

**ENQUIRING INTO THE CONTRIBUTIONS OF AFRICAN  
PHILOSOPHIC CONCEPTUALISATIONS OF HUMAN RIGHTS TO  
THE MODERN DISCOURSE OF HUMAN RIGHTS.**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS OF THE DEGREE LLM (HUMAN RIGHTS AND  
DEMOCRATISATION IN AFRICA)**

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**PLAGIARISM DECLARATION**

I *AUGUSTINE S. MARRAH* do hereby declare that this dissertation *Enquiring into the contributions of African philosophic conceptualisations of human rights to the modern discourse of human rights* is my original work and that it has not been submitted for any other degree or examination in any other university. Wherever other sources are used or quoted in this work, they have been duly cited or acknowledged.

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## **DEDICATION**

This work is affectionately dedicated to my parents, Stephen and Aminata Marrah who have taught me by their exemplary hard work that one can rise from the lowest rabble if one is prepared to work hard and endure life's challenges.

IN MEMORY OF STEPHEN AND GABRIEL, ONCE COMRADES IN THE COSMIC PILGRIM

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To the 2010 assemblage of fine legal minds, I thank the paths of nature for leading me into thine midst. Together we toiled braving the centre-ordered storms but we also fleetingly spent wonderfully pleasant times which I know oblivion can never succeed to entomb.

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## ACRONYMS/ABBREVIATIONS

Unless the context requires otherwise, the following acronyms or abbreviations stand for the corresponding words, titles, names etc:

<b>(The) African Charter</b>	African Charter on Human and Peoples' Rights
<b>African Children's Charter</b>	African Charter on the Rights and Welfare of the Child
<b>African Women's Protocol</b>	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
<b>CEDAW</b>	Convention on the Elimination of all Forms of Discrimination Against Women
<b>CRC</b>	UN Convention on the Rights of the Child
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>SCSL</b>	Special Court for Sierra Leone
<b>TWCs</b>	Third World Countries
<b>UN</b>	United Nations Organisation
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organisation
<b>UNICEF</b>	United Nations Children's Fund
<b>Universal Declaration</b>	Universal Declaration of Human Rights

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## Chapter one: Dissertation outline

### 1.1 Background

It can hardly be gainsaid that the splendour of African history has but received disproportionate attention in international scholarship on peoples and societies of Africa. A plethora of various scholarships on the African continent spilled so much ink on unfounded and academically feeble claims that the history of the Africa is shrouded in darkness. This misleadingly erroneous view about the African continent, though increasingly losing currency, has unfortunately influenced scholarship on the origin and philosophy of human rights. This explains therefore, the failure of eurocentric writers' to consult or examine the rich tapestry of cultural values of African societies in their assertions about the origin and philosophy of the modern phenomenon of human rights. However, like its predecessor, this fallacious academic position has attracted scholarly responses from afro-centric scholars. Zeleza has noted that the:

western appropriation of human rights does grave intellectual and political disservice to the global human right discourse and movement. Intellectually it homogenises and oversimplifies the human rights traditions of both the west and the rest of the world and undermines theoretical advances that can come from serious and sustained intra and inter-cultural comparisons and conversations.<sup>1</sup>

Some scholars have noted that, in fact, to reject the existence of an African philosophy in itself is to deny oneself of the very essence of philosophy, which is wisdom.<sup>2</sup> If Aristotle was correct that, 'all men by nature have a desire to know'<sup>3</sup>, then the western renunciation of African philosophy was a self-waged war on their human dispositions for knowledge. In essence, rather than jettisoning the entire notion of African philosophy as an intellectual stunt, western scholarship should have embarked on examining the ingredients of same to derive knowledge from that unknown (in the sense of the dominant western philosophic paradigm).

This work, though not being the central theme, would engage very seriously the question as to whether Africa had any shade of philosophy or ideas akin to philosophy. This is because one cannot examine the nature of the contributions of African philosophy to the modern discourse of human rights without embarking on an examination (even if a brief one) of African philosophy and debunking claims that Africa lacked all shades of philosophical thinking. Jones has argued that 'in conducting their historical essays, African philosophers want to rectify the historical prejudices of negation, indifference, severance and oblivion that have plagued African philosophy in the hands of European

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<sup>1</sup> PT Zeleza & PJ McConaughay *Human Rights, the rule of law and development in Africa* (2004)

<sup>2</sup> PH Coetzee & APJ Roux *Philosophy from Africa* (2002)

<sup>3</sup> Aristotle *On man in the universe* (trans) LR Loomis (1943) 5



devil's advocates and their African accomplices.<sup>4</sup> It is worthy of note that in contrast to western individualism, most African societies were communal in nature and thus, the first generation of rights (civil and political rights) in the modern concepts of human rights could be said to be more reflective of western philosophic orientations of individualism. Not surprising therefore that earlier scholarship on human rights blindly labelled the entire movement of human rights as western-construct. However, with the steady emergence of socio-economic and cultural rights which find so much expression in African communal cultural values,<sup>5</sup> there was little doubt that the second generation of rights (social, economic and cultural rights) had little or no influence from western liberal philosophies. This is without the least intent of saying that civil and political rights are purely western-oriented while socio-economic rights are African or non-western. However, socio-economic and cultural rights which many western scholars still do not regard as part of the whole corpus of human rights are no doubt an important branch of the modern human rights discourse and its conceptualisation and growth might have derived significant meaning and inspiration from African cultural values and communal systems. These influences in this sphere are glaringly portrayed in concepts such as the rights to culture, duties to one's community and group/peoples' rights. For example, the cultural values of humanism in pre-colonial Akan society of Ghana emphasised moral values which Wiredu (being an Akan and an African philosopher) has defined in the context of the Akan culture as 'the observance of rules for the harmonious adjustment of the interest of the individual to those of others in society.'<sup>6</sup> This morality, Wiredu noted, is independent of religion, as it is purely founded on human interests.

The name of the African regional human rights instrument is substantially a re-echo of the African concept and approach to human rights. The African Charter on Human and Peoples' Rights indicates that Africa places premium on communal values without diminishing the importance of individual rights. The African Charter reinforces the notion of group or people's rights which are the heartbeats of cultural values in Africa. Additionally, this Charter also unveils a significant aspect of the understanding of human rights values in Africa which is rights and duties. This to a very large extent mirrors the typical African cultural approach to rights which often provide corresponding duties in order to safeguard against potential abuse of individual rights. Thus, an individual owes a duty to his community not to use his individual liberty to the detriment of the rights of others. Also, the emphasis on human dignity which many African cultures articulate might have helped shape the perception of equality and non-discrimination especially in the growing African human rights jurisprudence. Justice Cameron of the Constitutional Court of South Africa has mentioned that an approach to the right to equality is informed by the African philosophy of *ubuntu*.<sup>7</sup> Ubuntu, a cultural value in the southern part of Africa and in some parts of West Africa, articulates human dignity, and obliges Africans to regard one another as dignified and to come to each other's aid when such dignity is under attack.

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<sup>4</sup> WR Jones *The legitimacy and necessity of black philosophy: some preliminary considerations* (1977-78)

<sup>5</sup> This does not suggest an exclusivity of these values to African societies. Scholarship has shown that similar values also existed in some Asian societies.

<sup>6</sup> K Wiredu 'On decolonizing African religions' in PH Coetzee & APJ Roux *Philosophy from Africa* (2002) 288

<sup>7</sup> In a speech delivered in Windhoek, Namibia during Human Right Awareness Week 2001

Also, the right to development originally propounded by the Senegalese jurist and philosopher Keba M'baye has been recognised internationally and has even been designated the third generation of human rights and this work will examine very seriously its usefulness in the global movement of human rights

## **1.2 Problem statement**

This work embarks not so much on an examination of African philosophy in respect of human rights but to reveal the various contributions of African cultural values in philosophic conceptualisations to the growth of human rights. In short, this work will enquire into how much African philosophy has influenced or impacted the various understandings of modern human rights.

## **1.3 Research questions**

This work will closely examine and attempt to provide answers to the following questions:

- i. Is there an African philosophy?
- ii. What is the philosophy behind human rights (western and African)?
- iii. What socio-cultural evidence is there of human rights values in pre-colonial Africa?
- iv. Have these values contributed in a normative sense to the modern human rights discourse?

## **1.4 Significance of study**

This enquiry is significant in that it will help establish that human rights are an integral part of African values thereby crumbling assertions that human rights values are wholly western concepts. This work will show that human rights reflect to large extent positive cultural values of Africa. In essence, it will reinforce the fact that human rights concepts are not alien to pre-colonial African communal values and lifestyles but should be seen as a resuscitation of a conglomerate of the welcoming aspects of traditional African societies. This work will also inform an understanding about the indispensable contributions of African values in the development of both normative and jurisprudential standards of human rights in modern era. It will no doubt add also to the scholarship debunking the eurocentric views about Africa while enriching the jurisprudence of Africa. Hence, this work will help reveal human rights not as another yoke of imperialism but as an ideal for social cohesion, individual liberty, hence the survival of humanity.

## **1.5 Preliminary literature survey**

There is substantial anthropological literature on African cultures and these would be useful in informing the work in respect of African multicultural societies. Keesing has discussed extensively the phenomenon of culture and custom in Africa which will inform this work on human behaviour and

societal progress in Africa.<sup>8</sup> However, his work does not establish directly or indirectly a nexus between cultures/customs in Africa and the human rights movement. In respect of the philosophy of human rights especially within the context of Africa, there are relatively few works. Liebenberg has tried to depict African cultures as characteristic of human dignity<sup>9</sup> while Cornell<sup>10</sup> has pointed out that the concept of *ubuntu* in Southern African cultures has affinity with the whole notion of human rights. Cobbah<sup>11</sup> has gone further to reveal the relevance of African values to human rights while Mutua<sup>12</sup> has linked the concept of duties under the African Charter as flowing from the African communitarian approach to rights as involving duties especially to the community. Busia has pointed out that the communitarian nature of rights and obligations in Africa did not always subsume individual rights and that to some extent individual rights of both men and women existed although social cohesion and community interests more often than not had overriding significance.<sup>13</sup> Busia has also tried to shed light on human rights in pre-colonial Africa and their implications for contemporary practice but his work did not seek to portray the influence of those notions of human rights in pre-colonial Africa on contemporary practice in Africa and beyond.<sup>14</sup> Dieng has examined the unique culture of the Dinka of Sudan who like few African peoples were least touched by western and Islamic civilization.<sup>15</sup> Dieng has tried to draw a correlation between their rich cultural values and human rights values. Appiagyei-Atua has equally examined the contributions of the Akan philosophy to the conceptualisation of African notions of human rights.<sup>16</sup>

The foregoing works whilst striving to establish a link between African cultural values of human dignity and the modern phenomenon of human rights have not gone further to establish the unique contributions of those values to the global entrenchment of human rights. In essence, so much of the literature focus on proving that human rights existed in pre-colonial African cultures without endeavouring to show that those values have in fact infiltrated the modern human rights movement and have contributed in no small measure towards the protection and promotion of human rights.

## 1.6 Proposed methodology

This work will mainly involve textual analysis in order to answer the foregoing research questions. This will principally be done through an enquiry into African philosophy which requires a critical examination of scholarly works on African philosophy in relation to African cultural value systems

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<sup>8</sup> FM Keesing *Cultural anthropology* (1963)

<sup>9</sup> S Liebenberg 'The value of human dignity in interpreting socio-economic rights (2005) 21 *South African Journal on Human Rights* 1

<sup>10</sup> D Cornell 'Exploring *ubuntu*: tentative reflections' (2005) 5 *African Human Right Law Journal* 195

<sup>11</sup> J Cobbah 'African values and the human rights debate' (1987) 9 *Human Right Quarterly* 309

<sup>12</sup> M Mutua 'The Banjul charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 333

<sup>13</sup> NKA Busia 'The status of human rights in pre-colonial Africa: Implications for contemporary practice' in E McCarthy-Arnolds et al; *Africa, human rights and the global system* (1994)

<sup>14</sup> As above

<sup>15</sup> AA An-Naim & FM Dieng *Human rights in Africa: cross cultural perspectives* (1990)

<sup>16</sup> K Appiagyei-Atua 'Contribution of Akan philosophy to the conceptualisation of African notions of human rights' *Comparative and International Law Journal of South Africa* 2000

and also not only trying to draw correlations between those African cultural values and human rights but also proving their influence on the evolution and modern discourse of human rights.

