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**AN AKAN PERSPECTIVE ON HUMAN RIGHTS IN THE
CONTEXT OF AFRICAN DEVELOPMENT**

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January, 2000**

**A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment
of the requirements of the degree of Doctor of Civil Law**

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DEDICATION

**This dissertation is dedicated to my wife and two sons
Comfort, Ekow and Yaw**

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ABSTRACT

The present dissertation is a multi-disciplinary project that examines the relationship between human rights and development in Africa, with specific focus on Ghana. The proposition, which is expressed in a theory of community emancipation, is that human rights hold the key to the attainment of *sustainable holistic* development. The theory of community emancipation represents the Akan notion of rights which speak to the lived experiences (traditional, colonial and post-colonial) of Akan peoples. It is offered as a contribution to the evolution of distinct African notions of rights. The Akan perspective on rights aims at making human rights a more accessible concept that people can relate to and to use as an effective tool to attain development. The theory is used in a general context to analyse Western development foreign policies implemented in post-colonial Africa with the active collaboration of African leaders. It concludes that these policies "failed" due to the lack of attention to human rights. Consequent to this is the creation of a culture of rights abuse in Africa and the unfounded claim propagated by African leaders that human rights does not matter for Africans, and is not part of the African culture. The work also examines Western development policies in the post-Cold War era and concludes that in general the development NGO concept is not conducive to the promotion of *sustainable holistic* development in Africa. The solution, among others, lies in local human rights NGOs collaborating in a new relationship with their foreign counterparts; and both given a more prominent role to play in the political, as well as the economic liberalisation processes.

The significant contribution of the work, *inter alia*, is linking the discourses in African philosophy and African notions of rights, which had hitherto gone their separate ways, through the theory of community emancipation. This results in the construction of new paradigm for examining rights in Africa from a developmental context. It is expected that this contribution could help enrich the international human rights discourse, contribute to plugging the loopholes and make the implementation of human rights more relevant and effective in Africa.

RESUME

Cette thèse, un projet multi-disciplinaire, a d'analyser le rapport entre les droits de la personne et le développement en Afrique, particulièrement au Ghana. La théorie d'emancipation communautaire fournit la base théorique du projet. La théorie soutient que le moyen d'atteindre le développement durable et complet passe par le respect des droits de la personne. La théorie se veut une représentation du concept Akan des droits de la personne, lesquels s'expriment dans leurs expériences pratiques (pre-coloniale, coloniale et post-coloniale). De cette façon, le peuple pourra utiliser les droits comme un instrument efficace de développement. Aussi, la théorie fournit un cadre d'analyse des politiques étrangères des pays industrialisés au sujet du développement des états post-coloniaux africains, telles que politiques accomplies avec la collaboration active des chefs d'état africains. La conclusion est que ces politiques ont "échoué" en raison du manque de respect des droits de la personne. En conséquence, la création d'une culture d'abus des droits promu par les chefs d'états africains selon laquelle les droits de la personne ne sont pas importants pour l'Afrique et ne se trouvent pas dans les cultures africaines, perpétués des politiques de développement qui ignorent ces droits. Un autre aspect important de la thèse est à l'égard des politiques étrangères des pays industrialisés au sujet du développement à l'ère du processus de la globalisation. La conclusion est que la philosophie, les mandats et les opérations de beaucoup d'organisations non-gouvernementales (ONGs) dans le secteur du développement servent de pierre d'achoppement à la réalisation du développement durable et complet en Afrique. Entre autres, la solution suggérée comprend l'élargissement de l'espace des ONGs locales des droits de la personne avec la collaboration de leurs homologues internationales dans le processus de la libéralisation politique et économique.

La contribution significative de cette thèse concerne l'utilisation de la théorie d'emancipation communautaire afin de lier les discours en philosophie africaine et les notions africaines des droits pour obtenir une analyse exhaustive des notions africaines des droits de la personne. Cela peut enrichir les droits internationaux et contribuer à améliorer l'efficacité du régime international des droits en Afrique.

ABBREVIATIONS

ACDRs	Association of Committees for the Defence of the Revolution
AFC	Alliance For Change
AI	Amnesty International
AMDH	L'Association Mauritanienne des Droits de l'Homme
BNI	Bureau of National Investigations
CAPSDH	Commission africaine des promoteurs de la sante et des droits de l'homme
CASMAS	The Coalition Against Slavery in Mauritania and Sudan
CDHR	Committee for the Defence of Human Rights
CDOs	Civil Defence Organisations
CDRs	Committees for the Defence of the Revolution
CHRAJ	Commission on Human Rights and Administrative Justice
CIDA	Canadian International Development Agency
CLO	Civil Liberties Organisation
CPP	Convention Peoples' Party
DWM	31 st December Women's Movement
ECOSOC	Economic and Social Council
GA	General Assembly
GBA	Ghana Bar Association
GCHPR	Ghana Committee for Human and Peoples' Rights
GJA	Ghana Journalists' Association
GNAT	Ghana National Association of Teachers
GONGOs	Government-Organised Non-Governmental Organisations
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICJ	International Court of Justice
IGO	Intergovernmental Organisation
IMF	International Monetary Fund
JFM	June Fourth Movement
KNRG	Kwame Nkrumah Revolutionary Guards
LCHR	Lawyers' Committee for Human Rights
LRC	Legal Resources Centre
MAI	Multilateral Agreement on Investment
MFJ	Movement for Freedom and Justice
MNCs	Multinational Corporations
NCCE	National Council for Civil Education
NDC	National Democratic Congress
NGOs	Non-Governmental Organisations
NPP	National Patriotic Party
NRC	National Redemption Council
OAU	Organisation of African Unity
OECD	Organisation for Economic Cooperation and Development

PAMSCAD	Programme to Mitigate the Social Cost of Adjustment
PNDC	Provisional National Defence Council
PNP	Peoples' National Party
PONGOs	Politically-Organised Non-Governmental Organisations
PP	Progress Party
SAPs	Structural Adjustment Programmes
SMC	Supreme Military Council
TUC	Trades Union Congress
UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children Education Fund
USA	United States of America

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A PROLOGUE ON OPPRESSION

The oppressor and the oppressed are both oppressed, though they experience different kinds of oppression. While the oppressor is oppressed by himself and his coterie of men fearers and men pleasers, time servers and place seekers, the oppressed are oppressed by the oppressor and his cohorts.

The oppressor is oppressed because he does not think together with others. He thinks for others. Free, liberated thinking is thinking together with others and agreeing with them or tolerating and accommodating their views even if you disagree with them. This liberates the person yet makes him part of the community. A lone thinker who imposes his thoughts on the rest of the community in the form of decrees is oppressed.

The oppressor is also oppressed because he has in his mind that the oppressed are going to turn against him soon. Fear for his own personal safety and security puts him on constant alert and disables him from walking about freely and going to any place at any time he wishes. Fear for his life oppresses him.

The oppressor is also oppressed by the wealth and riches he illegally acquires from the oppressed. The wealth oppresses him not only because it is illegally acquired, but also because the fear of losing it one day overwhelms his judgment. His inability to enjoy all the wealth at the same time weighs on his mind and oppresses him.

The oppressor is also oppressed because, while he thinks for others he is not able to think for himself. He is not able to appreciate who he really is. He therefore surrounds himself with his sycophants who lavish praise on him which they know he does not deserve. But they do it for him in order to win his favours and save themselves from being oppressed by the oppressor. He who is not able to think for himself and appreciate who he really is, is not free but oppressed for he drinks the opium of sycophancy and gets drunk and is laughed at by the very parasites who flatter him.

In this wise, the sycophants are also oppressed, even more than the oppressed themselves. For they are forced to think the way they expect the oppressor to think about himself. So, through his style of oppression, the oppressor unconsciously and unwittingly creates an image of who he wants to be for the bootlicks to go about drawing that picture of the oppressor and presenting it for him to admire. He who is not able to think for himself and come to the conclusion he would reach independently not free. Sycophants are also oppressed because, by trying to avoid oppression by the oppressor, they betray the rest of the community and so live in constant fear of reprisal. Their conscience haunts them and this oppresses them.

The oppressed are oppressed because the oppressor and his bunch of men pleasers and betrayers oppress them. The oppressor uses his cohorts to physically oppress the oppressed. The oppressor uses his control of the instruments of power and communication to stifle dissent and to instill fear.

The oppressed therefore have nothing to lose but their chains while the oppressor has everything to lose: his throne, the power, the wealth and his sycophants. Also, while the oppressed think about freeing themselves from the hands of the oppressor, the oppressor thinks of oppressing all the more so that the oppressed will not attain liberation. The oppression of the oppressor becomes more intense and severe during the era of the liberation struggle.

