struggles for control for justice and improvements for themselves. This type of internal struggle for control over cultural sources and symbols can be said to underscore contemporary discussions about the cultural legitimacy of human rights in Africa.

The process of lawmaking in most African states has been characterized by varied and contrasting positions on how best to uphold minimum universally accepted human rights standards while at the same time taking into consideration the cultural orientations of local peoples. In other words, this process concerns what appropriate steps should be taken in the effort to ground new national and applicable universal human rights standards on the cultural traditions of local peoples without adversely compromising either. Two contrasting perspectives to this process can be identified and each demands some elaboration. On one hand, there are male-dominated, urban-based elites whose perception of "cultural legitimacy" focuses on the idealized African traditions of collectivism, definitive gender roles, and conservative male dominance and interpretation of moral values. Their views of culture and tradition are often patriarchal. While they may be well disposed to the institution of the core humanistic ideals of the universal human rights regime within the state, these groups argue for the retention of more cultural initiative on issues of private social relations such as those concerning religion, the family, and morality. This may be termed the "conservative paradigm" of cultural legitimacy.

On the other hand, however, there are emerging and increasingly vocal groups, represented mainly by local women's groups and non-governmental organizations (NGOs) working for women and minority rights, who argue the implicit individualism of human rights and whose ideas of cultural legitimacy exclude the perpetuation of culture-based patriarchies and gender inequalities. They focus instead on themes such as traditional methods of conflict resolution, the centrality of the family in social life, and the reciprocal relationship between rights and duties. While they subscribe to the view that universal rights be given some form of cultural interpretation, they use universal human rights language with its emphasis on individual rights to critique present cultural practices that infringe human rights. This reflects a "dynamic paradigm" of cultural legitimacy.

The discourse on the cultural legitimacy of human rights in Africa has tended to focus more on the conservative paradigm of cultural legitimacy than on the dynamic paradigm. It has, for the most part, involved debates among the dominant male elites in African states over how to ground constitutional rights on prevailing cultural traditions. Until very recently, little had been heard from advocates of the dynamic paradigm. The reasons for this are not far-fetched. For one, human rights discourse in Africa has generally focused more on human rights violations at the male-dominated formal public sphere than at the informal private sphere. Second, marginalized and submerged groups such as rural women and minority groups lack the means, organization, and power to articulate their positions in national human rights discourse. One example of the dominance of the discourse on the cultural legitimacy of human rights at the level of the conservative paradigm comes from the constitutional debates in Nigeria in 1979.

As part of the process of drafting a new constitution to replace the old independence constitution in 1978, the fifty "wise men" who made up the Constitutional Drafting Committee (hereinafter CDC) were confronted with the problem of what to do with section 28 of the old Nigerian Constitution which dealt with the rights (or absence of them) of so-called "illegitimate children." By exempting from its human rights guarantees against discrimination "any customary practice in force," section 28 of the old Constitution exempted from the prohibition against discrimination in the bill of rights any law imposing disability or restriction on any person "having regard to the *special circumstances* pertaining to the persons to whom it is applied" (Nigeria Constitution 1966, sec. 28, cl. 2[d]). This provision effectively meant (and was interpreted by the courts to mean) Constitutional approval, or at least condonement, of pervasive cultural traditions across the country that discriminated against children born out of wedlock, particularly with regards to inheritance rights. This was clearly in conflict with the universal principle that "all human beings are born free and equal in dignity and rights" (UDHR 1948, art. 1).

After heated deliberations, the CDC succeeded in changing this legal position. In its report, it recommended omitting the old Constitutional proviso that allowed for discrimination under certain circumstances of birth from the new bill of rights. To avoid any ambiguities, the new Constitution expressly provided that "No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth" (Nigeria Constitution, chap. 4, sec. 42). What is interesting, however, is the difficulty it took the CDC to reach this seemingly obvious and long overdue Constitutional amendment. Explaining the rationale for its decision, the Committee stated:

Our decision was based on the grounds that it is unjust to accord an inferior status to persons who were not in any way responsible for the situation in which they found themselves. Some members were highly critical of this decision ... They pointed out that under Islamic law, a *bastard* [sic] has no right to the estate of his deceased putative father. They argued that the present draft contains a provision which is *repugnant to morality and that nothing of the sort can be found in the laws or constitution of any other state*. The majority of members however did not agree that Section 35(3) is in anyway immoral and they were satisfied that it is in accordance with equity and natural justice.