### **1.7 Proposed structure of dissertation**

*Chapter 1* will be an introduction setting a background of the dissertation.

*Chapter 2* will involve an enquiry into African philosophy. In essence, this chapter will focus on answering the question frequently posed, as to whether there is an African philosophy.

*Chapter 3* will examine the philosophic foundations of human rights. This chapter will particularly throw light on the historical background of the notion of human rights in western philosophy but shall also examine the historicity of human rights in Africa.

*Chapter 4* the body of this work will closely examine philosophical concepts in Afro-centric scholarship and enquire into their impacts on the current understanding or the global discourse of human rights.

*Chapter 5* will be a conclusion highlighting the main points of the dissertation.

### **1.8 Limitations of study**

The foremost limitation is the fact that ‘cultural anthropology is best studied by real-life experiences [although] however it can also be understood indirectly from books.’<sup>17</sup> Hence this work will be limited in that the cultural analysis will only be done theoretically rather than by experience or field study. Also, the examination of African cultural values and their subsequent influence on modern discourse of human rights will be limited to the period prior to the European colonialist contact with Africa.

### **1.9 Assumptions and delineations**

This work will be done on the assumption that the academic works on African cultural values are empirically correct. It also assumes that the whole notion of human rights is somewhat philosophically inspired.

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<sup>17</sup> JH Bodley *Cultural anthropology* (1994). Emphasis mine.

## Chapter two: The concept of African philosophy

### 2.1 Introduction

The question whether there is such thing as an African philosophy is not novel in philosophical discourse especially in the African domain. Before now, the mere mention of the words ‘African philosophy’ attracted such interrogation which was often wafted by intellectual prejudices. It is interesting to note that such scepticism which surrounded the notion of an African philosophy did not only come from outside Africa but also from within. This band of scholars, who have been dubbed eurocentric writers succeeded for a long period of time to keep African philosophical enterprise in chains by the crusade of eurocentrism. Thus, the whole question about the existence of an African philosophy was viewed by many African scholars as an ontological one poised to challenge the humanity of Africans because the very denial of an African philosophy inherently suggested that Africans could not cope with the intellectual demands of philosophy.

Copleston turning his back on historical evidence ‘totally rejected the historic and scientific African philosophy of ancient black Egypt and its subsequent influence on and relation with early Greek philosophy.’<sup>18</sup> Historical sources have shown that philosophy flourished in Egypt from 3400 BC to 343 BC and in Kush (also known as Nubia or Ethiopia by the Greeks) from about 1000 BC to 625 BC. In fact, it has been advanced that the first definition of a philosopher appeared in ancient Egyptian philosophy.<sup>19</sup> Because the truism of Egyptian history could not be expunged, opponents later argued that ‘Africa is no historical part of the world: it has no movement or development to exhibit...Egypt... does not belong to the African spirit.’<sup>20</sup> This Hegelian paradigm was however laid to rest in the UNESCO Summit of 2004 (held in Cairo) where world historians and philosophers agreed though not unanimously that Egypt was a flourishing ancient kingdom of north-east Africa and that the Egyptian civilization was essentially an African civilisation on account of its ‘spirit, character, behaviour, culture, thought and deep-feeling.’<sup>21</sup> It has equally been mentioned that women were also involved in the intellectual, scientific and philosophical traditions in ancient Egypt. Lady Peseshet who lived during the 4<sup>th</sup> or early 5<sup>th</sup> dynasty (2584 or 2465 BC) in the Egyptian kingdom has been identified as the first female doctor of medicine in world history.<sup>22</sup>

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<sup>18</sup> Copleston, an American catholic clergyman, 1907-1985. This view runs contrary to Aristotle and Herodotus’ acknowledgment of the Egyptian foundations of western philosophy.

<sup>19</sup> *Rekh or Sai*, someone who engages in the formulation of a system of abstract thoughts by using graphic and concrete symbolism. T Obenga ‘Egypt: Ancient History of African Philosophy’ in K Wiredu *A Companion to African Philosophy* 34

<sup>20</sup> George Wilhelm Fredrich Hegel (1770-1831) stated in his lectures delivered in the winter of 1830-1 on the philosophical history of the world.

<sup>21</sup> Obenga (n 19 above) 33

<sup>22</sup> (As above) 36

The denial of a philosophy from Africa has been outshone by so much intellectual evidence cataloguing various philosophic works from ancient Egypt to contemporary times by African scholars. In a sense, African philosophy should now be viewed as a pure deliberation of philosophy and the overthrow of the regime that sought to restrain philosophy into distressful and unproductive confines of monopoly.<sup>23</sup> This resistance against an African philosophy has been correctly interpreted as undermining the very essence of the science of reasoning and thinking which are often full of ideological tensions:<sup>24</sup>

...a philosophy that reflects and/or endorses the white experience dominates the discipline. Accordingly to call for a black philosophy...is to launch an implicit attack on racism in philosophy, especially in its conceptual, research, curricular, and institutional expressions. ... to advance a black philosophy is to affirm that the black perspective has been devalued and omitted from the recipe of western philosophy and that which has been ignored is a necessary ingredient for authentic philosophising.

## 2.2 Is there an African philosophy?

Like any response to a scientific or intellectual enquiry, an affirmative response would mean a justification outlining 'a specific understanding of the nature of the philosophical enterprise and the appropriate standards and methods of philosophy.'<sup>25</sup> In this regard, Osuagwu has noted that 'African history of philosophy is an existential, call it an ontological, memorial of the ways our scholarly ancestors thought and lived life through, the way they attempted to understand and master themselves and their world.'<sup>26</sup> Obenga has indicated that 'the spirit of Chinese philosophy, Indian philosophy, African philosophy, European philosophy and Maya philosophy can differ greatly in their treatment of subject but philosophy always deals with human knowledge and the elevation of the mind.'<sup>27</sup> Thus, African philosophy is one that is discussed extensively within socio-historical perspectives. In a sense, the African philosophy seeks to critically unveil a historical perspective of life in African cultures in a bid to reinforce the human and intellectual identity of Africans:<sup>28</sup>

In conducting their historical essay, African philosophers want to rectify the historical prejudices of negation, indifference, severance, and oblivion that have plagued African philosophy in the hands of European devil's advocates and their African accomplices. African historical investigations in philosophy go beyond defence, confrontations, and corrections. They are also authentic projects and exercises in genuine scientific construction of African philosophy concerning diverse matters of its identity and difference, problem and project, its objectives, discoveries, development, achievements and defects or failures.

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<sup>23</sup> MB Ramose 'The struggle for reason in Africa' in PH Coetzee & APJ Roux *Philosophy from Africa* (2002) 6

<sup>24</sup> Jones (n 4 above) 153

<sup>25</sup> (As above) 151

<sup>26</sup> IM Osuagwu *African historical reconstruction* (1999) 22

<sup>27</sup> Obenga (n 19 above) 31

<sup>28</sup> (As above) 25

Unsurprisingly, opponents of African philosophy knowing their intellectual arguments were losing grounds moved on to quibble that what has been presented as African philosophy shares some striking semblance with western philosophy to the extent that the peculiarities of the former are less distinctive. However, the fact that an African philosophy might be linguistically and philosophically similar with western philosophy does not in itself negate the existence of an African philosophy, because familiarity is not equal identity and for Ramose, to state that African philosophy is western or entirely derived from western philosophy can only be true if:<sup>29</sup>

...a) two separate conditions may be found to be exactly the same in all respects at one and the same time; b) if human freedom and, therefore the inherent predictability of human action, were to be completely removed from the human experience. For as long as a) and b) cannot be fulfilled at the same time in specific circumstances relating to a particular human experience, the point that familiarity is not identity remains intact. Furthermore, the fact that human experience is time and space bound allows for the possibility of similar insights arising out of dissimilar experiences.

The welcoming aspect of the outright denial of African philosophy was the fact that it invited an investigation into the nature and conceptual contours of the foregoing discipline because such questions when posed by non-African thinkers were heavily-laden with prejudices and it was therefore appropriate for African scholars to reinforce their affirmative response with concrete or defined examples of African philosophic thoughts.<sup>30</sup> In essence:

an investigation into African philosophy needs to reconcile the discursive and intuitive points of view, exteriority and interiority, objective explanation and sympathetic comprehension, the search for formal models and the phenomenological grasp of subjective attitudes. It is a difficult task, fraught with pitfalls; the source of many failures, but it is also an exalting task.<sup>31</sup>

One cannot certainly examine the differing ingredients of African philosophy without stating that African philosophy contrary to what many hold that it assumes homologous characteristics of the whole of Africa, is rather a mere label for the differing philosophical discourses in Africa by Africans or other scholarly writings portraying the African worldview. However, it is illuminating to probe into the historical backdrop into such interrogation in the immediate subsequent sub-paragraph.

## **2.2 Eurocentrism and African philosophy**

It was often said by western philosophers and other prominent figures that ‘Africa has contributed nothing remarkable in philosophy from antiquity to contemporary times.’<sup>32</sup> Such blatant rejection of historical sources that confirm the immeasurable contributions and influence of philosophical works from Africa on ancient, medieval and modern western philosophy was a mere foreshadow of what was

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<sup>29</sup> Ramose (n 23 above) 7

<sup>30</sup> IP Laleye ‘Is there an African philosophy in existence today?’ in PH Coetzee & APJ Roux *Philosophy from Africa* (2002) 86

<sup>31</sup> As above

<sup>32</sup> Pope John Paul ‘Fides and Ratio Vatican’ 1998 in Ramose (n 23 above)

to be labelled *eurocentrism* by opposing scholarship of this dogma. It is pertinent in any enquiry into the African philosophy to examine the nature of eurocentrism and its subsequent incalculable intellectual torment it caused the African philosophic venture. Serequeberhan has referred to eurocentrism as ‘a pervasive bias located in the modernity’s self-consciousness of itself. It is grounded at its core in the metaphysical belief that European existence is qualitatively superior to other forms of human existence.’<sup>33</sup> It is worthy of note that eurocentrism was an intellectual crusade which sought to politically, economically and mentally oppress non-Caucasian peoples. Hence many philosophers embarked on idealizing the white race in their philosophical writings rejecting any conception of counterpart philosophies in other races, especially the Negro race. About the Negro Kant once said:<sup>34</sup>

The Negroes of Africa have by nature no feeling that rises above the trifling. Mr Hume challenges anyone to cite a single example in which a negro has shown talents, and asserts that among the hundreds of thousands of blacks who are transported elsewhere from their countries, although many of them have been set free, still not a single one was ever found who presented anything great in art or science or any other praise worthy quality, even though among the white some continually rise aloft from the lowest rabble, and through superior gifts earn respect in the world. So fundamental is the difference between these two races of man, and it appears to be as great in regard to mental capacities as in color.

Hegel also remarked about the black man:<sup>35</sup>

The Negro, as already observed, exhibits the natural man in his completely wild and untamed state. We would lay aside all thought of reverence and morality – all that we call feeling – if we would rightly comprehend him; there is nothing harmonious with humanity to be found in this type of character.