Thus, in an oppressive regime all is oppressed. One only notices the oppression of the oppressed because they are in the majority and their eyes are open to their oppression. In a massive voice they cry out and fight for release. But the oppression of the oppressor and his bunch of flatterers is intangible and they know not that they are oppressed.

When the oppressor willingly gives up his stranglehold on power and liberates the oppressed he also liberates himself. He is now able to think for himself and to think alongside the people. He is also liberated from the oppression of wealth and fear for his

own security. But willingly handing over the throne does not come easily. In fact, it is well-nigh impossible for the oppressed oppressor to imagine that his freedom lies in his termination of the oppression of the oppressed. He is afraid of reprisals from the oppressed, he is afraid of losing his wealth, and he is afraid his cohorts will turn against him since their security is dependent on his continued leasehold on power. Above all, who is going to mentally liberate him? He is not in a position to know he is a bad person since his portrait is painted by his cohorts, and because the cohorts are dependent on him for their survival, they are not ready to give him the correct picture of himself.

Thus, in most cases, it is through a peoples' revolution that the oppressor and his cohorts are overthrown. In this wise, the former oppressor and his cohorts do not immediately become liberated. The oppressor may think the people have betrayed him, that they are blind and ungrateful. He is also concerned for his security and that of his ill-gotten wealth. The sycophants will be concerned about their security and ill-gotten gains, but not about who they are because they know they are sycophants.

In order to ensure an end to oppression in all its forms, the liberated people must not oppress the former oppressor and his cohorts in turn. They need to be re-integrated into the society and stripped of all illegally acquired gain but not what they rightly earned or what was bequeathed to them. For if the liberated people oppress the former oppressor and his cohorts, and the leaders of the revolution step into the shoes of the oppressor, they will also become oppressed and a new cycle of oppression will begin. It not only takes a liberated person to encourage a former oppressor to work with him on a basis of equality, it also takes a liberated oppressor to agree to the new pattern and relationship.

But all this sounds impossible, for humankind is born free but grows to be greedy and revengeful. Even where the liberated oppressed do not fall into the greed of the former oppressor, so long as the liberated people seek to unleash vengeance on the dethroned oppressor, everyone will remain oppressed. The oppression is occasioned by the anger that is at the root of revenge. The vengeful behaviour and actions are dictated by the

legacy of the former oppressor. The liberated oppressed are reactors but not actors. He who is not able to let his own projections shape his life and attitudes, but allows himself to react to the attitudes of others, is not free because he does not act on his own. Such a person remains oppressed by the former oppressor.

If humankind cannot escape greed or vengeance, it may be that oppression is destined to shape us forever.

INTRODUCTION

My interest in human rights stems from my secondary school days when I was introduced to Amnesty International (AI), how it began and what it does to promote human rights around the globe. Until then I harboured the naïve assumption that governments existed to promote the interests of their citizens and their rights as well. My initiation into issues of human rights by AI made me follow the news and to begin to analyse government activities that might amount to an infraction of rights within AI's mandate. I found the discourse interesting but at the same time troubling. Why do governments who are elected by the people, or who come to power by the barrel of the gun on the grounds that the predecessor government was corrupt, etc., turn round to abuse the rights of the very people they are supposed to serve? It was not until I entered my first year in the University that in my Legal Systems and Methods course I came to learn that the concept of human rights was developed by the natural law theorists who formulated the concept in order to protect individuals from each other and from abuse by the government.

It was fascinating reading Locke, Hobbes, Rousseau and others. But there was still so much rights abuse going on in Africa. Thus, not having been exposed to any concept of human rights from the African perspective, I came to the conclusion that human rights abuses were part of the contemporary African political system on the basis that Africans did not have a concept of rights of their own. This view, incidentally, was confirmed by the cynical reaction of friends and family members who learned of my increasing interest in human rights. Thus began my interest in examining the presence or absence of human rights in African culture. In my political science course on the political economy of Ghana, I discovered the argument that development is in conflict with human rights and democracy, and that led me into shifting my focus to the area of human rights and development. I also came to realise that the cynicism that my friends and family members displayed towards my interest in human rights was shaped by an old-time propaganda campaign successfully waged by Africa's post-

independence political leaders that human rights did not belong to Africa and therefore was an irrelevant concept for Africans.

But it came to light again and again that African leaders have misled and taken advantage of their people. Their contention about Western governments' conspiracy to plunder the resources of the continent did not arise so much from a genuine concern for African peoples but from a selfish frustration that African leaders were not getting enough of the capitalist booty. Thus, every political concept that they developed was formulated in such a way as to benefit them at the expense of the people, and to even the score with their Western counterparts, with whom they have a collaborative-competitive relationship. Freedom was conceived of only as freedom from colonialism, but not individual freedoms for citizens against the government. Classes and class struggle were also considered as something existing at the international level only, in the context of the struggle between the "developed" and "developing" states, but not between the marginalised entities and the ruling group at the internal level. The cry against neo-colonialism was supposedly a cry for a better deal for African peoples, but in reality it was a complaint lodged by Africa's leaders to obtain a "fairer share" in their collaborative-competitive relationship with Western capitalist interests. These leaders were involved in the very neo-colonialism they were condemning.

Thus, for far too long, rights discourse has been used as an ideological propaganda tool, first by the European colonial exploiters and, later, by African leaders. The colonialist contention was that Africans did not have a notion of rights and democracy. Therefore the colonialists had to import their own into Africa. The exercise and enjoyment of these rights, however, was limited to the colonisers because the colonised were deemed not yet mature enough to enjoy rights. African leaders took over from the former colonial powers and misled the people into thinking that human rights is a Western cultural artifact, a sophistication and even a bane to development which, if they were to be enjoyed at all, had to wait until development

was attained. African nationalist leaders did not set out to reveal to their people that human rights is a general cultural artifact which is inherent in each particular culture, and which African peoples, as people with distinct cultures, also possessed and could develop as an alternative or complement to the Western notion. They adopted an exclusionary approach to rights as a purely Western concept due to the strategic political significance it held for them: not only to numb the people's resistance to oppression and suppression but also dissuade them from proposing an alternative bill of rights that speaks directly to their past and present experiences. This attitude of African leaders, with the influence and active collaboration of Western capitalist interests, sets the tone for the analysis of this work which rests on this key issue: whether rights should be taken as a foundation to development or whether they should take a back-seat and only become relevant after development is attained. The whole dissertation project is encapsulated in this issue.

The theoretical foundation of the dissertation is the theory of community emancipation. This is an empirical-conceptual model which derives from the traditional African political system of the Akans of the former Gold Coast. Gold Coast is the previous name for Ghana, which gained independence from British colonial rule in 1957. While the thesis project is set in the Akan/Ghanaian context, references are made to situations where the analysis is of general application to Africa. This position is adopted, taking cognizance of the fact that Africa has diverse and multitudinal forms of traditional political systems.¹ Therefore, one cannot present one model to fit the whole. However, judging by the fact that there are certain common elements that run through many of the traditional political systems² and also the fact that there are common colonial and post-colonial experiences that the nation-states that emerged out of colonialism share, the model that is presented lends itself

¹ Christian Potholm, *The Theory and Practice of African Politics* (Englewoods Cliffs: Prentice-Hall, 1979).

² One such major element is the tensions, conflicts and contradictions that emerged as a result of the unwillingness of citizens to succumb to tyranny and oppression. According to Potholm, Paulin Hountondji, Timothy Fernyhough and others, this situation led to the splitting up of kingdoms and chiefdoms and the setting up of new ones. Tyranny was a luxury most Africans could not afford. See details in the rest of this Chapter and in Chapter 2.

for adaptation to other situations on the continent. More importantly, the model is offered as a contribution to the wider discourse on African philosophy; I attempt to link this discourse to the evolution of African notions of rights.

Finding an answer to the simple question which should take precedence, human rights or development, in the context of an analytical survey of traditional African political systems, involves a multidisciplinary approach. An initial attempt to found an answer on international human rights law revealed that the issues involved are more diverse and complex than those typically dealt with in the conventional ambit of international law. The work therefore expanded to include African philosophy (with specific reference to Akan philosophy), political economy, international relations, development economics, constitutional law and national human rights law in the context of international human rights law. This approach has been influenced by the field-sector theory of international law which involves specialisation in a cross-disciplinary field or sector with the fields and sectors organised around *real problems* or *issues*.³

In this regard, one way this work sets itself apart from conventional legal scholarship is that it deviates from the classical notion of international law as outlined in the three traditional forms of categorisation, or the “core” of the discipline of international law⁴ – legal philosophy,⁵ infrastructural theory⁶ and doctrine.⁷ With regard to legal philosophy, for example, the use of the language of rights is examined in the context of Akan philosophy in an attempt to redefine and reconceptualise the meaning and

³ Douglas Johnston, “Strains in the Theory of International Law,” (1990) Vol. 19 *Canadian Council on International Law: Proceedings of the Annual Conference*, 196 at 203.