(CDR 1966, p. xvii)

Twenty years later, discrimination against children on the basis of the circumstance of their birth and prevailing cultural and religious traditions persists across the country – a testimony to the fact that the objections made by some of the "wise men," hard as they are to justify, were not misplaced. For them, the cultural legitimacy of constitutional rights clearly means the

perpetuation of traditional conservative communal notions of morality even if, as in this case, it compromises individual rights.

This kind of conservative and male-dominated paradigm of cultural legitimacy is also evident in the position of some African states in relation to the CEDAW, which has the dishonor of being the convention with the greatest number of reservations by state signatories. In the African context, the reservations are intimately linked with compromises and accommodation made by ruling elites regarding cultural traditions on the one hand and women's sexual rights on the other. Article 5 of the Convention provides that state parties shall take all appropriate measures to "modify the social and cultural patterns of the conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women" (CEDAW 1979). Although several African countries have ratified the CEDAW, many have done so with extensive reservations and rejected some of its requirements. Malawi, for example, rejected some provisions with the explanation that:

Owing to the deep-rooted nature of some traditional customs and practices of Malawians, the Government of the Republic of Malawi shall not, for the time being, consider itself bound by such of the provisions of the Convention as require immediate eradication of such traditional customs and practices.

*(Jensen and Poulsen, 1993, p. 6)*

This conservative paradigm of cultural legitimacy stands in contrast to the more dynamic paradigm of cultural legitimacy, a situation that is itself a reflection of the fundamental conflict between the implicit individualism of human rights and the importance of collectivism and definitive gender roles in most African cultures. However, for the marginalized groups at the receiving end of culture-based inequalities (as are many African women), cultural legitimacy is conceived in a different sense. Women's groups in Africa, while campaigning against such cultural practices as "female genital mutilation," degrading widowhood rites, and discriminatory customary rules of inheritance, have emphasized the need for human rights work to focus more attention on traditional systems of support for women in the family. Additionally, they assert that human rights work should consider the reciprocal relationship between rights and social responsibilities and traditional methods of conflict resolution that emphasize more of reconciliation than retribution.

Across Africa, many women's NGOs seem to have arisen primarily from this need to respond more effectively to the new demands caused by the breakdown or unresponsiveness of traditional structures to new social realities. NGOs working for women's rights – whether in the form of church councils as in Swaziland, Kenya, and Namibia, or as groups of women lawyers in Ghana, Uganda, and Nigeria – have focused on a dynamic, critical, and selective interpretation of cultural legitimacy. In Ghana, for example, the national federation of women lawyers (FIDA) has consistently argued that customary legislation and practices in areas such as inheritance and maintenance of children no longer safeguard women in present-day urbanized African societies. In its view, change is urgently needed in this culture-based legislation. Yet in its counseling and advocacy FIDA-Ghana canvasses the employment of traditional methods of conflict resolution based on securing consensus.

In Swaziland, one of the dominant women's rights NGOs, the Council of Swaziland Churches (CSC), pushes for critical debate and uses the global human rights debate to criticize cultural practices that no longer safeguard women. However, the organization is always "careful to avoid bias against traditional systems" (Jensen and Poulsen 1993, p. 6).



For these groups, cultural legitimacy of human rights is conceived more in terms of providing traditional economic security and support for women and families rather than recognizing culture-based gender roles in national human rights legislation.