Such dicta from prominent western philosophers fanned Caucasian feelings of superiority. Serequeberhan<sup>36</sup> agreeing with Lyotard<sup>37</sup> has pointed out that the notion of modernity is nothing less than a guise of European globalization which means empire and colonialism and it never occurs without a shattering of victims’ belief. So in essence, eurocentrism questions the entirety of existence that is the whole value of subjugated peoples, their arts, their cultures, modes of thoughts and how they relate to their world. Thus, eurocentrism became a ‘banal bias in some metaphysical pretext intended to heap the Whiteman’s burden in its self-assured global civilising project.’<sup>38</sup> Thus, subjugated peoples were whipped with eurocentrism to abandon their beliefs, their thoughts and their worldviews for the white man’s. Hopelessly, Chief Kabongo of the Kikuyu tribe in Kenya once

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<sup>33</sup> T Serequeberhan ‘The critique of Eurocentrism and the practice of African philosophy’ in PH Coetzee & APJ Roux *Philosophy from Africa* (2002) 64

<sup>34</sup> Immanuel Kant *Observations on the feeling of the beautiful and sublime* translated by JT Goldthwait (1960) 110-11

<sup>35</sup> GWF Hegel *The philosophy of history* (1956) 91-99

<sup>36</sup> Serequeberhan (n 33 above) 65

<sup>37</sup> JF Lyotard *The post modern condition* (1992) 77

<sup>38</sup> Serequeberhan (n 33 above) 66



lamented ‘we elders looked at each other. Was this the end of everything that we had known and worked for? Indeed it was!’<sup>39</sup>

Thus, western philosophy in garments of eurocentrism became a mono-narrative of the entire universe applicable to all peoples and was thence used as a pillow to suffocate, any non-Caucasian philosophic or any intellectual piece, which it labelled as unprogressive, primitive and uncivilised.<sup>40</sup> This singularisation in denial of human diversity led to the suppression of all shades of philosophy or intellectually critical works within Africa and hijacked the existing ones which proved difficult to suppress. Hence, eurocentrism was essentially that multi-purpose tool employed by the quest to subjugate non-Caucasian peoples in all spheres particularly the discipline of philosophy. Such ulterior motive which later became apparent cheated the discipline of philosophy in order to promote the agenda of domination. In this regard, Jose Rabasa noted:<sup>41</sup>

...by eurocentrism I do not simply mean a tradition that places Europe as a universal cultural ideal embodied in what is called the west, but a rather pervasive [metaphysical] condition of thought. It is universal because it affects both Europeans and non-Europeans, despite the specific question and situations each may address.

It is therefore necessary to examine the various paradigms employed in eurocentric writings to discard the notions of philosophy by African minds.

### **2.3 Western/African cross-cultural paradigms**

In the examination of the various paradigms, Biakolo<sup>42</sup> has pointed out that for a very long time in the field of philosophy the central concern has been the relationship between the subject and its object and, that anthropological influences are a fairly recent phenomenon.<sup>43</sup> Therefore, he pointed out that the difficulty became ‘how to think the non-Caucasian races, “the other” with whom the western world had come into contact since the great exploratory journeys of the fifteenth century.’<sup>44</sup> Biakolo has embarked on examining several cross-cultural paradigms in a bid to demonstrate that the approach adopted in comprehending the value of the personhood of the African and his philosophical products was immensely flawed. However, just three of the most important paradigms relevant to this work will be examined.

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<sup>39</sup> Chief Kabongo, ‘The coming of the pink checks’ in LE Clark (eds) *Through African Eyes, IV, The colonial experience: An inside view* (1972) 32

<sup>40</sup> Serequeberhan (n 33 above) 67

<sup>41</sup> J Rabasa *Inventing America* (1993)

<sup>42</sup> E Biakolo ‘Categories of cross-cultural cognition and the African condition in PH Coetzee & APJ Roux *Philosophy from Africa* (2002) 9

<sup>43</sup> (As above) 10

<sup>44</sup> As above

### 2.3.1 Oral versus written

Havelock parochially opined that ‘without modern literacy, which means Greek literacy, we would not have science, philosophy, written law or literature, nor the automobile or the aeroplane.’<sup>45</sup> This statement was a mere synecdoche of the whole western intellectual arrogance with regard to oral traditions and thoughts. The *homo loquens*, the speaking man, was viewed sadly as retarded in an intellectual sense, and less sophisticated than the *homo scriptens*, the writing man. It has been noted that literacy has merely stimulated innovation, inventiveness and objectivity and should not be seen as endowing intellectual grandeur to any race over another.<sup>46</sup> As a matter of fact, the oral/literacy paradigm is confusingly presented. Firstly, it assumes a communicative distinction and secondly it is employed to show disparity between the western and African cultures.<sup>47</sup> The latter was clearly an intellectual sleight of hand to put forward an agenda of cultural superiority.<sup>48</sup> As a matter of fact, it is only post-Socratic Western philosophy that began writing down western philosophy because Socrates’ philosophy was mainly absent in writing and Plato’s written philosophy is still being treated with ambivalence and these two are regarded as pioneers of western philosophy.<sup>49</sup> In effect, to condemn oral thoughts as unfit to qualify as critical thoughts of a philosophical nature is essentially to question the philosophical minds of the torchbearers of western philosophy.

According to Laleye, the fact that written philosophy in Africa was largely an oral discourse does not in itself suggest a conclusion of a non-existent philosophy.<sup>50</sup> In effect, it is not the writing that confers philosophical title on the thought, as the former is just one of the means of storage of knowledge. Therefore, the overly criticised *oralness* of African critical thoughts has resulted in a dismissal of oral philosophy as ineligible to be termed philosophy. Instead of undertaking to probe into the elements of these thoughts, western philosophy simply dismissed oral African philosophy thus being guilty of the commission of a fallacy of composition. It is commonsense to know that the oral nature of a philosophy that should not be the rule for exclusion but rather the constituent elements of the oral philosophical thought. Sadly though, the western philosophers in their crusade of undervaluing any contribution from Africa blindly dismissed oral African philosophy thoughts even though such dismissal even questioned their own philosophical foundations.

### 2.3.2 Savage versus civilised

The image of Africa and all its human and non-human components is one for a very long time painted by eurocentric scholarship as revealed in the preceding paragraphs as ‘brutish, ignorant, idle, crafty,

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<sup>45</sup> E Havelock ‘The oral-literate equation: A formulation for the modern mind’ in D. Olsen and N. Torrence (eds) (1991) 24

<sup>46</sup> Biakolo (n 42 above) 13

<sup>47</sup> (As above) 14

<sup>48</sup> As above

<sup>49</sup> L Outlaw ‘African philosophy: Deconstructing and reconstructing challenges Africa’ in PH Coetzee & APJ Roux *Philosophy from Africa* (2002) 143

<sup>50</sup> Laleye (n 30 above) 89

treacherous, bloody, thievish, mistrustful, and superstitious.’<sup>51</sup> Hume in his sordid portrayal of the *civilized* nature of Caucasian cultures starkly said that:<sup>52</sup>

There never was civilised nation of any other complexion than white, nor even any individual eminent in action or speculation. No ingenious manufacturer among them, no arts, no sciences ... Such a uniform and constant difference could not happen, in so many countries and ages, if nature had not made an original distinction betwixt these breeds of men’.

Hence the western paradigm in its civilizing project regarded Africans and their cultures alike as backward, in the rut of savagery and barbarism. The French model of colonialism was therefore a reflection of the self-assumed supremacy of (French culture) over its African counterpart.<sup>53</sup> The British on the other hand were a little suspicious about the humanity of Africans, therefore designed a system whereby natives govern themselves within the former’s colonial supervision.

It is obvious that the western philosophy approached the humanity and philosophical understandings of African peoples with a mind heavily prejudiced with parochial conceptualizations. In essence, even before the Whiteman came to Africa he harboured with utter vehemence the feeling that his culture was superior to the Negro’s, so wasted no time in classifying the latter as outside the frontiers of his civilisation which he uncompromisingly assumed is applicable to all peoples. Instead of viewing the African from the worldview of his own humanity and instead of comprehending the peculiar historicity underlying the thoughts, beliefs and *modus vivendi* of African peoples, European thinkers dismissed them as savage and uncivilised. Uncivilised, eurocentric enterprise meant, not in conformity with European standards and parameters of civilization. The obvious fallacy is that the African was not judged within the laws that naturally apply to his environmental uniqueness, instead he was judged by ordinances of civilization of which he was not socio-culturally privy to. Because philosophy is defined by problems, African philosophy should not be analysed within western socio-cultural milieu, but should be considered within its quest to respond to and tackle problems that arise from within its societal configurations.<sup>54</sup>

### **2.3.3 Perceptual versus conceptual**

In regard to the episteme of Africa, it has been observed that:<sup>55</sup>

The collective representations of primitives, therefore, differ very profoundly from our ideas or concepts, nor are they their equivalent either. On the other hand, as we shall presently discover, they have not their logical character ... On the other hand, they see many things of which we are unconscious.

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<sup>51</sup> Biakolo (n 42 above) 10

<sup>52</sup> As above

<sup>53</sup> (As above)11

<sup>54</sup> Laleye (n 30 above) 91

<sup>55</sup> L Lévy-Bruhl (eds) *How natives think* (1985) 37-38

The above view is incongruous with historical positions which have unveiled that Egyptian philosophers did indeed make use of logic as a tool of precision in constructing and developing their mathematics.<sup>56</sup>

The African worldview which is mainly represented in his thoughts and understandings was frowned upon by rationalist-driven western philosophy which regards the perceptual understandings of one's society as non-philosophical. This was why Lévy-Bruhl opined that for Negroes 'the slightest mental effort involving abstract reasoning, however elementary it may be, is distasteful to them.'<sup>57</sup> Western philosophy thus rejected perceptual philosophy because of the absence of abstraction or logic which typified western liberal theories. While Africans engage abstract concepts through perceptual philosophies, their western counterparts employed abstractions to proffer explanations for tangible experiences. The African perceptual approach could even qualify as a form of philosophy under empiricism in western philosophical discourse because Africans mainly employed real life experiences in developing their thoughts. The essence of philosophy, as has been noted is not only to engage the mind in abstract consultations but to employ those critical thoughts in responding to real-life issues, thus improving the lot of one's society. Structuralist thesis posits that, all life and culture manifest themselves in a binary form hence there is nothing eccentric about Africans embarking on abstractions via perceptual conduits.<sup>58</sup> In fact, Biakolo has raised the suspicion that the conceptual limitations to the philosophical approach to knowledge were driven by ideology rather than principles of epistemology.<sup>59</sup> Van hook has put it clearly:<sup>60</sup>

Questions concerning the existence of African philosophy are...perceived as reflecting a western colonial bias that there is no such thing as, and has never been (and some would even say, cannot be) an African philosophy, because Africans are not rational or not as rational as westerners, or do not have the temperament needed to produce philosophy.

#### **2.4 African philosophy: Deconstructive and reconstructive movement**

As noted earlier, western philosophy was essentially a construction of a self-image, which was sowed by the intellectual writings of Plato and Aristotle and later reinforced by philosophers such as Hume, Descartes, and Kant to whom philosophy became more or less a project to articulate and guard this self-image.<sup>61</sup> Outlaw has commented that reason and rationality (*logos and nous*) became the fulcrum of the self-imagining agenda in the realm of philosophy hence the encounter with Africa was full of the

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<sup>56</sup> Obenga (n 19 above) 41

<sup>57</sup> Lévy-Bruhl (n 55 above)

<sup>58</sup> Biakolo (n 42 above) 12

<sup>59</sup> As above

<sup>60</sup> JM Van Hook *African philosophy: its quest for identity* (1993) 30

<sup>61</sup> Outlaw (n 49 above) 139, 143

voices of the 'rational man' who saw himself 'as the paragon of human development and existence.'<sup>62</sup> Outlaw commented that.<sup>63</sup>

This form of self-image was off-loaded to Africa from the decks and bridges of slave ships and from inland caravans through rationalisation of greed and imperialism, under the camouflage of sacred texts and practices guided by the cross, the pseudo-science of the 'other'...and the outright practice of near genocide and domination. ... By then philosophy had become the well-entrenched, self-appointed guardian...