⁴ *Ibid* 196.

⁵ This is related to the traditional conflict and tension between the natural and positive law schools. International law was able to function with reference to these schools and the legal philosophical debate died down at the end of the 19th century until its resurrection in the 1940s with the attempts of the UN Charter to address world community purposes and human welfare objectives.

⁶ Infrastructural theory involves the classical notion of seeing the international legal system as designated and designed to serve exclusively the interests of the nation-state: Johnston, *supra* note 3 at 199.

purpose of rights from a traditional Akan perspective. Akan philosophy is discussed in the context of this work as referring to the lived experiences of the Akan people which are reflected in their worldview, beliefs and attitudes. These are in turn expressed in songs, folk-tales, proverbs, parables, socio-economic and political institutions, etc. I use these lived experiences, especially the proverbs and art symbols, as the basis for deriving the Akan notion of rights and employing this concept of rights as a deconstructive and reconstructive tool for African development.

The deconstructive aspect of the work builds on the “deconstructive challenge” that Serequeberhan assigns African philosophy.⁸ This covers the internal institutions and structures left over by colonialism. One aspect of the colonial relic that I uncover and subject to review is the campaign waged by post-colonial African leaders to promote the view that human rights does not matter or even if it does, it is something that is a Western cultural artifact, not part of Africa’s traditional political history. As a result of this stance, in their formulation and presentation of African socialism, African leaders made no direct reference to human rights. The role of African philosophy in general is to unpack this colonial legacy which still lingers in the minds of Africans. This approach is expanded to cover the international dimension of the colonial remnants inherent in the discourse and practice of human rights, and the production of concepts and formulation of development policies for Africans by Western states. The goal here is to challenge the view that policies of states have a benign objective entirely dissociated from conduct in politics.⁹

⁷ Doctrine deals with a technical concept that has attained widespread support among experts in a particular field and which is sought to be imposed as a model for state practice. *Ibid* 200.

⁸ Initially postulated by Outlaw who stated that in “light of the European incursion into Africa, the emergence of ‘African Philosophy’ poses deconstructive (and reconstructive) challenges.” It is then picked up by Tsenay Serequeberhan who sees the “deconstructive challenge” as “directed at the Eurocentric residues inherited from colonialism” and inherent in the educational, political, juridical, and cultural institutions taken over by African states at independence. “But the parameters within which they function, the cultural codes inscribed within them, and the Eurocentric principles and attitudes that inform these institutions remain unthought and unchallenged.” See, Tsenay Serequeberhan, “African Philosophy: the point in Question,” in T. Serequeberhan, *African Philosophy: The Essential Readings* (New York: Paragon, 1991) at 3.

⁹ G.H.F. van Hoof, *Rethinking the Sources of International Law* (Boston: Kluwer Law and Taxation Publishers, 1983) at 25.

On the other hand, Serequeberhan's "reconstructive challenge" aims at "critically revitalizing – in the context of the modern world – the historico-cultural possibilities of the broken African heritage."¹⁰ In sum, the discourse of African philosophy is, "indirectly and historically linked to the demise of European hegemony (colonial/neocolonial) and is aimed at fulfilling/completing this demise."¹¹ It must also empower the oppressed.

It is in the context of using Akan philosophy, an important component of African philosophy, as a tool of empowerment that the theory of community emancipation is founded on human rights. The traditional Akan concept of rights that I seek to formulate here is defined as socio-economic and political claims and entitlements which are exercised and enjoyed by human beings *qua* human beings to enable the realisation of potentials, the utilisation of capacities and performance of duties that will lead to the meeting of needs and the attainment of development. It is derived from the traditional expression Akan expression of rights as *tumi*: power or ability. It can also translate literally as "having the way," that is enjoying the privilege to do or not to something. The object of the theory of community emancipation is to re-imagine the European or Western-liberal notion of human rights. I contend that some components of this latter notion of rights is, in a large measure, disempowering and cannot be used as an effective tool to promote development in Africa by African peoples. Certain portions of these Western-liberal notions of human rights represent power *over* the oppressed:¹² as an extension of a tool initially used to justify colonial exploitation in the name of mixing one's labour with whatever one finds in the colonised world. The theory of community emancipation therefore seeks to reconceptualise rights as power to confront the powers-that-be and claim what is due to the oppressed. This way, the exercise will help plug some of the loopholes that exist in the international human

¹⁰ T. Serequeberhan, *supra* note at 8, 22.

¹¹ *Ibid* 22-23.

rights system which remains Western-biased. At the same time, it will make it easier for Akan and African peoples to accept the international human rights regime through their indigenous human rights system.

To achieve this goal, the theory of community emancipation reconsiders rights in its application to the African context on three grounds: cultural background, historical-colonial experience, and the developmental situation. The reconceptualisation of rights is premised on the need to see rights as something not just inherent in the human person and to be enjoyed for its own sake, but as a crucial tool and vital ingredient for development: the key to unlocking the potential each individual is endowed with and helping to realise these talents and potentials as the tool for development.

This application of theory deviates from the classical sense which sees theory as a device to enhance understanding of one or more elements of reality in order to be better able to cope with present and future situations and problems.¹³ This traditional notion of theory is the first of the two types described by Cox: "the problem-solving theory which takes the present as given and reasons about how to deal with particular problems within the existing order of things."¹⁴ Cox rejects this type of theory and rather upholds the importance of critical theory which stands back from the existing order of things to ask how that order came into being, how it may be changing, and how that change may be influenced or channelled.¹⁵ The present work seeks to move beyond even critical theory by asking *why* and how that change came about. It also asks how that change is evolving and the direction of the change. Related issues involved are: whether it is the same motive force that is driving the evolutionary

¹² Richard Devlin, "Solidarity or Solipsistic Tunnel? Reminiscences of a Renegade Rapporteur," in K.E. Mahoney and P. Mahoney, eds., *Human Rights in the Twenty-First Century* (The Hague: Kluwer Academic Publishers, 1993).

¹³ G.J.H van Hoof, *supra* note 9 at 17.

¹⁴ R. Cox, "Globalization, Multilateralism and Democracy," ACUNS Reports and Papers, The John Holmes Memorial Lecture, at 3.

¹⁵ *Ibid.*

trend, how inequities involved in the motif can be exposed, and what can be done to change negative trends embedded in the process to let change take a more equitable course. That is the applied theoretical task of this work.

Chapter 1 of the dissertation deals with the cultural aspect that has informed the Akan notion of rights as is formulated and presented in this dissertation. I undertake this aspect of the work within the context of African philosophy in an attempt to merge the discourse of African notions of rights with that of African – particularly Akan – philosophy. In this regard, I first examine two prominent views of African philosophy represented by the *contemporarist* and *holistic* schools. The theory of community emancipation's approach to rights discourse in the Akan cultural context is postulated within a needs-capacities-duties-rights framework of analysis. This framework in turn reveals that within the traditional Akan community people seek to meet their needs by determining, based on their capacities, strengths and potentials, what duties they can impose on themselves, individually and collectively, and perform in order to meet their needs. But the people realise that it is rights exercise that will enable them to realise their potentials and to put those potentials to effective use. The steps towards the realisation of rights involve placing duties on the community to help the rights-holder attain his or her *being* – that is to exercise the rights *to be*. Attaining this goal introduces the community to its next line of duties to the rights-holder: that is to help the rights-holder to attain the rights *to do*. This process involves helping to find a means of livelihood for the rights-holder and at the same time not placing unnecessary stumbling blocks in the way as he or she attempts to exploit and legitimately expand the space defined for him or her, based on his or her capacities. Members of the community are also not supposed to hinder the rights-holder in the exercise of the third level of rights: right *to have*. The right *to have* is two-tiered: the individual right *to have* and the community (or communal or collective) right *to have*. The exercise of the individual aspect leads to the self-development of the individual rights-holder. The other, which belongs to the community, becomes due after the attainment of self-development by the rights-

holder. At this stage, he or she is in a position to perform duties to the community. This is a way of paying back and showing appreciation to the community for helping him or her to attain self-development.

The cultural background informing Akan notions of rights seeks to establish the fact that traditional African political systems had notions of rights – the sum of which is presented above and whose exercise enabled African peoples of old to attain their own notions of development.