Indeed, at the core of this apparent conflict between the paradigms of cultural legitimacy is the fact that the realities of present-day African societies, particularly in the urban areas, are characterized by the destabilization and breakdown (without effective alternatives) of traditional models of rights and support in the family. While traditional notions and institutions survive in appearance and prestige, and thus provide a basis for the continued calls for African states to ground human rights on them, they are largely emptied of their former economic and social content. The dilemma of the African state today is that the community and extended family are no longer able to play their social welfare roles, while the state is not yet able to replace them in doing this. Put differently, cultures are no longer able and constitutions are not yet able. Under such circumstances of social change and need, groups and individuals are beginning to apply different interpretations and strategies of cultural legitimacy depending on their interests and relative power. Thus while cultural relativists and the male-dominated groups of African elites have sought to maintain cultural legitimacy by tempering the modern content of human rights (as enshrined in national constitutions with a broad range of cultural norms and values), other less-prominent groups have been more critical and selective.

### **Making compromises: reconciling culture and constitution**

Dominant groups or classes within society will continue to maintain perceptions and interpretations of cultural values and norms that are supportive of their own interests, proclaiming them to be the only valid view of that culture. Dominated groups, on the other hand, may hold, or at least be more open to, different perceptions and interpretations that are helpful to their struggle to achieve justice for themselves. This is typical of the internal struggle for control over the cultural sources and symbols of power within any society (An-Na'im and Deng, 1990, p. 20).

In spite of these realities, there is a real and urgent need to seek acceptable ways of ensuring the cultural sensitivity and legitimacy of national human rights regimes. In so doing, it is important to secure the agreement and cooperation of the proponents of cultural legitimacy's counter position in choosing and implementing national human rights standards. To harness the power of cultural legitimacy in support of national human rights standards, African states need to develop techniques for internal cultural discourse and cross-cultural dialogue. In addition, they must work toward establishing general conditions conducive to constructive discourse and dialogue. This approach assumes and relies on the existence of internal struggles for cultural power within society. Further, it encompasses the realization that certain dominant classes or groups would normally hold the cultural advantage and proclaim their view of culture as valid, while others will challenge this view, or at least desire to do so.

Thus, it is important to create space for a dialogue between weaker and stronger groups within the cultural community and society at large. Legitimizing national human rights standards requires recognition and cultivation of this dialogue. Women and minority groups must be able to dialogue over interpretations of cultural values with politicians, officials, traditional leaders, and family heads in both the rural and urban areas. If respect for human rights is to be achieved and made sustainable, human rights must reside not only in law but in the living and practiced culture of the people. There is a need, therefore, for dialogue among groups with different paradigms of cultural legitimacy on what role culture should play in legitimizing national human rights regimes within African states. What is advocated is some form of "cross-paradigmatic" approach to the quest for national consensus on the ways to enhance

cultural legitimacy. Ideally, the object of such internal cross-paradigmatic dialogue would be to agree on a range of cultural support for national human rights, in spite of disagreements on the justification of those beliefs. While total agreement on cultural interpretation and application to human rights may not always be achieved, it is essential to keep the avenues for dialogue open.

In addressing the conflicts between national human rights standards and dominant cultural orientations, it is useful to bear in mind that national constitutional human rights provisions are not meant to regulate every aspect of human action within the society. They do not mandate specific social attitudes. Rather, they represent broad standards, ideally arrived at by consensus on which rights are considered fundamental within the state. Thus, national human rights provisions should still give room for cultural expression. In some cases, cultural communities within the state should still retain some latitude over how to implement these rights. For example, the constitutional right to freedom from discrimination on the grounds of gender may be a fundamental right, but there remains a margin of cultural interpretation as to what constitutes gender discrimination. Here, social and cultural contexts are crucial. The tradition in many African societies that stipulates that women may not hold certain traditional titles and offices or chieftaincy positions is no more an expression of gender discrimination than the rule among Catholic Christians which bars women from becoming priests. Such traditions become problematic when extended beyond the realms of culture and religion to imply the exclusion of women from public offices.

The point here is that to be effective, national human rights guarantees must allow for some form of cultural expression and initiative. Indeed, the same analogy can be made between national human rights provisions and international agreements. International human rights agreements are not meant to resolve controversial clashes over rights within individual societies nor do they mandate specific social policies. They are merely widespread agreements about what rights are fundamental, and countries retain great latitude over how to put these rights into practice.