African philosophy therefore emerged as a deconstructive enterprise especially within ethno-philosophy to replace the *irrational African man* with a reconstructed image of philosophical standing grounded on universality and rooted in the historicity of his society.<sup>64</sup> However, the critique such deconstruction movement has encountered is that the destruction of the savage-paradigm of the African personhood is sadly being framed within western philosophical boundaries. In essence, the deconstruction of the western-image of Africans is being undertaken within western philosophic theories rather than the original peculiar African thought-process. In effect, why did Africans decide to choose the word philosophy to qualify their critical thoughts or deep-thinking about life and their society? Would it not amount to restricting their discourses within biased, restrictive and historically oppressing contours of western philosophy or adulterating the orature that is fundamental to African epistemology?<sup>65</sup> In response to this Houtoundji has noted:<sup>66</sup>

What is in question here, substantially, is the idea of philosophy, or rather, of African philosophy. More accurately, the problem is whether the word 'philosophy', when qualified by the word 'African', must retain its habitual meaning, or whether the simple addition of an adjective necessarily changes the meaning of the substantive. What is in question ... is the universality of the word 'philosophy' throughout its possible geographical applications.

My own view is that this universality must be preserved – not because philosophy must necessarily develop the same themes or even ask the same questions from one country or continent to another, but because these differences of *content* which, as such, refer back to the essential unity of a single discipline, of a single style of inquiry.

The essential point ... is that we have produced a radically new definition of African philosophy, the criterion now being the geographical origin of the authors rather than an alleged specificity of content. The effect of this is to broaden the narrow horizon which has hitherto been imposed on African philosophy and to treat it, as now conceived, as a methodical inquiry with the same universal aims as those of any philosophy in the world. In short, it destroys the dominant mythological conception of africaness and restores the simple, obvious truth that Africa is above all a continent and the concept of Africa an empirical, geographical concept and not a metaphysical one.

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<sup>62</sup> (As above) 141

<sup>63</sup> As above

<sup>64</sup> (As above) 147

<sup>65</sup> (As above) 149

<sup>66</sup> P Houtoundji *African philosophy: myth and reality* (1983) 56, 66

In effect, the word philosophy does not suggest a single style of inquiry therefore should be viewed as a description of the many commodities of critical thinking. This is because divergence or ideological tension is the natural feature of philosophy which is incompatible with monopoly or unity or universality of ideas.<sup>67</sup>

The movement of African philosophy started from a reactionary point in a bid 'to reaffirm singularity, uniqueness, identity and most importantly, a sense of self.'<sup>68</sup> This reaffirmation is viewed as the reconstruction of the true identity of the Negro defined by intellectual orientations, emancipated from the mere distorted physicality of the hegemonic, western, caricature of the archetypal Negro. Philosophy, not in the western sense of exclusivity, but simply as a form of human activity has always been prevalent in African societies and thus, a revival in the reconstructionist sense of African philosophy would reinforce these eternal truths about the ability of Africans to engage their socio-cultural and political issues with critical lenses.<sup>69</sup> Modern philosophy has in fact witnessed a sprout of artificial divisions of philosophy in continental discourses such as American philosophy, European philosophy, African philosophy and Asian philosophy.

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<sup>67</sup> Outlaw (n 49 above) 152

<sup>68</sup> M Deacon 'The status of Father Tempels and ethnophilosophy in the discussion of African philosophy' in PH Coetzee & APJ Roux *Philosophy from Africa* (2002) 97

<sup>69</sup> Laleye (n 30 above) 90

## Chapter three: The philosophic foundations of human rights

### 3.1 Introduction

The modern discourse of human rights has permeated every sphere of academia and has become predominant in international dialogues, ranging from political to commercial. Without seeking to embark on an elaboration of the scope and complexities of human rights, an overview of the basic definitions of human rights must be explored. It is worthy of note that there is increasing dissension amongst philosophers about the nature and philosophic ambits of modern human rights concepts. This chapter will obviously not engage these divergent perspectives because it falls outside its scope but will endeavour to provide an overview of the modern philosophical perspectives on human rights.

Human rights are widely regarded to mean entitlements that belong to human beings simply because they are human beings or desperate needs of humans which deserve special legal attention and protection.<sup>70</sup> However, some scholars have levied criticism against human rights calling it a mere ‘artefacts of state action’, meaning that these rights are only meaningful because of the existence of a state.<sup>71</sup> This perspective contrasts sharply with the traditional understating of human rights which regards these rights as accruing to human beings independent of anything, even the state. The whole notion of human rights has ignited many complex and often unresolved questions such as whether only individuals (as opposed to a group of people) are bearers of human rights. Whether human right is merely ancillary to a goal pursued or is the pursuit itself and whether these human rights imply correlative duties and if yes, who bears them? The tremendous growth of human rights in modern times has perplexed philosophers some of whom have sought to question everything about the human rights movement such as that human rights are artificial constructs and that human rights cannot be conceptually founded.<sup>72</sup> Even in modern times, human rights are still largely being treated as legal concepts rather than philosophical conceptualisations. However, liberal advocates have become mindful of the need for a philosophical rethinking and classification of human rights concept in order for human rights to assume the full status of a philosophical discourse.<sup>73</sup>

The relationship between modern human rights and earlier doctrines of natural law and natural rights has been extensively explored. It is a widely held view in philosophical circles that human rights have now emerged as the resuscitated natural right theory which grew out of a quest to secularise natural law which was mainly predicated on religious precepts and dogmas.<sup>74</sup> This shift in the moral focus

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<sup>70</sup> MC Nussbaum ‘Capabilities and human rights’ in P Hayden *The philosophy of human rights* (2001) 213

<sup>71</sup> (As above) 213

<sup>72</sup> CH Perelman ‘Can the rights of man be founded?’ in AS Rosenbaum *The philosophy of human rights: International perspectives* (1980) 45

<sup>73</sup> AS Rosenbaum *The philosophy of human rights: International perspectives* (1980) 29

<sup>74</sup> TW Pogge ‘How human rights should be conceived’ in P Hayden *The philosophy of human rights* (2001) 189

was effected because as Pogge put it, ‘ascribing rights to God seems awkward, because we do not think of Him as having vital interests that are vulnerable to human encroachment’.<sup>75</sup> The object of the resuscitated natural right thoughts in modern human rights discourse has been considered as the move to reconcile the ‘is and ought’ in law and for Shestack, the debt that ‘inherent dignity and inalienable right’ owe to natural law philosophy is therefore obvious.<sup>76</sup> This reconceptualisation of natural rights into human rights saw morality and personhood at the fore, hence the presence of words like ‘inherent dignity’ ‘inalienable human rights’ in the preamble of the pioneering human rights instrument, Universal Declaration of Human Rights in 1948.<sup>77</sup>

The modern phenomenon of human rights is seen to be contiguous with the secularization of moral standards emphasizing that humans are the central concern of moral codes. Whilst it has been agreed that human rights correspond more or less to natural law, natural justice, natural rights, it is worthy of mention that human rights have amassed so much significance because of its less-ostensible attachment to traditional underpinnings of natural law.<sup>78</sup> It has been emphasised that the shared feature of natural law/right and human right is probably the potential applicability of their standards to all peoples from different epochs, cultures, religions or moral traditions.<sup>79</sup> This affinity between human rights and natural law stems largely, if not entirely from the western philosophic understanding of human rights. Historically, human rights as a global movement started when most countries in Africa and Asia were still under the yoke of colonialism. Hence western theories of human rights monopolised the discourse without acknowledging contributions from non-western regions. Hence Africa, Asia and other non-western regions, by the circumstances of colonialism and its inimical effects on intellectualism contributed very little to the conceptual birth of the global human rights movement. However, Peter Woo has even conceded that human rights is alien to the Chinese culture adding that it was rooted in the western metaphysical philosophy that infiltrated the Chinese philosophy in the early twentieth century.<sup>80</sup>

The western liberal approach to human rights has been summarised as resting on ‘an isolated, autonomous individual...with inherent rights in the domain of civil and political.’<sup>81</sup> Donnelly has responded referring to such assertion as a minimalistic approach to liberalism noting that the liberal tradition is characterised by its ‘three-fold commitment to autonomy, equality and the protection of these values through natural or human rights.’<sup>82</sup> However, human rights have now been identified with

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<sup>75</sup> (As above) 190

<sup>76</sup> Shestack ‘The philosophic foundations of human rights’ (excerpt) in C Heyns & K Stefiszyn (eds) *Human rights peace and justice in Africa: A reader* (2006) 6

<sup>77</sup> Rosenbaum (n 73 above) 26

<sup>78</sup> M Cranston ‘Human rights, real and supposed’ in P Hayden *The philosophy of human rights* (2001) 64

<sup>79</sup> Pogge (n 74 above) 188

<sup>80</sup> PKY Woo ‘Metaphysical approach to human right from a Chinese point of view’ in AS Rosenbaum *The philosophy of human rights: International perspectives* (1980) 133

<sup>81</sup> A Pollis, ‘Liberal, socialist, and the third world perspectives of human rights’ in P Schwab & A Pollis (eds) *Towards a human rights framework* (1982) 7,5

<sup>82</sup> J Donnelly ‘Human rights and western liberalism’ in AA An-N’aim & FM Dieng (1990) *Human rights in Africa: cross cultural perspectives* (1990) 32



concepts ranging from natural rights to individual, social and community rights. The nature of human and peoples' rights in modern discourse is a manifest testimony to the fact that human rights have progressed beyond the traditional western understandings of the rights of man.

## 3.2 Western historical foundations of human rights

The history of the evolution of the present phenomenon of human rights is said to be linked with natural law tradition. Hence human rights have been viewed as a conceptual revival of moral value which was archetypal of natural law.<sup>83</sup> This idea has however been rejected on the basis that a global perspective on human rights must include 'an assessment of the impact non-western, non-liberal philosophies have had on their conception.'<sup>84</sup> It must be noted that the western influence on human rights is hugely manifested in the Universal Declaration. The term human right was suggested by Eleanor Roosevelt in 1947 to replace previous terms like 'rights of man', 'natural rights' etc.<sup>85</sup> However, it was Thomas Paine, it is claimed, who first employed the term 'human rights' in his English translation of the French Declaration of the Rights of Man.

### 3.2.1 Classical roots

Western heritage of human rights as a normative ethical concept is traced to classical Greek philosophy which regarded nature as the sole standard to regulate human affairs.<sup>86</sup>

Human behaviour and the principles of natural justice were seen as governed by natural law whose ultimate knowledge might be approached through a systematic description of the type of behaviours that ought to occur in society.<sup>87</sup>

It was in this discourse that Plato and Aristotle introduced a number of equality postulates namely: 'equal respect for all citizens' (*isotimia*); 'equality before the law' (*isonomia*); equality in political power' (*isokratia*) and in suffrage (*isopsephia*) and equality of all civil rights (*isopoliteia*).<sup>88</sup> These philosophical principles have been labelled the 'egalitarian framework for the next development of human rights theory.'<sup>89</sup>

The Roman concept of equality extended the scope to practical affairs to include more beneficiaries without distorting customary Greek notions of natural law.<sup>90</sup> The Stoics are said to be the founding fathers of the natural law theory of equality and respect amongst citizens. Hence their view of human beings as being entitled to equal civic status broadened the narrow political standards of the Greeks.<sup>91</sup>

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<sup>83</sup> Rosenbaum (n 73 above) 8

<sup>84</sup> As above 8

<sup>85</sup> (As above) 9

<sup>86</sup> As above

<sup>87</sup> As above

<sup>88</sup> (As above) 10

<sup>89</sup> As above

<sup>90</sup> As above

<sup>91</sup> As above.

Every human community that is regulated by laws and customs observes a rule of conduct which in part is peculiar to itself and in part common to mankind in general. The rule of conduct which a people have settled for its own observance, and which is peculiar to that people, is termed the *jus civile*. Those principles which natural reason has taught to all mankind, are equally observed by all, and collectively are termed the *jus gentium*.