The theory of community emancipation ultimately produces significant innovations and a contribution to the discourse on human rights including the following. First, the idea of rights is located in traditional African political communities, having been present and enjoyed since time immemorial.¹⁶ Therefore, for Akans, rights did not emerge only in the 18th century under social contract theory, arriving in Africa after its introduction in the 1960s into the independence constitutions. Second, the human community has metamorphosed through three stages: the *communal*, *political* and *advanced political*, and each stage has corresponded with specific rights exercise. Also, the so-called civil rights and liberties are derived from their exercise and enjoyment at the *communal* stage (where they were enjoyed in a socio-economic context, in the absence of political structures and institutions) before being *politicised* at the *political* stage as a means to counter governmental excesses. Thus, the Akan concept of rights differentiates between the *socio-economic* aspect of civil rights and *political* civil rights. The former were used to overcome the challenges that Akan forebears faced in their struggle to conquer nature, and to survive and attain their notion of development. Thus, eg., they thought about how to survive (in exercise of the right to thought), met (in exercise of the right to movement and association) to discuss (in exercise of their right to expression) and then to act together or individually. The theory goes on to expose the fact that the first generation of rights

¹⁶ Contrary to the conventional Western-based definition of human rights since the time of the Universal Declaration of Human Rights in 1948.

is not civil and political rights, but *socio-economic* civil rights or *communal* rights, with *political* civil rights and political rights as the second generation and economic, social and cultural rights as the third generation of rights. Rights are not seen as crystallized and ossified but subject to a process of redefinition and elasticisation within these three generations. These and other innovations are what rights, argued from the Akan perspective, can contribute to rights discourse and praxis. They, together with other related issues, occupy Chapter 1 and provide the foundation for tackling the rest of the work.

Chapter 2 continues the discussion initiated in the previous Chapter by focusing on the relationship between human rights, civil society and development. The goal is to examine African scholarship on human rights in a bid to contribute to the discourse of African notions of rights from an Akan perspective. This exercise is undertaken within the context of the role that the socio-economic and political groupings in the Akan political system played in the promotion and development of Akan notions of human rights. The Chapter also deals with a differential analysis of rights and civil society from the African and Western perspectives.

Chapter 3 concerns itself with analysing the historical-colonial link to rights exercise in Africa. In the language of the theory of community emancipation this represents the *political* stage of the metamorphosis of African communities. This analysis is connected to the post-Cold War development agenda being pursued by Western states and multinational corporations in Africa. It represents the ultimate arrival of the *advanced political* stage in Africa. But in this chapter it is argued that African traditional socio-political communities were forced to graduate to this stage in order to accommodate the administrative and economic conveniences of colonialism. The chapter concentrates on how colonialism laid the foundation for the establishment and implementation of the modernisation theory and an improvised version of Keynesianism in Africa. It is contended here that the post-colonial Western development foreign policies for Africa could not have been implemented without a

high-handed approach that is at variance with rights exercise. This is referred to as the *negative* approach to defining the relationship between rights and development. The implementation of this approach to development favours only the ruling group, not the popular sectors, the producers of wealth. Thus, this form of “development” only benefits Western states, multinational enterprises and their African counterparts. For that matter, one cannot fairly talk of the “failure” of Western development policies for Africa but their success, since the results attained are what were (or could have been) anticipated. The chapter therefore finds it pertinent to discuss the issue of aid and its effect on human rights and democracy. The conventional linkage between aid and human rights has moved from examining a recipient country’s human rights record and to punish it through the denial of aid – the “negative” political conditionality regime – to the “positive” conditionality regime under the guidance and direction of the World Bank and the International Monetary Fund. However, not much effort has been spent to examine the effect of aid on human rights. This chapter delves into that issue by examining the philosophy, mandate and activities of development NGOs in the globalisation process and how they impact on the exercise of the rights of the people they are supposed to help.

Chapter 4 is devoted to a specific and detailed case-study of Ghana which is hailed as one of the “success-stories” regarding both the implementation of structural adjustment programme (SAP), and the political liberalisation or democratisation process that is currently going on in Africa. I argue that while significant improvements have been made in democratisation and in the level of respect for human rights, much remains to be done. Most of the so-called reforms are being used by the government as a smokescreen to continue with serious human rights abuses in more subtle forms. I undertake a legal analysis of the Ghanaian constitutional provisions on human rights, the structures put in place to promote and protect human rights and the counter-policies of the governments to override these attempts at rights promotion and protection.

Chapter 5 is devoted to an analysis of the role of NGOs who are depicted as providing a crucial link to rights promotion and protection. I look at the definition and evolution of human rights NGOs on the world scene and their impact on African NGO formation. I also examine the characteristics and activities of some human rights NGOs operating in Africa and how these should be modified to enable the people to realise the maximum benefit from their operations.

Chapter 6, the final chapter, is an overview and conclusion of the work. Taking the historical and analytical lessons of the thesis into account, it is argued that the colonial-historical background and the state of development on the continent of Africa call for using rights as a tool for development, not as an excuse to abuse rights in the name of “cultural relativism” or promotion of development.

CHAPTER 1

THE ROLE OF AKAN PHILOSOPHY IN THE CONCEPTUALISATION OF AN AKAN NOTION OF HUMAN RIGHTS

The present focus of African reflection, as dictated by the realities of the post-colonial era, has been the immediate and practical issues of 'development', understood as a process of the accommodation of African lives to the demands of modernity. It is especially in this connection that the observed divergence between traditional values in Africa and the Western paradigm that governs the very idea of modernity has come to assume a practical importance and to represent something of a dilemma.— Abiola Irele.¹

Introduction

An emerging trend in international law theorisation depicts a tension between the “core,” representing the most widely accepted facts, values and terminologies,² and the “periphery”— the gravitation of international law into cross-disciplinary fields and sectors.³ The present work seeks to follow this trend and to adopt an integrative approach which involves an extension of the discussion into the domain of international human rights law. My objective is to contribute to the discourse on African notions of human rights from an Akan⁴ perspective.

¹ Abiola Irele, “Introduction,” Pauline Hountondji, *African Philosophy: Myth and Reality*, (2nd ed., Trans., Henri Evans) (Bloomington: Indiana University Press, 1996) at 9.

² Johnston describes the core, or the defensive formation, as constituted by legal philosophy, infrastructural theory and doctrine. See Douglas M. Johnston, “Strains in the Theory of International Law,” (1990) Vol. 19 *Canadian Council on International Law: Proceedings of the Annual Conference*, 196 at 196.

³ The periphery, or the offensive formation, on its part is made up of policy science, linguistic theory and field-sector theories. See *ibid*, 197ff.

⁴ The Akan represents the largest ethnic group in Ghana and Cote d'Ivoire. Several sub-groups come together to form this ethnic group. They include the Fantis, Asantes, Kwahus, Brongs, Akims, Akuapems, etc. See below a justification for selecting the Akan ethnic group and the relationship between Akan and African philosophical perspectives, including the place of the Akans in present-day Ghana.

I seek to do this by placing the tension that is on-going between the universalists and the cultural relativists in the discourse on human rights within the core and periphery frameworks.⁵ The position of the universalists is that human rights is universal or has come to acquire a universal character through a combination of factors, such as the effect of European contact by way of colonialism and the effort of the United Nations to internationalise the concept of rights. Regarding cultural relativism, one comes across different brands of it. However, cultural relativists seem to be united on the premise that human rights are shaped by the cultural background of each particular cultural community. Some therefore argue for the recognition of human rights from the perspective of each locality while others argue for integration of the various strands of rights as they exist in each cultural milieu.⁶

Adopting the peripheral framework, a reliance on the theory of policy science aspect of the offensive formation approach will involve adopting the stance which advocates making international law “cross-disciplinary in composition, contextual in scope, and problematic in orientation.”⁷ With regard to linguistic theory, I express interest in the deconstructive and analytical philosophical approaches which enable this school to portray international law (in the context of this work, international human rights law) as having been strongly influenced by Western culture, and remaining essentially part of that culture. The goal, therefore, is to establish to what extent international human rights law, as a language, can be developed into a global language that would reflect the diverse cultures of the world and make the exercise and enjoyment of rights more relevant, more effective and more readily enforceable.

It is an important contention of the universalists that accommodation of a cultural relativist approach to the conceptualisation of rights is responsible for opening the

⁵ Asbjorn Eide, “Linking Human Rights and Development: Aspects of the Norwegian Debate,” in Irving Brecher, ed., *Human Rights, Development and Foreign Policy: Canadian Perspectives* (Halifax: The Institute for Research on Public Policy, 1989). See below for detailed discussion. Also, Diana Ayton-Shenker, “Droits de l’homme et diversité culturelle,” <http://www.un.org/french/hr/dpil627f.htm>, under “Nations Unies. Notes d’information.”

⁶ See details of this argument in Chapter 2.

⁷ Johnston, *supra* note 2.

floodgates to rights abuse in the less industrialised non-Western states.⁸ It is therefore deemed necessary for an international morality of a sort to be established and respected. However, one does not need to go far to establish the fact that there were, and still are, problems with the international application of the international bill of rights. This is in spite of agreeing with the claim that the drafting of the Universal Declaration of Human Rights, eg., represents “a painstaking effort ... to take account of the differing religious traditions, political philosophies, legal systems, and economic, social and cultural patterns represented among the then fifty-eight Members.”⁹ Indeed, one major defect of the universalist approach is its cultural insensitivity which has contributed to rendering ineffective the promotion and respect of international human rights for oppressed peoples in non-Western communities.