In the same way, rather than seeking to prescribe new rules for social relations within cultural communities, national human rights laws should aim at successfully promoting human rights within the prevailing cultural attitudes and institutions. The challenge is to seek ways in which cultural practices through change, adaptation, and modification can be made to serve as a complement rather than a constraint to specific national human rights aspirations. In doing this, it is not enough to identify the cultural barriers and limitations to modern domestic and international human rights standards and to reject them wholesale. It is also not enough to attempt to uphold national human rights standards over these cultural traditions merely by legislative or executive fiat. It is more important to adopt a holistic and sensitive approach that seeks to understand the social basis of these cultural traditions and how cultural attitudes may be changed and modified to complement or at least conform to basic human rights standards. Such change and integration must be done with local initiative and involvement in a way that does not compromise the cultural integrity of the people. Local people and cultural communities must feel a sense of ownership of the process of change and adaptation.

Unfortunately, such processes of cultural change through local initiatives have not been common. In many African nations, human rights have merely been decreed from above through constitutional and other legal provisions, while cultural orientations and practices have been expected to conform by legislative fiat with these new human rights standards. Culture evolves, however, rather than transforms and the process of evolution is painstakingly gradual and complex. Cultural practices, being a reflection of collective social strength, acts as a framework by which self-interest is defined and realized within each community. Therefore, the cultural

legitimacy of rights cannot be deduced or assumed from the mere fact that existing formal documents officially recognize the claim as a human right.

### Beyond law: cultural reinvention

Many African states have demonstrated a willingness to introduce legislation holding national human rights above customs and cultural traditions where conflicts arise. However, their experiences show that formal legislative enactments alone cannot change pervasive cultural attitudes. Moreover, formal legislation alone cannot resolve the conflict between cultural traditions and national human rights standards. In the case of FGM, legislation has proven effective only where it has been integrated into other aspects of a comprehensive eradication strategy.

In several African countries where FGM legislation exists, it is not enforced for fear of alienating certain power bases or exacerbating tensions between practicing and non-practicing communities. No African country that has banned FGM, including Senegal, Egypt, Ghana, and Burkina Faso, dares enforce the law. Law by itself has not and cannot eliminate the influence of harmful customs nor remedy harmful traditional practices. The major constraint remains limited enforcement capacity particularly at local levels. In Guinea, FGM carries the death penalty but it has never been applied (*Economist* 1999, p. 45). Early attempts to enforce legislation against FGM in Sudan caused such popular outcries that enforcement was subsequently abandoned. In Burkina Faso, which incorporated a prohibition of FGM into its Constitution and prosecuted practitioners in connection with the deaths of young girls during female circumcision ceremonies, it soon became clear that criminalizing practitioners and families only succeeded in driving the practice underground and creating an obstacle to outreach and education (Jones *et al.* 1999, p. 219).

These experiences and others elsewhere have shown that in order for legislation to be effective it must be accompanied by a broad and inclusive strategy for community-based education and awareness-raising. Conflicts between cultural practices and national human rights standards as exemplified in the case of FGM need to be addressed from a holistic and coherent standpoint, which locates the problem within three interrelated frameworks – public health, cultural reorientation, and human rights. To be effective, such programs must necessarily involve local communities as changes in cultural attitudes and orientations can only be meaningful and sustainable if they come from within these local communities.

This approach to the problem of FGM would appear to have worked quite well in Kenya where some local communities have successfully introduced “alternative circumcision rites” to replace old traditions. Under the new procedure arrived at through communal dialogue and consensus, the people within these communities agreed to do away with the physical mutilation of the woman’s body during the traditional female circumcision rites while retaining other harmless aspects of the circumcision rites (Mwakisha 1991). It responds to concerns by local peoples for whom such circumcision rites are central to socialization. For them, blanket abolition of the practice means losing important celebrations that endorse their identity and value.