### 3.2.2 Natural law theories in the middle ages

In the medieval period, natural law was caught in the religious fibres of the European society. This religiosity of humanity saw the surge in theological interpretations of natural law by philosophers such as Thomas Aquinas who sought to redefine natural law within notions of divine inspirations.<sup>92</sup> Thus, ‘both ethical and physical laws were viewed as objective and good by virtue of the reason and perfection of God.’<sup>93</sup> Natural law during this period subjected human existence both to the authority of God and of mankind.<sup>94</sup> This Christian theological belief in a ‘universal brotherhood of humanity’ also considered the individual to be somehow distinct from his membership in a state or community. This distinction has been held to have laid the conceptual foundation for both individualism as a political theory and notions of ‘freedom of rights’ which later served as the precursor to the emergence of modern western postulations of human rights.<sup>95</sup>

### 3.2.3 Natural law replaced by natural rights in the seventeenth century

By the seventeenth century, natural law began undergoing secularisation. It was during this period that the Dutch jurist Hugo Grotius held that natural law both physical and moral was ‘so unalterable that God himself [could] not change it’. According to Grotius ‘the authority and validity of his mathematical model and of the right and rules of reason could be established independently of the existence of God.’<sup>96</sup>

This novel brand of natural law mostly articulated by John Locke radically departed from earlier understandings of natural law. It was Locke who employed the theory of natural law as a foundation for natural right philosophy, asserting that the individual possesses by virtue of nature, the right to life, liberty and property.<sup>97</sup> Natural right theory then became not only widely recognised and legally asserted by subjects but was also used as the first condition for legitimacy of governments.<sup>98</sup> Locke’s natural right theory influenced many eighteenth century writers such as Thomas Paine and Thomas Jefferson. For instance, Jefferson’s popular phrase in the American Declaration of Independence 1776,

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<sup>92</sup> (As above) 11

<sup>93</sup> As above

<sup>94</sup> As above

<sup>95</sup> As above

<sup>96</sup> (As above) 12

<sup>97</sup> As above

<sup>98</sup> As above

‘life, liberty and a pursuit of happiness’ was an offshoot of Locke’s theory of natural rights to life, liberty and property in his second of his two treatises on government.

### **3.2.4 Natural rights in European enlightenment era**

The 1700s witnessed a mushrooming of natural rights theories whose corollary was the emergence of both French and American declarations.<sup>99</sup> These declarations gave prominence to the notion of universal individual ‘equality before the law’. This period, otherwise known as the age of reason sought to express the concerns of the day, for instance, the ‘liberation of the individual from absolute authority and of human reason from dogma.’<sup>100</sup>

The philosophical contributions of Immanuel Kant and Jean-Jacques Rousseau figured prominently during this period of European enlightenment. Kant’s philosophy followed the same path as traditional rationalism in its ‘appeal to a formal, non-empirical system of reason and its support of the free will of the rational individual as upheld through the ideals of the French and American revolutions.’<sup>101</sup> This view and akin concepts were the fountain for the claim that natural rights are self-evident.<sup>102</sup> Unlike Kant, Rousseau regarded natural rights as provided in the ‘general will’ of society with external manifestation in the sovereign.<sup>103</sup> But however contrasting their philosophies might have been, they have served as the primary development of two key human rights principles of ‘equality’ and ‘freedom’.<sup>104</sup> This ideological tension between the rights of the individual and society was later replicated in the nineteenth century doctrines of individual liberalism and collectivism (Marxist socialism).<sup>105</sup> During this period, the future of natural right theory became obfuscated by the apparent impossibility of coherence in natural rights theories in the dynamic western society.

### **3.2.5 Natural rights in the nineteenth century**

The nineteenth century was an era of enormous discoveries and inventions, so too were philosophical theories during this period. Earlier nineteenth century writings, such as those of Hegel and Fichte, rejected the idea that individual rights were the ultimate standard of society. Hegel held that ‘the dialectical evolution of society would involve the suppression of individual rights to achieve some higher ethical syntheses.’<sup>106</sup> Thus, the nineteenth century saw the swinging of the philosophical pendulum from the metaphorical connotations of natural rights to a more empirical interpretation. It is in the light of this that Bentham remarked that ‘individual natural rights had force only if recognised in conventional law, otherwise they would be merely rhetorical.’<sup>107</sup> Herbert Spencer however held differently in his recognition of the underlying natural evolutionary emergence of rights which to him

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<sup>99</sup> (As above) 13

<sup>100</sup> As above

<sup>101</sup> As above

<sup>102</sup> (As above) 14

<sup>103</sup> As above

<sup>104</sup> (As above) 15

<sup>105</sup> As above

<sup>106</sup> (As above) 16

<sup>107</sup> As above

are necessary for human survival.<sup>108</sup> John Stuart Mill's utilitarian doctrine of greater happiness was interpreted in the natural right sense as reinforcing the natural freedom of individuals and other entitlements to 'moral finalities to pursue private satisfaction'. His concept of right as indispensable to human happiness suggests that all persons are naturally entitled to 'equal moral consideration by others.'<sup>109</sup>

The second half of the 19<sup>th</sup> century and the first half of the 20<sup>th</sup> century saw an interlude in natural rights and the emergence of positivism which considered the notion of natural rights as 'nonsense on stilts'.<sup>110</sup> The nineteenth century also experienced the growth of legal positivism, much influenced by the seminal work of John Austin, which posited that there is no inherent or necessary nexus between law and ethics or morality. This school of thought has levied criticism against modern human rights movement for its leanings on moral or natural right theories to promote the legal human rights cause.

The atmosphere of the nineteenth century was dominated by varying philosophical ideologies such as liberalism, socialism and communism. For instance, the western liberals considered equality as: equality before the law without distinction and discrimination between and amongst all members of society. For socialists, the unit was not the individual but the collective which was not a mere conglomerate of social individuals but also included their socio-economic interdependent dimensions.<sup>111</sup> Thus, in the Marxist perspective equality (classless society) could only be achieved by: a) abolition of private property and of individual competition for livelihood; b) collective ownership of the means of production; and c) centralised socio-economic planning.

These disparities in conceptualisations and applications of principles such as equality and freedom were to have a direct impact on later developments of human rights. These ideological tensions fertilised the socio-political factors that emerged during the nineteenth century which beclouded natural rights theories by its deprivation of rational underpinnings and universality.<sup>112</sup>

### **3.2.6 The twentieth century re-emergence of natural rights**

With the dawn of the twentieth century came a surge in military technology which alerted international attention. Technological and ideological influences accounted mainly for the revival of natural (human) rights doctrine which started with the signing of several international pacts to regulate warfare and weaponry, for instance the Hague tribunal of 1899.<sup>113</sup> This human right awakening was politically fostered by the Nazi holocaust and the defeat of the Axis powers by allied forces in World

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<sup>108</sup> As above

<sup>109</sup> (As above) 17

<sup>110</sup> Famous words of Jeremy Bentham.

<sup>111</sup> Rosenbaum (n 73 above) 20

<sup>112</sup> (As above) 22

<sup>113</sup> As above

War II. This defeat was interpreted then 'as a triumph of western liberalism (individualism) over fascist collectivism (totalitarianism).<sup>114</sup> Subsequently, there was a global moral outcry against 'Nazi militarism, racism, technologism and at the image of a society bereft of the ideals of moral universalism and with an astonishing capacity for self-deception and rationalisation.'<sup>115</sup> This germinal occurrence saw the revival of natural law/natural right though not, *stricto sensu*, within philosophical spheres but with the realms of international politics and with a new nomenclature *viz* human rights. Rosenbaum has argued that 'human rights (natural rights) might not have survived the temporary lapse if it had not been for such historical events and political forces.'<sup>116</sup>

### **3.3 African historical foundations of human rights**

Without doubt, the philosophical discourse on the foundations of human rights was essentially in the West with minimal contribution from Africa.<sup>117</sup> However, this does not suggest that notions or practices of human rights were historically absent in Africa. Unlike the western historical developments of human rights that underwent phases, African historical foundations of human rights have been largely based on relatively unchanged value-systems. There are two fundamental historical aspects of value-systems in Africa, namely, communalism and human dignity which are pertinent to an enquiry into the foundations of human rights in pre-colonial Africa.

#### **3.3.1 African communalism and personhood**

Because the concept of human rights hinges primarily on the 'person', it will be useful to briefly throw light on the concept of personhood in Africa. In other words, how the 'person' was perceived in communal societies in pre-colonial Africa. About personhood in Africa, Mbiti has held that:<sup>118</sup>

In traditional life, the individual does not and cannot exist alone except corporately. He owes his existence to people, including those of past generations and his contemporaries. He is simply part of the whole. The community must therefore make, create, or produce the individual; for the individual depends on the corporate group ... Whatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual. The individual can only say: 'I am, because we are; and since we are therefore I am.'

By the above token, existentialism of the individualism and his status is determined to a large extent by the criteria and other social structures of the society. Obviously, societies across Africa differ on the meaning and approach to personhood but their consensus is the fact that personhood is not attained merely by one's existence or by virtue of physical manifestations. In effect, Africans view personhood beyond physical attributes and place premium on invisible characteristics which Tempels termed as

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<sup>114</sup> As above

<sup>115</sup> As above

<sup>116</sup> (As above) 24

<sup>117</sup> IG Shivji *The concept of human rights in Africa* (1989) Codesria Book series: London

<sup>118</sup> J Mbiti *African Religions and Philosophy* (1969)

the 'force' beyond the African person.<sup>119</sup> This African worldview on personhood was mainly influenced by the communitarian facets of the African mode of life. African communitarianism has been viewed as not a 'mere association of individual persons whose interests and ends are contingently congruent, but as a group of persons linked by interpersonal bonds, biological and/or non-biological, who consider themselves primarily as members of the group and who have common interests, goals, and values.'<sup>120</sup> In short, personhood and communitarianism were inextricably bound in traditional Africa. In this vein, Sedar Senghor remarked that:<sup>121</sup>

In Europe, human rights are considered as a body of principles and rules placed in the hands of the individual, as a weapon, thus enabling him to defend himself against the group or entity representing it. In Africa, the individual and his rights are wrapped up in the protection the family and other communities ensure everyone.

African communitarian mode of living ensured the socio-economic and political stability of African societies. Communalism was not a burden on individual rights but a means of collectively affirming and protecting the rights of the members of a community. In effect, communities ensured that each member's livelihood was qualitative and that individuals worked towards the common good of the society. Dieng noted carefully that:<sup>122</sup>

The individual's sense of justice was as important to the group as was the interest of the group to the individual. The society ultimately rested on the sum total of the cooperation of the individuals.

Such communitarian nature of African societies was the bedrock in the establishment of the Ashanti federation, believed to have been the one of the first federal political system in the world. Obviously, it was not termed a federation but it had striking semblance with the western form of federation namely, a constitutional distribution of power between the central government and other governing units within the political setup. If Africans could conceive of a complex political system such as a federation, they would certainly have thought of basic civil and political rights and principles such as separation of power and participatory governance to ensure the existence and stability of the federation.<sup>123</sup>

### **3.3.2 Human dignity as the bedrock of human rights in Africa**

Cobbah has attempted to summarise the whole notion of African philosophy as resting on the communitarian notions of human dignity.<sup>124</sup> For Cobbah, human rights are essentially a quest to nurture and ameliorate human dignity. In essence, the African philosophy of human rights was founded on the ideals of human dignity from a collective point of view. This concept of human dignity is not one that is seen from that individualistic pursuit against the state but one in which society (the

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<sup>119</sup> P Tempels, *Bantu Philosophy* (1959)

<sup>120</sup> K Gyekye 'Person and community in African thought' in PH Coetzee & APJ Roux *Philosophy from Africa* (2002) 298

<sup>121</sup> Address by Leopold Sedar Senghor, 1979, extract in C Heyns & K Stefiszyn *Human rights, peace and justice in Africa: A reader* (2006) 49-52

<sup>122</sup> FM Dieng 'A cultural approach to human rights among the Dinka' in AA An-N'aim & FM Dieng *Human rights in Africa* (1990) 269

<sup>123</sup> Busia (n 13 above) 2

<sup>124</sup> Cobbah (n 11 above) 309-331

community) plays a significant role in upholding the dignity of its members. This conception differs with human rights in liberal individualism which views the individual as always contending against the state (society) and where the external society is mainly seen as the antagonists in the human rights drama. Cobbah has made the point that ‘African societies function within a communal structure in which a person’s dignity and honour flow from his/her transcendental role as a cultural being’. Human dignity in Africa emphasizes the holistically nature of the individual and is a form of humanism founded upon both a moral and spiritual fact which expresses the person as a whole.<sup>125</sup> Shestack alluded to Professors McDougall, Lasswell and Chen’s exposition of the concept of human rights holding that human dignity is the centre of the sanctity of the human person and that, interdependent values of humankind flow from human dignity.<sup>126</sup>