However, the general approach of cultural relativism to resolve this issue has not done much good towards the effective promotion and protection of human rights in Africa. With regard to cultural relativism, a principal drawback that I identify here is the way the concept has been approached, in the context of African scholarship on human rights,¹⁰ in positing a so-called African concept of rights. For example, the pioneering work of African scholars limited the discussion and study of human rights in Africa to small-scale communities and created out of it a conglomerate concept of African rights. This approach continues to predominate and finds expression in, *inter alia*, the African Charter on Human and Peoples’ Rights.¹¹ Added to this factor is the politicisation of the concept of cultural relativism and its use by African leaders as a shield to supplement the eroding concept of state sovereignty. As a result, human rights discourse in Africa has in most respects tended to represent the “master’s

⁸ See eg., R. Howard, *Human Rights in Commonwealth Africa* (Totowa: Rowman and Littlefield, 1989), and; Jack Donnelly, “Cultural Relativism and Universal Human Rights,” in 6 (1984) No. 4 *Human Rights Quarterly*, 400; also Rosalyn Higgins, *Problems & Process: International Law and How to Use it* (Oxford: Clarendon Press, 1994) at 96ff. Also, Ayton-Shenker, *supra* note 5.

⁹ James Green, *The United Nations and Human Rights* (Washington, DC: The Brookings Institution, 1957) at 26. See also, John Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry: Transnational Publishers Inc., 1984).

¹⁰ The subject of discussion in Chapter 2 of the present work.

¹¹ See Chapter 3.

voice.”¹² The rhetoric adopted by the first generation of African leaders with regards to human rights, including the fact that the concept was a Western cultural artifact, a sophistication and even a bane to development, seems to have made a major imprint on the human rights regime in Africa. This message continues to be propagated and practised in diverse forms by succeeding African governments. As a result, African peoples, even among those in intellectual circles, have a skeptical attitude towards human rights, adding to the list of things that continue to enslave the mind of Africans today.¹³

In spite of the defects and misapplication of the concept of cultural relativism I share its foundational position: that societies have distinct notions of morality, attitudes and beliefs. However, this paradigm needs to have flexible borders that will accommodate change, incorporation and recognition into the wider national, regional and international contexts. It is represented as a concentric framework with the local community and its culture at the core and spreading out to influence and to be influenced by the national, regional and international cultures. The local community is represented by the Akans of Ghana, and the rest by reference to Ghana, Africa, and the international community, respectively.¹⁴

In other words, I argue for a cross-cultural, pluralistic approach to human rights discourse and praxis in Africa and contend that African societies have distinct notions of rights. And recognising the differences is key to making rights exercise more relevant to the ordinary person. The relevance of cultural relativism should lie in using it as a tool to make rights exercise more effective and relevant to the people, not

¹² Hountondji's term. According to him, all discourse on human rights is necessarily marked by the author's position, in the passive and active senses. That is, according to whether he himself does or does not have the direct or indirect opportunity to bully others with it. "There is thus the voice of the master: arrogant or subtle, uneasy or sure of himself, cynical or more 'human'; and there is the slave: resigned or rebellious, consenting or insurgent, mystified or lucid." P. Hountondji, "The master's voice – the problem of human rights in Africa," in P. Ricoeur, ed., *Philosophical foundations of human rights* (Paris: UNESCO, 1986) 319 at 332.

¹³ This was one problem I anticipated in drawing up a proposal for my field research. That fear was confirmed in diverse ways. Some intellectuals saw the exercise as of academic relevance only. Others manifested their disinterest by their lackadaisical approach to submitting themselves to interviews.

¹⁴ Appendix A.

for those who tread the corridors of power. Integrating an African perspective would make human rights a concept accessible and meaningful to Africans. This perspective should genuinely reflect the aspirations and input of the oppressed people; be actually grounded in their lived experiences; and, a practical application of rights should likely contribute towards the attainment of *sustainable holistic* development for themselves.

In light of the foregoing, the present work represents a modest attempt to conceptualise the Akan notion of rights and link it to development, against the backdrop of their pre-colonial, colonial and post-colonial experiences. Thus much of the analysis is specific and related to Akan culture, history and traditions. Yet, there are certain perspectives which have the potential of reflecting the cultural evolution on-going within other African societies. This would demand parallel research to test the theoretical framework and the hypothetical contentions I make.¹⁵ Also, it is to be noted that along the line, the discussion in the context of Akan society will be generalised to cover the broad situation of human rights in Ghana. Such an approach becomes necessary due to the fact that Akan society was merged with other ethnic groups to form the then Gold Coast when they were subjected to British colonial rule in the 19th century. The Gold Coast emerged out of colonialism as Ghana. Therefore, the Akan society cannot be discussed outside the Ghanaian context. The importance of using the Akan system is that it is the largest ethnic group in Ghana, composing of about 60% of the population. Unofficially, the Akan language is the nation's *lingua franca*. Therefore its culture is quite pervasive in the country. This cultural influence has been helped by the fact that prior to colonialism the Akans were able to defeat other ethnic groups within the geographic location of present-day Ghana and thereby introduce and diffuse their culture with that of the former vassal states. Thus, for those ethnic entities, the Akan culture is not unknown to them. Aside of that, the Akan political system represents one of the most advanced political systems in Africa. It was able to go through various stages of evolution which others could not

¹⁵ As such, as and when necessary, reference will be made in a general context to Africa.

reach before colonialism arrived. Therefore, its socio-political institutions possess some qualities that other ethnic groups in Ghana can identify with.¹⁶

The present project seeks to locate the Akan notion of rights in the cultural – socio-economic, religious and political – life of the people which is derived from their art symbols, proverbs, folktales, myths, folk songs, rituals, customs, institutions and practices, etc. These bases of cultural reference have been shaped by the moral and ethical codes of the Akan people. The Akan moral code represents an existential system that is believed to have the sanction of God (*Nyame* or *Nyankopon*), the ancestors, the gods, etc and implemented by the chiefs, elders and the people.¹⁷ The relevance of making reference to, and founding the Akan notion of rights on its cultural past is supported by the Akan attitude and belief that that a society or individual must move in tandem with the times while at the same time respecting and upholding tradition. This finds justification in the Akan proverb: *Nea otwa sa nhu se n'akyi akyea*. Literally, “The one who cuts the path cannot tell if he is cutting a straight one.” In other words, Akans believe in a forward march but admits that in so doing, mistakes may be made. It is therefore important to look back for guidance in order to steer back on to the right track. Another proverb that confirms this contention is expressed thus: *Se wo were fi na wo san kofa a yenkyi*: Literally, “It is not a taboo to learn from the past.”¹⁸ Thus, in its forward march, there is the need to look back and take the best that is left behind and move ahead with it. The proverb thus reflects the Akan belief that the past serves as a guide for planning the future. In this regard, one can say that the Akan culture has the flexibility to consider and incorporate other worldviews into theirs so long as sight is not lost of the foundation that their ancestors

¹⁶ It is for this reason that my field research concentrated mostly on the Akans.

¹⁷ Some of the “laws” are also made by the people when they take part in joint decision-making. The laws from *Nyame* is connected with the conscience and therefore deemed to be inherent. Akans therefore have a proverb which goes thus: *Obi nkyere akora Nyame* (Nobody teaches the child the way to God). Others are said to come to the people through the priests. See Kwame Gyekye, *An Essay on African Philosophical Thought: The Akan Conceptual Scheme* (Cambridge: Cambridge University Press, 1987). Also, John Mbiti, *African Religions and Philosophy* (London: Heinemann, 1988).

¹⁸ In other words, it is wise to learn from hindsight. This proverb is expressed in the *Sankofa* bird, a mythical bird that legend claims flies forward with its head turned backward.

built for them.¹⁹ This view is supported, for instance, by the Akans' readiness to accord the status of a wise person to someone who is well-travelled, irrespective of age, which is normally considered as the principal factor. The conclusion here is that it is possible for an Akan concept of rights to admit of and, in fact, be used as a basis for the people to find meaning and acceptance in the international human rights regime.