The “alternative circumcision rites” initiative was the result of meetings among some Kenyan mothers seeking alternative ways to usher their daughters into womanhood without subjecting them to the ordeal and hazards of “facing the knife.” The new rite of passage known as *Ntania na Mugambo*, or “circumcision through words,” uses a week-long program of counseling capped by community celebration and affirmation in place of the former practice. During the celebrations, which still include the traditional period of seclusion, the adolescent girls are taught the basic concepts of sexual and reproductive health and are counseled on gender issues

and other customary norms. The modified rite includes all the meaningful aspects of the traditional ritual but “leaves the cut out” (Elijah 1999, p. 31). As a way of legitimizing the new procedure, the girls receive certificates certifying that they have undergone the traditional rites into womanhood (Reaves 1997). These innovations have produced hopeful results where previous efforts have failed. In one of the communities where the alternative circumcision rites were introduced and where about 95 percent of the girls previously had to undergo circumcision, the rate of FGM is estimated to have gone down to 70 percent (Achieng 1998).

A similar ritual by which the girl is declared a woman without being maimed is now carried out in parts of Uganda. The case of Uganda is particularly interesting because the new ritual was promoted not only by the women themselves but also by male elders in the clan who formed an Elders Association for the purpose of discussing changes to this and other cultural traditions (Chelala 1998, p. A23). This is an example of the “cross-paradigmatic” consensus of both the conservative and dynamic paradigms of cultural legitimacy being used to resolve the conflicts between cultural traditions and national human rights standards. Such cross-paradigmatic consensuses can be further explored in addressing other culture-based human rights violations in traditional widowhood rites and mourning taboos, child betrothals, and forced marriages.

Although the alternative circumcision rites initiative in Kenya and Uganda still faces some opposition, it is an example of the process of community involvement in advocacy, information, education, legislation, and policy formulation. This community involvement offers the best prospects for a culturally sensitive solution to resolving the conflict between national human rights and cultural traditions. Such initiatives may not always offer concrete results or guarantees of success, but they represent a creative and promising approach to resolving real and serious human rights issues.

These debates about modifying cultural practices to conform with modern rights standards are not exclusive to Africa or the “traditional” developing world. In Spain, a similar debate has raged in the past decade about modifying the centuries-old blood sport of bullfighting to conform with modern animal rights standards. As with the FGM debate, some advocates for reform have argued for a “reinvention” of the sport rather than an outright ban. As one Spanish official put it, such cultural reinventions that reflect “more advanced values” are necessary to achieve a “dignified and respectable society” (Minder 2010). Indeed, in an age of rights, societies must continually seek to reinvent traditions through debates and dialogues to meet changing expectations. The model of cross-paradigmatic dialogue that this chapter advocates offers some directions on how societies can best undertake cultural reinventions to meet modern rights standards.

## Conclusion

The efforts at ensuring the cultural legitimacy of human rights in the African state must begin with a proper understanding of both the general nature of the tension between national human rights regimes and cultural traditions and the internal tensions between contending paradigms of cultural legitimacy. Every cultural tradition contains some norms and institutions that are supportive of some human rights, as well as norms and institutions that are antithetical or problematic in relation to other human rights. Because respect for human rights is fostered by reason as well as by experience, a constructive approach to promoting human rights is to seek ways of enhancing the supportive elements of culture while redressing the antithetical or problematic elements in ways that are consistent with the cultural integrity of the tradition in question and the contending groups within it. It is counterproductive to attempt to enhance the awareness of human rights within any culture in ways that are unlikely to be accepted as legitimate by that culture or significant groups within it.

The promotion of national human rights standards against the background of the dominant cultural and social traditions in the state should be done with due respect to meritorious cultural values and traditions of local communities. The interplay between national human rights standards on one hand and local cultural orientations on the other should be a dynamic process of give and take, ideally through persuasion and dialogue, with legislation serving only to complement this process. What is advocated here is a two-way system of cross-fertilization in which cultural systems continually fertilize, and are fertilized by, national and universal social and legal standards. In this way, the gap between national human rights provisions and cultural orientations can be narrowed and constitutional rights can derive their legitimacy not only from state authority but also from the force of cultural traditions.

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