Human dignity in the ancient Egyptian philosophy was portrayed in the philosophy of *Maat*. It has been noted that the survival of Egyptian societies for almost thirty five centuries amongst other things was attributable to the underlying values of *Maat* which has been cited as the keystone of Egyptian philosophy.<sup>127</sup> The concept of *Maat* has been equated to principles such as ‘truth’, ‘justice’, ‘righteousness’ and ‘rightness’. *Maat* was the highest concept of physical and moral law known to ancient Egypt and has been alleged to transcend mere ethical and moral concept.<sup>128</sup> Obenga wrote that ‘during this long span of time, there was no societal discrimination between men and women, no human servitude or slavery, no detention in jails, and no capital punishment’. It is even argued that in conformity with *Maat*, individual rights were fully recognised in ancient Egypt.<sup>129</sup> The implicit values of *Maat* also existed in some other parts of Africa in a concept called *ubuntu* which was mainly practised in South Africa and some parts of West Africa. Justice Yvonne Mokgoro of the Constitutional Court of South Africa has likened *ubuntu* to principles such as ‘human dignity, respect, inclusivity, compassion, concern for others and honesty’.<sup>130</sup> Also, the Dinka a Nilotic people in the south of Sudan historically have related values in their concepts of *cieng* and *dheng* which ensure avenue for individual and collective pride, honour and dignity within the Dinka community.<sup>131</sup> Respect for human dignity still constitutes the sum total of the moral codes of the Dinka.<sup>132</sup> Also, as far back as 1236 in Kouroukan Fuga (Kanbaga, Mali) a written charter on rights was adopted. It is said to be the first written document in Africa which gave recognition to individual rights. Article 5 of that charter articulated the dignity of the human person: ‘Everyone is entitled to life and to the preservation of their physical integrity.’<sup>133</sup> Article 44 placed an obligation on everyone for the implementation of that charter.

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<sup>125</sup> As above

<sup>126</sup> Shestack (n 76 above) 210

<sup>127</sup> Obenga (n 19 above) 46

<sup>128</sup> (As above) 47

<sup>129</sup> (As above) 48

<sup>130</sup> *S v Makwanyane and Another* 1995 3 SA 391 (CC)

<sup>131</sup> *Cieng* requires one to behave in a certain way while *dheng* labels one as virtuous for adhering to those tenets (*cieng*).

<sup>132</sup> Dieng (n 122 above) 271

<sup>133</sup> M Mubiala *Le Système Régional Africain de Protection des Droits de l’Homme* (2005) 8

### 3.3.3 Conclusion

Human dignity is deemed the super value in the whole corpus of the foundational values of human rights in various human rights system theories.<sup>134</sup> In fact, if one could describe the Universal Declaration in two words, those words would certainly be 'human dignity'. Also, in modern human rights discourse group, community and peoples' rights have gained significant international attention and found recognition in international legal quarters. Thus communitarian practices (group rights and liberties) and values of human dignity in traditional Africa account largely for a foundation of human rights in Africa. Hence one cannot say that the underlying attributes of human rights are comprehensively alien to pre-colonial African societies. Certainly, what was originally introduced in the human rights movement spearheaded by the west was the name human right but the ideas and practices which provide a rationale for human right existed in Africa since antiquity. Although as usual eurocentric writers in the persons of Howard and Donnelly have argued that communitarian African societies were 'structurally, ideologically, and philosophically incompatible with human rights' and that it is only the liberal regime type that can accommodate human rights,<sup>135</sup> it is patent that human dignity, the bastion of African cultural value-system is now seen not only as the edifice that has opened its door for a simplistic understanding of human rights but also as the *raison d'être* in the promotion and protection of human rights all over the world.

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<sup>134</sup> Shestack (n 76 above)

<sup>135</sup> RE Howard & J Donnelly 'Human dignity, human rights, and political regimes' (1986) *American Political Science Review* 80 3



## Chapter four: Influence of African philosophy on the human rights discourse

### 4.1 Introduction

Nana Busia has noted that in socio-historical disciplines, Africa has been deliberately divided into three phases in a bid to do justice to a proper and critical analysis of the socio-political and cultural dimensions of the African continent.<sup>136</sup> These triad periods have been carefully labelled in relation to one of the two most significant episodes in African history. Colonialism and slavery are said to have a lion share in the history of Africa. While colonialism perhaps could be said to be pre-eminent as a result of its political and administrative attributes, slavery outside the European driven, regulated and dominated trans-Atlantic slave enterprise, was not a novelty. This was because domestic slavery was prevalent in African societies as was in other societies, hence the practice of slavery was not really novus in African societies. Undeniably what the European slavers introduced were the horribly shocking and dehumanising aspects of slavery. Thus, African history is best studied or examined by looking at Africa before, during and after colonialism (pre-colonial, colonial and post-colonial or modern Africa). It is worthy of note that historical scholarship have largely focused on the last two phases and rarely examine pre-colonial Africa and even when they do, the historical analyses do not articulate the connecting influence that the latter exerted (and still exerts in the case of modern African) on the two prior phases. Busia has noted that the ‘effect of pre-colonial African social formations on contemporary human rights practices, though important, remains an untreaded [sic] terrain.’<sup>137</sup> In any case, the growing modern anthropological findings on African societies have contributed in shaping perceptions about pre-colonial Africa while revealing its enduring multi-dimensional influence on modern Africa.

In the preceding chapter, light was shed on two foundational principles of human rights in pre-colonial Africa. As was noted, human rights in present day Africa are to a large extent grounded on concepts of communitarianism and human dignity in Africa. In this chapter, the spotlight will be turned on these principles which form the crux of the African philosophy on human rights and continue to shape the modern discourse of human rights both within Africa and globally. Whilst the analysis will adopt an intra- and inter-African approach, it is pertinent to indicate that these influences in the domestic and international spheres are not entirely dissociable. In some cases, the domestic influences have found some shades of recognition on the international platform and of course, the international impacts suggest the inclusion of the African continent. In essence, these influences are

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<sup>136</sup> Busia (n 13 above) 1

<sup>137</sup> As above

somehow interlinked but for the purposes of clarity in analysis, they shall be considered separately which should not be taken as an indication of mutual exclusivity.

## **4.2 Influences on regional African human rights system**

What can hardly be denied in present human rights trends in Africa is that the concept of human rights in Africa has substantially moved beyond the corridors of the Universal Declaration and subsequent pioneering human rights instrument. Human rights movement as a global phenomenon heralded by natural rights principles of liberalism and individualism has acquired additional features as a result of its intercourse with African cultural values such as human dignity and communitarianism. These African cultural values are certainly enormously important in their portrayal of the unique features of African civilisation and are acutely reflective of the peculiar socio-cultural fabrics of Africa. Additionally, if one perceives the global movement of human rights as working towards achieving a common goal, then every regional human right endeavour should be deemed as an effort in realising that goal. Therefore, the impact may be particular or specific to a certain environment but the influence should be viewed as global or international. Thus, although these influences may not have voyaged so much beyond the frontiers of Africa, what is certainly true is the fact that they have contributed in the elevation of the human dignity of African citizens in the global world. Two key unique contributions to the modern understanding of human rights in Africa will be examined. These are the concepts of 'peoples' rights' and the notion of 'corresponding duties' in human rights in Africa.

### **4.2.1 Human and Peoples' Rights**

The primary document in the case of human rights in Africa is the African Charter on Human and Peoples' Rights.<sup>138</sup> In respect of its substantive provisions, scholars have categorised the African Charter into three conceptual parts: 'Peoples and Individual rights', 'Duties of States and Individuals (not peoples)', 'Implementation'.<sup>139</sup> The African Charter's uniqueness is manifested in the fact that it swerved away from the traditional understanding of human rights as attaching to only individuals and states in the case of self-determination. This aspect of the African Charter was not a drafting accident as the Committee of Experts who drafted the Charter was mandated to put together a human rights document that 'should reflect the African conception of human rights ... and meet the needs of Africa.'<sup>140</sup> It is not regarded as a surprise therefore that the African Charter has this paragraph in its preamble: 'Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights.'<sup>141</sup>

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<sup>138</sup> African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU DOC. CAB/LEG/67/3 REV. 5, 21 I.L.M. 58 (1982) Entered into force Oct 21, 1986.

<sup>139</sup> EA El-Obaid & K Appiagyei-Atua 'Human rights in Africa: A new perspective on linking the past to the present' (1996) *McGill Law Journal* 819 9

<sup>140</sup> As above. See, The Organization of African Unity and Human Rights, AI Index IOR 03/04/87 at 8.

<sup>141</sup> The African Charter, Preamble, para 5

Certainly, if a charter is to be of an African nature then such should be conspicuously enunciated in any legal framework to articulate the understanding of human rights in traditional Africa. Hence the African Charter has added peoples' right even in its title to clearly articulate that human rights in African societies were and are more than just the individual elements which characterise the western approach to human rights. This was the first time in the discourse of human rights that peoples' right was given international legal recognition in human rights spheres. In the peoples' sense under the African Charter, collectivities (groups, communities etc) can be holders of human rights.<sup>142</sup> Obviously, the communitarian nature of traditional Africa and the philosophy of community life as opposed to individual existence accounted mainly (because politically the existing cold could have also had an influence in this formulation) for the African Charter's placement of peoples' rights *pari passu* with individual rights. In fact, the African Charter, though recognising the privacy of individuals does not provide specifically for the right of an individual to privacy (even the word privacy does not appear in the African Charter). This could be interpreted to suggest the irreconcilability of the notion of peoples' rights with the individualism-oriented right to privacy. Hence the Charter deliberately leaves out privacy right to accentuate the importance of peoples' rights. Although, there are potential dangers in this approach that one must not just brush aside, the fact is that peoples' rights is given prominence in order to define human rights in Africa as reflective of one of the foundational elements of right protection in pre-colonial Africa.

One shortcoming of the African Charter is that it does not define the term 'people'. The term 'people' in ordinary sociological sense is resistive to definition and the many socio-cultural complexities in Africa make it more difficult for the term people to be ordained with definition in the African Charter. Of course, the onus is now on both the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to determine 'people-status' on a case-by-case basis. UNESCO has attempted to describe basic features for the purposes of identifying a 'people' in international law: 'A group of individual human beings who enjoy some or all of the following common features:

- (a) a common historical tradition;
- (b) racial or ethnic identity;
- (c) cultural homogeneity;
- (d) linguistic unity;
- (e) religious or ideological affinity;
- (f) territorial connection;
- (g) common economic life;<sup>143</sup>

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<sup>142</sup> Philip Elston & Asbjorn Eide Discussion Paper prepared for the African seminar on Human Rights and Development in Gaborone Botswana 1982 2

<sup>143</sup> UNESCO 'New Reflections on the Concept of Peoples' Rights' (1990) *Human Right Law Journal* 11 3-4 446

The communitarian approach to human rights in traditional African societies has undoubtedly influenced provisions in the African Charter.<sup>144</sup> The word ‘peoples’ appears forty-five times in the Charter whilst the word ‘individual’ appears twenty-five times. Without attaching any importance in that collocation, it should however be emphasised that African societies have throughout their historical epochs dwelt in communities which draw inspiration from common ancestry, cultural beliefs and common pursuits. As a matter of fact, human dignity which is the core value in the whole corpus of the African cultural values of human rights is believed to be secured and promoted communally rather than when the individual is isolated from the rest of the community. Perhaps a simplistic interpretation of human and peoples’ right would be that the ‘human’ represents ‘human dignity’ and ‘peoples’ represents the ‘communitarian sheath’ which is both a fountain of the former and a protector. In respect of the community/individual relationship, Dupuy has made the following comments:<sup>145</sup>

It is really impossible, in the absolute, to set the community off against the individual . . . The dialectic is that of the community, without which man is an irresponsible being, concentrating on his rights as an egotistically guarded heritage, and that of man, without whom the community becomes an oppressive, not to say a murderous entity.