The relevance of this exercise is related to the contention that African peoples need to develop their concepts of rights as an alternative model for promoting indigenous development.²⁰ It is therefore to conceptualise the Akan notion of rights and incorporate it in the popular Western bill of rights which most African states have had to adopt in order to be considered as belonging to the comity of "democratic states." Founding the notion of rights on the people's culturally-inspired democratic principles inherent in human rights will help maximize the space for the people and afford them the opportunity to participate in government. Thus, this postulation of Akan notion of rights aims at contributing to plugging the loopholes that the present work identifies to be inherent in the current composition of the Western-biased notion of human rights. More importantly, the process and its underlying philosophy is to develop a model which can be adopted by other African cultures as a vehicle for a successful incorporation and practice of the predominant Western form of human rights in African states. It is my contention that the loopholes that currently exist in the international human rights regime are being exploited by African leaders with the tacit support and connivance of multinational corporations and the Western donor community in general in their operations in Africa. At least three such situations are worthy of mention. First, the compartmentalisation of rights into civil-political, and economic, social and cultural rights. This has enabled African leaders and

¹⁹ The importance attached to the past is expressed in the proverb: *Abrewa nni wo fie a, due*: One who does not have an old woman in his or her family is to be pitied. This is because such a person will be lacking moral guidance in his or her spiritual/moral development.

²⁰ Hence the development of the notion that African concepts of rights, drawing from the Akan traditional political and the general colonial experiences of the people of the Gold Coast and Ghana, should be based on cultural, historical-colonial and developmental factors. See detailed discussion and a justification for this stance in especially Chapter 2 of the present work.

development NGOs adopting the “basic needs” approach to development to overlook civil and political rights abuses and say that their concern is only with the later category of rights. So African leaders continue to violate the civil and political rights of their people with impunity and development NGOs similarly disregard these rights so long as they are able to provide pipe-borne water for a battered and bruised community. The second situation is with regards to the non-recognition by the Western notion of rights of *socio-economic* civil rights. This has disabled international human rights NGOs from monitoring abuse of rights of village communities who have remained objects of decision-making by African governments, the donor community and development NGOs. The third is the inability of the Western notion of rights to draw the appropriate relationship between human rights and development. This has allowed African leaders to argue that effective rights promotion and protection has been hampered by the development woes of their countries. However, the African notion of rights sees human rights as the key to development. So the worse a country’s development conditions are, the more it needs to focus on rights exercise. These and related issues are explored in detail throughout this work. The conception of rights proposed, therefore, is to increase the burden on African leaders to accord greater respect to rights, not the other way round.

It is my contention that the present project can best be accomplished by placing the discussion in the framework of the on-going debate regarding the existence of an indigenous African philosophy. The Akan connection to African philosophy lies in the fact it possesses one of the most coherent set of beliefs which have been researched and written on.²¹ Its political system also belongs to one of the most prominent among the various strands of political systems which have been identified in Africa.²² On the other hand, the importance of establishing the philosophy-rights-

²¹ Eg., see K. Gyekye, *supra* note 17,

²² Christian Potholm, *The Theory and Practice of African Politics* (Englewoods Cliffs: Prentice-Hall, 1979). Potholm identifies the Akan political system under the umbrella of the Pyramidal or Federated Monarchy. Potholm, above, at 19-21. See also, G.B.N. Ayittey, *Indigenous African Institutions* (Transnational Pubs., Inc., 1991), Kwame Arhin, *Traditional Rule in Ghana: Past and Present* (Accra: Sedco Publishing, 1985), etc.

development nexus and discourse is founded on my central contention that rights exercise holds the key to the attainment of *sustainable holistic* development for Africa. Both African and Africanist writers have written in support of the existence of an African philosophy. Some have gone beyond that to express the use of African philosophy as a deconstructive and reconstructive tool to “decolonise the African mind” and empower Africans.²³ This view is very relevant and is supported by various Akan proverbs and attitudes with regard to knowledge (*nimdee*) and wisdom (*nyansa*). Akans believe that though wisdom is inherent in the human person the individual has an important role to play in acquiring and using knowledge. Wisdom without knowledge is unimaginable; the vice versa is also true. It is the belief that knowledge is empowering: it helps the individual to be free, independent, creative and to make maximum use of his wisdom. Knowledge is also to be put into practice, if it to be of relevance to the community, hence the proverb: *Nyansa nye sika na w'akyekyere asie* (Wisdom, unlike money, cannot be kept in a safe).

Yet, there is no systematic attempt to articulate this traditional discourse versus the African philosophical discourse as a deconstructive and reconstructive tool in the language of rights, more importantly in an African notion of rights. A close examination of rights discourse in the African context also reveals that there is a deep-seated controversy over whether there is, or should be, an African notion of rights, and if so, what form it should take. Yet, again the rights debate pursued by legal and political scholars in this domain is divorced from the debate on an African concept of philosophy. The rights debate also fails to address the relevance of an African notion of rights: how an African notion of rights can be employed to empower, liberate and benefit African peoples.

It is important to place the debate on the existence of African notions of rights within the framework of the controversies surrounding African philosophy and to chart a common ground. The reasons are three-fold: first, the conception of rights is located

²³ Tsenay Serequeberhan, “African Philosophy: the point in Question,” in T. Serequeberhan, *African Philosophy: The Essential Readings* (New York: Paragon, 1991) 3.

in philosophical constructs, and philosophy in turn is shaped by the particular historical experiences and cultures of a people.²⁴ Therefore, it can be said that rights and philosophy are located in the same domain – the mentalities of the people, their institutions, values, traditions and history. However, and this introduces us to the second reason for linking the African rights-philosophy debate, European philosophy failed to recognise the existence of rights in African societies. This attitude laid the foundation for initiating the debate on African notions of philosophy,²⁵ and ultimately, on rights. The third reason to link the rights-philosophical debate is that the two discourses have a symbiotic relationship: philosophy is shaped by the experiences of the people expressed in diverse ways, but more especially, through public debate, discussion and agitation provoked by individuals and groups. Such a debate is made possible through the exercise of rights and freedoms such as the rights to freedom of assembly, association and expression.

In spite of the cultural, historical and conceptual relationships that exist between discourses on African philosophy and rights, there has not been a conscious and deliberate attempt to link the two issues, or to use one to help gain insights into the other.²⁶ By neglecting such a joint project, a disservice seems to have been done to the debate on the existence and relevance of both African philosophy and African rights. My work therefore seeks to link the two debates to enable the working

²⁴ See Paul Ricoeur, Preface, *supra* note 12, who states, *inter alia*, that "... underlying the relationships between the *experience* of human rights and the opportunities available for *promoting* these rights, in different communities, there exist philosophical foundations that deserve a clear assessment." Kofi Quashigah also argues that, "[r]ights are therefore not concepts that are to be conceived of *in vacuo* but must be studied with regard to the background of the particular community." K. Quashigah, "The Philosophic Basis of Human Rights and its Relations to Africa: A Critique," (1992) Vol.1. Nos 1&2 *Journal of Human Rights Law and Practice*, 22 at 38. Also, P. Hountondji, *supra* note 12.

²⁵ Like the question of rights, it is my contention that African philosophy is not a conglomerate concept. I argue below that African philosophy is derived from the cultures and practices of the people. Hence one cannot talk of one ossified concept of African philosophy but in really, different brands of philosophical concepts that come together to be identified under the umbrella of African philosophy.

²⁶ Issa Shivji raises such a criticism in his book, *The Concept of Human Rights in Africa* (London: CODESRIA, 1989) but it is my contention that he does not address the issue fully. The reason is based on the stance I adopt in defining the parameters of philosophy: that it should cover both the past and the present. This is described as the *holistic* approach in African philosophy. But, in a typical *contemporarist* fashion, Shivji rejects Africa's past and adopts a generally Marxist approach in his

through of a comprehensive analysis of both rights discourse and indigenous philosophy and their potential contribution to development in Africa.

The joint project therefore covers one important factor that writers exploring an African notion of rights have failed to consider: the practical relevance of such a concept of rights for Africans. Typical African debates on the existence of African philosophy address that issue in relation to the promotion of democracy, freedom of expression and development in Africa. But the debate remains rarified and hard to relate to the clamouring of the ordinary oppressed people for rights and freedoms. The original contribution I would seek to make to this debate is to identify how rights exercise was expressed in the ordinary lives of the Akan people in the past and is still evident in their lives today, and how the theoretical construct adopted to analyse the Akan notion of rights in the context of development may lend itself for adaptation to other traditional African political systems and utilised as the vehicle for African development as a whole.

In analysing African philosophy, one comes across several schools, trends²⁷ or approaches.²⁸ While reference is made to most of them, emphasis is placed on two particular schools. One school does not recognise African philosophy as rooted in Africa's cultural past. Proponents of this school argue that African philosophy is now developing, and talk about adopting "the spirit of Europe"²⁹ – its philosophy, science³⁰ and technology – as a means of enabling Africa to develop.³¹ The other

analysis of human rights in Africa. See an analysis of his new perspective on human rights in Africa and my critique of it in Chapter 2.

²⁷ To use Henry Odera Oruka's terminology in H.O. Oruka, "Four Trends in African Philosophy," in Alwin Diemer, ed., *Philosophy in the Present Situation of Africa* (Wiesbaden: Franz Steiner Verlag, 1981).

²⁸ Peter Amato, "African Philosophy and Modernity," in E. Chukwudi Eze, *Postcolonial African Philosophy: A Critical Reader* (Cambridge: Blackwell Publishers, 1997), 71.

²⁹ Marcien Towa, *Essai sur la problématique philosophique dans l'Afrique actuelle* (Yaounde: Editions Cle, 1971) at 52.

³⁰ What Sandra Harding refers to as "ethnoscience." See S. Harding, "Is Modern Science an Ethnoscience? Rethinking Epistemological Assumptions?," in E.C. Eze *supra* note 28, 45.

³¹ Proponents of this school are referred to in this work as the *contemporarists* though they are generally known as the "professional philosophers." They include Hountondji, *supra* note 1, who is highlighted as the chief proponent of this school, although he borrows some of his ideas from Towa. Marcien Towa, *supra* note 29; Kwesi Wiredu, *Philosophy and an African Culture* (Cambridge, UK:

school argues that African philosophy has arrived and is founded on its past. At the same time, African philosophy is forward-looking, and to find solutions to Africa's contemporary problems, this school argues for an examination of the relevant way European philosophers of the nineteenth century "philosophized with the[ir] contemporary situation in mind" (but not the specific doctrines and solutions they put forward).³²

Inherent in the philosophy, science and technology of Europe on the one hand, and African traditional political thought on the other hand, is the discourse and praxis of rights. Therefore the complexities, nuances and contradictions inherent in the issues raised to the fore are discussed in a rights context which is grounded in the theory of community emancipation. The theory of community emancipation is an Akan-based paradigm that I have conceptualised to grapple with these fundamental questions. The paradigm expresses some commonalities with the *holistic* school, based on the *Sankofa* concept of taking the best of the past to build a better future.

One of the major cultural artifacts of the Akan community which I base my reference to human rights on is proverbs. Proverbs in the Akan social setting draw inspiration from, and is an expression, of the historical, cultural, religious and political life of the people. They represent an economic means of preserving decision-making, ideas, knowledge, history, etc of the people for existing and future generations. Some are represented in art symbols, such as one finds in the *adinkra* clothing; gold-weights;

Cambridge University Press, 1980); Peter Bondurin, "The Question of African Philosophy," in Serequeberhan, *supra* note 23; and Henry Odera Oruka, *supra* note 27.

³² K. Gyekye, *supra* note 17 at 39. Gyekye represents this school in this work. Others include Olabiyi Yai, "Theory and Practice in African Philosophy: The Poverty of Speculative Philosophy. A Review of the Work of P. Hountondji, M. Towa, *et al.*," in (1977) Vol. 2 *Second Order* 2; Oyokan Owoyomela, "Africa and the Imperative of Philosophy: A Skeptical Consideration," in (1987) Vol. 30 No. 1 *African Studies Review* 79; Kwame Arhin, *supra* note 22; C. Potholm, *supra* note 22, etc. One can include in this category Tsenay Serequeberhan who prefers to call his approach to African philosophy "historico-hermeneutical." See T. Serequeberhan *supra* note 23. The difference between Gyekye, for instance, and Serequeberhan, is that the former does not accept ethnophilosophy which the *holistic* school indirectly recognises. Oruka's "philosophic sagacity" expresses the view that traditional African societies have concepts of philosophy which were promoted and preserved mainly through elders who were considered sages and thinkers. See Oruka, "Sagacity in African Philosophy," in Serequeberhan, above, 47, esp. 51ff.

flags of the ethnic, sub-ethnic groups and communal associations; wood carvings; umbrella finial; stools and other furniture, etc.³³ The *adinkra* symbols are perhaps the most important signpost of Akan culture that denotes the level of freedom of expression that the people had and enjoyed. The symbols are displayed in the clothing of the people and have meanings which were derived from a proverb, a historical event, human attitude, animal behaviour, plant life, forms and shapes of objects, etc. It has been described as “a visual representation of social thought relating to the history, philosophy and religious beliefs of the Akan peoples of Ghana and Cote d’Ivoire.”³⁴

I: The Theory of Community Emancipation

The theory of community emancipation³⁵ draws inspiration from the Akan traditional socio-economic and political lifestyle. It is rooted in the Akan tradition by reference to various relevant proverbs, symbols, folktales, etc. The theory, however, is presented not only as a historical, but also a normative approach towards formulating an empirical-conceptual model which draws a broad correlation between rights, duties and development. The social context of the theory is the community (called *oman*, a generic term representing a society with or without a centralised political authority, depending on its stage of metamorphosis).³⁶ It is composed of an interactive group of people who are believed to derive their origin from a common maternal ancestor.³⁷ They seek to meet their everyday needs by pooling their diverse resources and talents together and

³³ Emphasis in this work, however, will be centered on the *adinkra* symbols as one can find most of art symbols depicted in the *adinkra* clothes that the people wear, mostly at funerals.

³⁴ See K. Ofori-Ansah, *Symbols of Adinkra Cloth (A Chart)* (Washington DC: Howard University, 1978). Also, A.K. Quarcoo, *The Language of Adinkra Patterns*, 2nd ed. (Legon: University of Ghana Press, 1994).

³⁵ At certain points where the context permits it will simply be referred to as “the theory.” The theory of community emancipation is a development from the “theory of community understanding” which was initially formulated for my LL.M thesis. See K. Appiagyei-Atua, *Re-Discovering the Relationship Between Rights and Development through the Theory of Community Understanding: The Experiences of Ghana and Canada* (Unpublished LL.M Dissertation, Dalhousie Law School, Halifax, NS, 1994).

³⁶ This word is preferred to others with similar meaning like “evolution,” “development” and “growth” because of the controversy surrounding their definitions.

³⁷ In the Akan traditional system, inheritance is derived from the maternal line. Both men and women are included in the matri-line but only female links are used to include successive generations.

engaging themselves in a transformative process to improve their lot and well-being, individually and collectively, against the backdrop of their peculiar environmental circumstances.

In its process of metamorphosis, the community passes through three stages – *communal*, *political* and *advanced political*.³⁸ This historical process has been experienced and is common to all of Africa – the pre-colonial, colonial and post-colonial, respectively – and is associated with different modes of socio-political system. The socio-political systems affect the nature of community organisation associated with each stage of metamorphosis and the type of rights that become due for exercise or enjoyment.

The paradigmatic construct within which the theory of community emancipation is posited is the needs-capacities-duties-rights framework of analysis. The paradigm postulates that the community has its needs the satisfaction of which lie in the ability of its constituent members to define such needs, assess their capacities and assign duties among themselves to be performed to meet these identified needs. The ability to do these is facilitated by the exercise and enjoyment of rights by members of the community. The exercise of rights is made possible by the members placing duties on themselves to accommodate each other's interests and needs and cooperate to help the other realise his or her potentials and talents. The ability of the community to meet its needs results in the attainment of development for the community.

1: Analysis of the Community Emancipation Framework

A: The Concept of Needs

The needs of the community are dictated by its particular socio-economic, historical, political and cultural circumstances. Community needs are seen in the context of the stumbling blocks that stand in the way of attaining the moral, spiritual, psychological,

However, it need be noted that other groups came to join the main group later on from other sources. See details below.

³⁸ These are treated in detail as sub-headings below.

intellectual, physical, emotional, aesthetic and material goals of the members, and the community as a whole. These stumbling blocks include conflicts and abuse of rights of fellow members. An Akan proverb admits the fact that human beings have needs and therefore need the support of somebody,³⁹ expressed in the proverb: *Onipa hia mmoa*. The needs of the individual members differ.⁴⁰ So are the talents of each individual. Therefore, the Akans have the attitude of pooling their resources together to help one another, hence the proverb: *Benkum dware nifa na nifa nso adware benkum* (literally: the left hand helps the right hand to both and vice versa). That is to say, no one is complete in him or herself and one needs the other to survive. Different types of needs exist in the community: individual, group and community. At the individual and group levels, each person or group perceives, assesses and articulates its peculiar needs. The community then meets, in whole or in parts, depending on the issue at stake, to enumerate and take account of these needs and plan on a course of action to meet these needs.⁴¹ This process involves the exercise of the rights of conscience, thought, opinion, expression, religion, movement, expression, association, and assembly.⁴²

B: The Concept of Capacity

Capacity is the strength with which the individual is endowed and manifests itself in the form of talents, potentials and gifts that he or she is born with. One major capacity that the Akan custom stresses to be common to everybody is wisdom (*nyansa*). Wisdom is said to be inborn and through practice it is put to use for the good of the individual and the community. Capacities are said to remain latent and dormant in the person until they are discovered, tapped, harnessed and exploited through the exercise of rights. The capacity that a person possesses determines the type and extent of duties he or she can perform and also what he or she can *create* and *achieve*. Therefore, there is a correlation between capacities and duties. The people in a community assess their capacities and

³⁹ Be it the Supreme Being (*Nyame*) and/or an ordinary human being.