The concept of human and peoples’ rights may not have gained foothold in international discourse of human rights but certainly whenever human right is mentioned in Africa, the ‘peoples’ component is also articulated. Equally, whenever the rest of the world is discussing human rights in Africa whether in courtrooms or classrooms, in political or diplomatic quarters, the concept of peoples’ right will be mentioned whether willingly or reluctantly, thereby reinforcing and inevitably gradually entrenching the idea of peoples’ rights on the international platform. In fact, some non-African scholars have even argued that peoples’ rights have formed part of ‘positive international law’.<sup>146</sup>

#### **4.2.2 The concept of duty in the African Charter**

The African Charter it must be mentioned was not the first human rights instrument to articulate the notion of duty in respect of human rights. Article 29 of the Universal Declaration and the preamble to the International Covenant on Civil and Political rights (ICCPR) had already made mention of the notion of duties in human rights prior to the adoption of the African Charter. For instance, a paragraph of the preamble to the ICCPR reads: ‘Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.’<sup>147</sup> With this in mind, the logically question is what is new about the African concept of duty in human rights in Africa? The African Charter, it must be emphasised, has gone beyond merely mentioning the principle of corresponding

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<sup>144</sup> Shivji (n 117 above) 22

<sup>145</sup> RJ Dupuy ‘Thème et variations sur le droit au développement’ in *Mélanges offerts à Charles Chaumont, Le droit des peuples à disposer d’eux-mêmes, méthodes d’analyse du droit international* (1984) 273. Quoted in JD Boukongou ‘The appeal of the African system for protecting human rights’ (2006) *African Human Rights Law Journal* 6 277

<sup>146</sup> M Virally ‘Panorama du droit international contemporain cours général de droit international public’ (1983) *Recueil des cours de l’Académie de droit international* 183 60

<sup>147</sup> ICCPR, para 5

duties to human and peoples' rights. In fact, whereas the preamble of the ICCPR only indicates the existence of duties, the preamble to the African Charter in addition to its recognition of the duties also stresses the performance of those duties: 'Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.'<sup>148</sup> The African Charter has elaborated the concept of duties by stating down the various duties that an individual is expected to perform in various respects. Of course, these duties are not a closed list but should be seen as a sufficient starting point for jurisprudential discussion of duties in human rights discourse.

Articles 17 and 18 of the African Charter place duties on the state to promote and protect the morals and traditional values recognized by communities and to assist the family which is the custodian of morals and traditional values respectively. Chapter II of the Charter defines the duties of every individual which comprise his duties towards the family, society, the state and 'other legally recognized communities and the international community'.<sup>149</sup> Article 29(7) of the Charter re-emphasises the preservation of positive African cultural values and places a duty on individuals to preserve and strengthen them:

The individual shall also have the duty.... to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society.

In another instance, the African Charter on the Rights and Welfare of the Child also places responsibility on the child towards his family, community, country and towards the promotion and achievement of the African unity.<sup>150</sup>

M'baye in his interpretation of the duties in the African Charter noted that:<sup>151</sup>

In Africa, the individual, completely taken over by the archetype of the totem, the common ancestor or the protective genius merges into the group.... In traditional Africa, rights are inseparable from the idea of duty. They take the form of a rite which must be obeyed because it commands like a 'categorical imperative.' In this, they tie in, through their spiritualism, with the philosophy of Kant.

Certainly, the duty paradigm in the African Charter is etched from the communitarian approach to human rights in Africa. The dominant words in the formulation of duties in the African Charter are community, society and moral and traditional values. In essence, it is the communitarian notions of rights in Africa that inform the approach to duty in the African duty because duties have always been regarded as inextricably bound with the rights and dignity of individuals. The moral and traditional values as usual can be summarised in human dignity. In effect, one is under a duty to ensure that the

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<sup>148</sup> The African Charter, para 6

<sup>149</sup> ICCPR, Art 27(1)

<sup>150</sup> African Charter on the Rights and Welfare of the child, OAU Doc. CAB/LEG/24.9/49 (1990) entered into force Nov 29, 1999. Article 31

<sup>151</sup> K M'baye & B Ndiaye 'The Organisation of African Unity' in K Vasak (ed) (1982) *The International Dimensions of human Rights* 593

dignity of others is respected. Hence the concept of community and human dignity account so much for the corresponding duties to the human and peoples' rights enshrined in the African Charter.<sup>152</sup>

The element of duty underlies the concept of rights in the African community. The community helps the individual to exercise his or her rights, and the individual, in turn, ensures a contribution to general community development. Individuals exercise rights to enable them to perform duties owed to four entities in the community: the community's supreme moral being/authority, the individual, the family and the community.

### ***Critique of the concept of duty in the African Charter***

It has been argued that the philosophy of duty in respect of human rights misconceives the entire notion of human rights.

Rights are inherent to the person, a part of one's nature and being: without them one ceases to be fully human. They are also instrumental, in the sense that the individual uses them to tap the potentials and talents with which he is endowed. In tapping this potential, the individual is enabled to perform his duties to attain full self-development and, thereby, contribute to community development. However, where a person is made to perform duties before, or as a condition of, the exercise of rights, then that person is being denied the conducive atmosphere that would facilitate the very performance.<sup>153</sup>

The duties specified in the African Charter have been viewed as placing the individual at the mercy of the community, thereby increasing the propensity for oppression of individual rights which means a diminution of the rights recognised in Articles 1 to 18 of the African Charter.<sup>154</sup> Such criticism levied against the duty notion in the African Charter is not entirely nugatory. The only danger is that it focuses disproportionately on the potential dangers of the duties in relation to the rights guaranteed. This over-criticism befalls the inherent worth of the corresponding duties and even questions the cultural legitimacy of the concept.

Perhaps, it was against the backdrop of potential abuse of duties in historically patriarchal African societies that the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted to cater for the needs of, and as an extra layer of protection to African women.<sup>155</sup> This African Women's Protocol has added to the existing international convention on women (CEDAW) such provisions as divorce rights, inheritance rights, women in conflict and right to abortion. It has been argued that the potential failure of the pre-existing international instrument on women to offer effective protection to African women or achieve gender parity necessitated the

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<sup>152</sup> EA El-Obaid & K Appiagyei-Atuua (n 139 above)13

<sup>153</sup> (As above) 14

<sup>154</sup> JD Boukongou 'The appeal of the African system for protecting human rights' (2006) African Human Rights Law Journal 6 276

<sup>155</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd ordinary session of the Assembly of the Union in Maputo, 2003, entered into force on 25 November 2005

adoption of the African Women's Protocol.<sup>156</sup> Hence it would be improper to completely censure the African approach to obligations in the form of duties that the African Charter places on the individual. These duties are certainly not intended to ridicule the rights that individuals possess but to accentuate the African notion of human rights as also involving the performance of duties to ensure that the rights are meaningfully realisable. Because Africans have historically lived in communities and not as quintessentially mere individuals in an environment, the concept of duty is indeed important in the safeguard against the abuse of rights to the detriment of the community. One's right in Africa is paramount because one lives within a community of individuals, so in essence one must owe some duties to that community to foster social cohesion and ameliorate human dignity.

### **4.3 Contributions to international human rights**

Nowadays, when one talks about the international community the first institution that springs to mind is the United Nations (UN) which is unarguably the largest organisation of states or governments. By this token, the UN is more international than any other entity of states or governments. In the analysis of the influence that the African philosophy on human rights has exerted on the international discourse of human rights, priority will be given to the UN institution or its specialised agencies. Certainly, the acceptance or recognition of a concept from Africa by the UN is itself suggestive of the fact that such concept or idea has gained international status. This does not however preclude any other form of international recognition if one is available.

In the international sphere, the African influence on the international growth of human rights will be examined on the basis of two notable contributions. One of the two contributions is certainly a concept which gave birth to a soft law in international jurisprudence while the other is a concept translated into law in Africa which inspired similar provision in the global movement of human rights. The right to development and an expansion of Children's rights are two prominent provisions that have emanated from Africa or from African philosophic concepts which have led to international recognition and protection.

#### **4.3.1 The right to development**

The concept of the right to development is considered a specifically African contribution to the international human rights discourse. Keba M'baye, the Senegalese jurist is attributed with having first propounded this right in 1972 which was later reflected in Resolution 4(XXXIII) of the UN Commission on Human Rights in 1979 in its 33<sup>rd</sup> Session which he presided over.<sup>157</sup> This Resolution subsequently gave birth to a UN General Assembly Declaration on the Right to Development.<sup>158</sup> This principle is also articulated in the preamble to the African Charter.

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<sup>156</sup> KSA Ebeku: 'Considering the protocol on the Rights of women in Africa' (2006) Africa Insight 36 1 25

<sup>157</sup> Shivji (n 117 above) 29

<sup>158</sup> Resolution 41/128 of 4th December 1986

While M'baye did not define the concept of the right to development probably escaping the daunting task of subjecting the theory to the authority of definition, he warned that the right to development is distinct from mere growth as it involves a transformation of structures which involves 'a range of changes in mental and intellectual patterns that favour the rise of growth and its prolongation in historical time.'<sup>159</sup> In respect of the right/duty relationship, M'baye has identified states and international community (governments and the organised international community) as the duty-bearers.<sup>160</sup> The right, according to M'baye, has descended from the 'spheres of morality to that of law.'<sup>161</sup>

M'baye has advanced justification for his concept of a right to development on political and economic, and on moral grounds in accordance with legal standards.<sup>162</sup> Certainly, his justifications will not be subjected to any critical analysis here because that is outside the intended scope of this work but will be useful in revealing the notions of African communitarianism and human dignity which informed his concept of the right to development.

From an economic perspective, M'baye relied very heavily on the colonial exploitation of Third World Countries (TWCs) by now developed countries and the North-South economic inequalities. He reiterated that the consequent poverty on TWCs whose ultimate beneficiaries are countries of the North has given rise to some obligations on the part of the beneficiaries. Thus, from that obligation could be derived a right to development by peoples' of TWCs.<sup>163</sup>

Politically, M'baye has argued that international peace and security would be severely undermined by the alarming rate of poverty in TWCs. Hence, if peace and security are to be guaranteed, TWCs must be helped by rich countries and peoples by their governments. In relation to his supposed duty that affluent states owe to TWCs, M'baye noted that the rich bear the responsibility because international events and their unwelcoming consequences on poor nations are of their making:<sup>164</sup>

They decide on peace and war, the international monetary system, the conditions governing business relations, they impose ideologies, and so on. They tie and untie the knots of world politics and the world economy. What could be more natural than that they should assume responsibility for the consequences of events and circumstances that are of their own doing?<sup>165</sup>

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<sup>159</sup> Shivji (n 117 above) 29

<sup>160</sup> As above 30

<sup>161</sup> Alston & Eide (n 142 above) 14

<sup>162</sup> Shivji (n 117 above) 30, see Alston & Eide (n 142 above)

<sup>163</sup> Shivji (n 117 above) 30

<sup>164</sup> Shivji (n 117 above) 30

<sup>165</sup> Alston and Eide (n 142 above) 9. See Keba M'baye 'Emergence of the Right to Development as a human right in the context of a new international economic order' Paper delivered to the UNESCO Meeting of Experts on 'Human Rights, Human Needs and the Establishment of a New International Economic Order', Paris, 19-23 June 1978. UNESCO Doc. SS-78/CONF. 630/8



Shivji has interpreted M'baye's concept of a right to development as grounded on principles of solidarity which he gave moral endorsement.<sup>166</sup> Apparently, M'baye sought to articulate the rights of communities/peoples to development which meant that the philosophy of communitarianism influenced his theory on the right of states and communities to development. Obviously, as we shall later see, M'baye did not include the individual in his bracket of right holders but a basic understanding of community would reveal that in essence it would be individuals who would benefit if a community's right to development was to be realised. Therefore, community rights are projected in order to secure, promote and fulfil the dignity of individuals in that community.

M'baye's concept has been variously re-interpreted in human rights discourse. For instance, while he described the right to development as 'an inalienable right belonging to all people' (a collective right), the UN Declaration on the Right to Development has extended it to individuals, groups, peoples and states.<sup>167</sup> Certainly this could be viewed as a calculated move to bestow international appeal to the concept because restricting it merely to collective right-status would make it difficult for applicability in the West where individualism is the hub of the phenomenon of human rights. Obviously, what can never be changed about the right to development is the fact that an African jurist in the person of Keba M'baye propounded this theory in advancement of human and peoples' right.

The right to development which might have been viewed in the 1970's as a trivia has now found accommodation in academic and political spheres by its acknowledgement in the international movement of human rights. In 1993, the Vienna World Conference on Human Rights delineated the Right to Development as an 'integral part of fundamental human right.'<sup>168</sup> Since then references to the right to development have now found places in many international human rights instruments. The Millennium Declaration has noted that the right to development should be a commitment in both national and international circles so as to ensure that this right translates into reality for everyone.<sup>169</sup> The right to development has inspired to a very large extent the UN Global Compact<sup>170</sup> which seeks to bridge corporate entities and human rights so as foster the human rights of peoples and individuals to development, amongst other things. This UN Global Compact which was pioneered by Kofi Annan while he was Secretary-General of the UN could be interpreted as a manifestation of the influence of the African notion of human rights because he (being an African) conceived primarily of basic responsibilities that corporate entities should owe to the overall development of especially local communities in their operational areas.

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<sup>166</sup> Shivji (n 117 above) 30

<sup>167</sup> (As above) 31

<sup>168</sup> Vienna Declaration and Programme of Action A/CONF. 157/23 para 10

<sup>169</sup> Millennium Declaration A/RES/55/2 para 11

<sup>170</sup> [www.unglobalcompact.org](http://www.unglobalcompact.org)

### 4.3.2 Contribution in the area of Children's rights

The African Charter on the Rights and Welfare of the Child was formulated in the same year when the UN Convention on the Right of the Child (CRC) entered into force.<sup>171</sup> Like many African human rights instruments, the African Children's Charter is intended to reflect the African cultural heritage and inspire children in the African civilization.<sup>172</sup> The African Children's Charter is notable for its unprecedented provisions and one of those provisions which is pertinent to our enquiry is Article 22. Article 22 essentially proscribes the recruitment of children in hostilities and obliges states to afford the necessary protection to children during armed conflict. Africa, being a continent on the throes of conflict, is perhaps enough explanation and justification for such provision which was not present in the CRC. It should be noted that the African Children's Charter places an obligation on everyone (government, communities and individuals) to respect and help children enjoy their rights and dignity.<sup>173</sup> There is no gainsaying the fact that affording protection and recognising the rights of children in armed conflict is not only responsive to the peculiar circumstances of the African child but also geared towards reiterating that the African notion of dignity and communitarian protection also extends to children.

The impact of this provision on the international discourse of human rights is certainly depicted in the fact that a decade after the formulation of the African Children's Charter, the UN adopted a Protocol to the CRC on the Involvement of Children in Armed Conflicts.<sup>174</sup> Certainly, the African Children's Charter which was the ground-breaking human rights instrument in respect of the rights of children in armed conflict significantly influenced this global protocol on the rights and protection of children in armed situations.

Also, it was in Africa that the first international legal decision on the recruitment of children in armed conflicts came from. In a sense, Africa did not only first conceive of the rights of children in armed situations but has also blazed the trail of jurisprudence in this regard. The UN-backed Special Court for Sierra Leone<sup>175</sup> reached an international legal decision that the recruitment of children as soldiers during armed conflict is not only an abuse of their rights but also a crime against humanity.<sup>176</sup> This decision was welcomed by especially UNICEF<sup>177</sup> (the UN specialised agency on children's affairs) and the entire international body of human rights. Although, this decision might have been influenced by the Optional Protocol to the CRC on the Involvement of Children in Armed Conflicts,

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<sup>171</sup> African Charter on the Rights and Welfare of the Child, OAU DOC. CAB/LEG/24.9/49 (1990), entered into force Nov 29, 1999.

<sup>172</sup> (As above) Preamble, para 6

<sup>173</sup> (As above) para 7

<sup>174</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, A/RES/54/263 of 25 May 2000, entered into force on 12 February 2002.

<sup>175</sup> The United Nations Security Council (Security Council) pursuant to its Resolution 315 of August 2000 created the special Court for Sierra Leone through an agreement with the government of Sierra Leone. S.C. Res. 1315, U.N. SCOR, UN Doc. S/Res /1315 (Aug. 14 2000).

<sup>176</sup> Case No. SCSL-04-15-A, 26 October 2009

<sup>177</sup> [http://www.unicef.org/media/media\\_21798.html](http://www.unicef.org/media/media_21798.html)

the SCSL being an affiliate of the UN, what cannot be discountenanced is the fact that such legal provision first appeared in human rights discourse on the African continent. And the fact that the first decision on such provision equally comes from a UN-backed African Court reinforces Africa's contribution to the furtherance of the right of the child. The African philosophic foundations of communitarianism and human dignity which inform the adoption of the African Children's Charter which was the first to offer human right protection and gave legal recognition to the rights of children in armed struggles have not only stimulated a global recognition and legal protection of the rights of children in armed situations but have taken the first step in holding individuals legally culpable for violation of this right.

## Chapter five: Conclusion

While the contributions examined in the preceding chapter should not be regarded as suggestive of a closed list, one is advised to approach them as a sufficient starting point in any enquiry into the influence that the African philosophic conceptualisations of human rights have exerted on the whole movement and discourse of human rights, human dignity or man's inalienable rights. This work should not be perceived as a movement towards appropriating human rights to a certain culture or geographical region but rather should be viewed as supportive of the universality of the concept of human rights. Such universality derived from notions of human dignity and human rights which have always existed in all human societies, albeit in varying degrees. In a sense, human rights should be seen as the result of humanity embracing positive cultural values and shedding the hazardous in order to uphold the universal tenets of human dignity. Indeed all cultures and traditions are incomplete and riddled with flaws which explains therefore the existence of other cultures because there can never be a universal culture that applies to all peoples in all places.<sup>178</sup> Of course, the history of liberalism the phenomenon that engendered the global movement of human rights is not one without impurities. With liberal individualism affording opportunities for exclusionary campaigns such as slavery, colonialism, the world wars and the holocaust, liberal theories of individual autonomy therefore lost credibility and authority in the discussion of human rights as being the solely and wholly eligible philosophy in the sphere of human rights.

I share the sentiments of Cobbah in that to achieve the goals of equality holistically as a society, we must give due recognition 'to the inescapably collective nature of our society and the pressing need to develop collective political principles and theory'.<sup>179</sup> Pollis and Schwab have argued that 'it is evident that in most states in the world, human rights as defined in the west are rejected or more accurately are meaningless.'<sup>180</sup> This is particularly true in communitarian societies like the African ones where the liberal theory of human rights in individualism would suggest very little room for society's role. Therefore, the African approach to human rights where the society/community plays an important role in giving significance to individual rights could establish a synergy with individualism in western scholarship, because both approaches are individually incomplete. Therefore, the discourse of human rights should commence as a matter of objectivity by critically looking at the differing historical and contemporary circumstances of societies.<sup>181</sup> This approach should not be viewed as a carte blanche endeavour to license undesirable cultural practices of communitarian societies but as a way to avoid the uncritical appropriation of eurocentric paradigms in spite of a lack of contextual relevance. Hence cross-cultural dialogue on human rights should be tolerated in modern discourse of

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<sup>178</sup> B Sousa Santos 'Towards a multicultural conception of human rights' in C Heyns & K Stefiszyn *Human rights, peace and justice in Africa: A reader* (2006) 58

<sup>179</sup> Cobbah (n 11 above) 319

<sup>180</sup> A Pollis & P Schwab *Human Rights: A western construct with limited applicability* (1979) New York: Praeger

<sup>181</sup> A Pollis & P Schwab 'Human Rights: A western construct with limited applicability' (excerpt) in C Heyns & K Stefiszyn *Human rights, peace and justice in Africa: A reader* (2006) 93

human rights in order to de-monopolise the discourse of human rights thus breathing life into the discourse of human rights in all corners of the globe.<sup>182</sup> One can only ignore the unique African contributions in conceptualisation of the growth and development of human rights discourse if one adopts a very narrow view.

If one carefully looks at the modern concepts of generations of human rights the analysis of which falls outside the confines of this work, one unless unfriendly to truth will agree that ‘while the first generation of human rights was designed as a struggle of civil society against the state, considered to be a sole violator of human rights, the second and third generation of human rights resort to the state as the guarantor of human rights.’<sup>183</sup> While the first generation of human rights has the individual at its hub, the second and third generation have approached the dignity of the individual from a collective point of view. This collective perspective of human dignity in Africa is informed by traditional communitarian approach to notions of human dignity and akin concepts of human rights. Strictly speaking, ‘traditional cultures did not view the individual as an autonomous and possessed of rights above and prior to society.’<sup>184</sup> However, a critical enquiry into the concept of peoples’ rights will reveal its usefulness in the realisation of especially the socio-economic rights and the right to development which are pertinent in the movement towards securing the rights and dignity of humankind. I would argue that individualistic notions of human rights are not best suited in a practical sense to give meaning and translate socio-economic rights into slates of reality. A collective approach to socio-economic rights and the right to development will make implementation easier than when individuals individually seek these rights. Cobbah has stressed that ‘an Africentric [*sic*] approach is particularly suitable for taking economic rights seriously.’<sup>185</sup>

What is especially substantially important in the study of the influence of African concepts of human rights to the global human rights movement is the revelation of the testimonials of the growth of human rights in Africa. Equally, the fact that contributions have come from all quarters of the globe has given authenticity to the quest for human dignity which summarises the global conception of human rights. Indeed if ‘the notion of human rights is to be a viable universal concept, it will be necessary to analyse the differing cultural and ideological conceptions of human rights and the impact of one on the other’.<sup>186</sup>

It has been revealed in this work that Africa has indeed contributed both in the normative standards of human rights and also its emergent jurisprudence. Normatively, the right to development though not legally binding in the UN arena of human rights (it is however legally recognised in the African Charter) has increasingly shaped recent discussions of the modern approach to human rights. The UN

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<sup>182</sup> Sousa Santos (n 178 above) 59

<sup>183</sup> (As above) 51

<sup>184</sup> Cobbah (n 11 above) 88

<sup>185</sup> (As above) 331

<sup>186</sup> Pollis & Schwab (n 181 above) 94

Declaration on the Right to Development is like the Universal Declaration which even though it is not a legally binding instrument (many argue the latter is recognised under customary international law) is so important in the discussion of human rights nowadays that one cannot dismiss it on the grounds of it being a soft law. What is unique about the right to development for example is its proclivity for being a grand right or better still a fine reconciliation of both civil/political and socio-economic rights. This is true because the right to development is not only economically meaningful but also comprises aspects of civil liberties which are incidental to a holistic notion of development. In essence, the historic ideological tension between civil/political and socio-economic rights has been comprehensively addressed by the African-philosophically-founded concept of right to development which views human dignity as holistic, that is to say an agglomerate of both civil liberties and economic rights and freedom. Jurisprudentially, the decision from the SCSL for example has not only been relied on in international courts, for instance by the International Criminal Tribunal for the former Yugoslavia (ICTY) being a creation of the UN, it has also triggered policy discussions and other humanitarian efforts towards the protection of children in situations of armed conflicts.

The main thrust of this work has been to show that while the liberal western philosophical tradition which considers human rights as attaching to and solely inherent in the individual has engendered, informed and directed the growth of the now global discussion on human rights, the African philosophical tradition with its African concept of personhood characterised by its emphasis on the individual as an actor of communal roles and duties, is poised to inform and direct the nature of the human rights discussion both within Africa and beyond to influence emerging national and international formulations of human rights in a bid to give more than theoretical meaning to human dignity in human rights. The influence which the African philosophical foundations of communalism and human dignity have exerted on human rights as already examined is a sufficiently clear indication of the cardinal role Africa is playing in the quest for the fulfilment of human rights.

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