⁴⁰ This is expressed in the Akan proverb: *Nwuram nnua nyinaa nye pe* (All the trees in the forest are not the same).

⁴¹ Kwesi Wiredu, "Democracy and Consensus in African Traditional Politics: A Plea for a Non-Party Polity," in E.C. Eze, *supra* note 28 at 303ff.

then assign the type of duties each member can perform to meet individual and community needs. The cumulative capacity of the individual members of the community determines the general capacity of the community. This is expressed in the proverb, *Abusua ye dom* (There is strength and bond where there is unity in the family).

C: The Concept of Duty

Duty refers to any act of commission or omission that the community agrees ought to be observed in order to let an individual attain his or her *being*. It has a moral foundation. Duties are to facilitate the exercise and enjoyment of one's rights, to promote good neighbourliness and peace, as well as to meet other needs of the community. They are owed to the following entities who compose the community's development structure – a divine/moral/ethical authority or Supreme Being (*Nyame* or *Nyankopon*)⁴³ and the gods,⁴⁴ the individual person (self) (*onipa*), group affiliations (*ekuo*)⁴⁵ and the community (*oman*) – literally, a state. These entities also constitute the community's economic, socio-cultural and political networks. So long as this structure remains undisturbed, in the sense that no new entities are introduced, the traditional ones not taken away, or divided into groups or classes, development proceeds smoothly.⁴⁶

The duties owed to the divine authority and the gods result from the community's morals, values and beliefs. These are believed to have been handed down to the people from *Nyame* through their kings, priests, chiefs and the wise thoughts of the elderly people. They are further developed among the people through practice, hence the importance the Akans attach to the practice of knowledge and wisdom. The application

⁴² At this stage, "freedom rights" are yet to evolve. The conventional "fundamental freedoms" or "civil liberties" are therefore rights *simpliciter*. This is explained shortly.

⁴³ See K. Gyekye, *supra* note 32 esp., Chapter 4. *Nyame* means "He who is greater than all," or "He who is the light." *Nyankopon* means "the Ultimate."

⁴⁴ According to John Mbiti, each particular community has its own name of the Supreme Being but the characteristics of such a God "are typically" the same. While traditional African religions believe in one God, they also believe in several gods who act as intermediaries between human beings and the Supreme Being. Traditional African religion is therefore described as polytheistic. See J. Mbiti, *supra* note 17.

⁴⁵ The group could be one of three: communal, associative or communitarian, depending on the community's level of metamorphosis.

⁴⁶ Appendix A.

of the community mores helps lay the moral foundation for the exercise of the rights of the people in the community. One can conclude that in the Akan philosophy the origin of rights is in the religion of the people. Religion developed to enable human beings to obey and rely on a higher God as the creator and provider of all things,⁴⁷ and to regulate human relations. To the individual are owed duties by the community to help the person strive to realise the potentials and talents with which he or she is endowed. These duties, from the perspective of the individual, constitute the rights that the community owe him or her. The community is to fulfil these duties at three levels constituting the three stages of rights that each rights-holder in the community is supposed to enjoy and exercise.⁴⁸ The individual owes a duty to him- or herself to complement the efforts of the community to satisfy his or her needs and attain self-development.

Thirdly, duties are owed to the group or groups the individual is affiliated with. The duties here relate to the objectives of the group. Fourth, to the community are owed the duties of using the results or benefits accruing from the realisation of an individual's potentials and talents – his or her self-development – to help others who have not yet attained self-development. The individual also uses his or her developed talents to meet such other general needs of the community. Inherent in the conduct of human relations is a two-fold conception of duty: the negative one of not to hurt or jeopardise the rights and interests of the entities on the community's development structure; and a positive duty to protect the interests of the same entities.

D: The Concept of Development

When one's talents are realised and the foregoing duties are performed they lead, contribute to, or result in the development of the four entities that constitute the community's development structure: God, the individual, the family, and the general community.⁴⁹ What the individual attains through the exercise and enjoyment of his or her rights provides the yardstick, and at the same time enables him or her to help other

⁴⁷ Thus, in the Akan traditional religion, the attributes of God include the fact that He is the Provider of rain, sunshine, food, etc.

⁴⁸ See details under sub-section on the concept of rights.

members of the family and community to develop themselves.⁵⁰ Cumulatively, the performance of these duties leads to the general development of the larger community.

Development, in the context of the theory of community emancipation, is defined as the process whereby an individual in a community is, with the help of the community, enabled to discover, tap and utilise his or her talents and potentials in order to meet his or her basic needs, and thus attain self-emancipation. It extends to the stage where the individual teams up with others in the community to work together, either consciously or unconsciously, directly or indirectly, in order to overcome the obstacles that militate against the development of the larger community. Inherent in this notion of development is the upholding of the values of the community, as well as achieving a sense of fulfillment, satisfaction and the carving of a distinct identity for the individual and community as a whole. Differently put, development is dictated by the ability of the members of the community at a particular time, stage of metamorphosis and within their peculiar environment to overcome their needs through the exercise of rights and the performance of duties which help them to invent the technology appropriate to meet those needs.

Thus, though one can talk of self-development, such development is not complete or recognised until it has been utilised to help or contribute towards helping other pre-developed members of the community⁵¹ or other pre-developed members in the community to attain full development. Development, seen in this context, can be *partial* or *holistic*. Partial development is defined in terms of an individual or a community's ability to meet part of its needs. Thus, if a community is able to meet its economic needs it will be said to be partially developed in the economic sense, or, simply put, economically-developed. The notion of *holistic* development is an ideal since, in reality, no person or community can ever meet his, her or its needs in full. It is a guide that the

⁴⁹ See an explanation of this on direct and indirect contributions to development below.

⁵⁰ Proverbs that support this behaviour include: "If I've helped you to develop teeth you should help me to lose mine."

⁵¹ These are members of the community who are yet to attain or are in the process of attaining their self-development.

community is supposed to strive towards. Community or self-development is therefore to be measured in terms of the nature of the needs of that person or community and the percentage of the needs which have been met. Community development is also measured in terms of the number of people in that community who have attained their optimal level of development.⁵²

The individual contributes to the development of the community in two ways: directly and indirectly. Each type of contribution can be *active*, *passive* and/or *negative*.⁵³ A direct contribution leads to direct development of the entity to whom or to which the duties are owed; and, indirectly, to the other entities to whom the duties are not directly owed. These entities benefit indirectly because the entities together compose the larger community. So what affects one directly affects the rest indirectly.⁵⁴

E: The Concept of Rights

Rights, according to the theory of community emancipation, are first and foremost inherent in the human person and can be enjoyed in and of themselves.⁵⁵ The theory therefore proposes that every member of the community has a rights framework which has a parent right engraved on it – the right to life. This right to life is used as the launching pad to acquire, and to attain the recognition of, and respect for, all other rights

⁵² In this regard, development in the context of the theory of community emancipation deviates from the conventional “vertical” meaning of development which is related to a community’s level of technological development and a sophisticated lifestyle. It supports, rather, a “horizontal” form of development having to do with the level of realisation of the human capital (potentials and talents) and needs of the members of the community dictated by their peculiar circumstances.

⁵³ These are explained below.

⁵⁴ For example, in the case of a duty owed to an individual, the benefit accruing from the performance of the duty goes directly to him or her resulting in self-development. However, since the individual derives his or her satisfaction and identity from being part of the community, the community shares in the attainment of his or her self-development in at least three ways. First, the self-development of the individual largely relieves the community of the responsibility of catering for that individual. Secondly, the developed member begins to play a more positive role to help some other member or members still in the pre-development level to climb out of that position. Thirdly, the community benefits from the individual’s development since community development is also measured in terms of the percentage of its membership that has attained a basic level of self-development. Consequently, when a member attains that personal development target, it adds to the general development of the community.

⁵⁵ The terminology “rights” may be Western but it is applied in the Akan context, which literally means giving one “the way” to do as it allowed by the traditions of the people.

that, when aligned with the needs of the community, become ripe for exercise and enjoyment in the community.

Rights in the Akan context derive from the aspirations of the people and the benefits that are bestowed on an individual or group on the development structure. Unlike the Western notions of rights, this idea of rights is attained in stages, depending on whether the community is at the *communal*, *political* or *advanced political* stage of metamorphosis.⁵⁶ At each stage, the exercise and enjoyment of rights follow an order. The rights exercised are broken down to rights *to be*, *to do* and *to have*.⁵⁷ At both the *communal* and *political* stages rights *to be* are collectively referred to as *positive, enabling or foundational rights*. Rights *to be* are so named because their exercise helps the individual to attain his status as a human *being*. An Akan proverb that captures this view is expressed thus: *Se mahwe wo ama wo se afifi a esese wohwe ma se tutu* (literally: if I helped you to grow teeth you need to take care of me to see to the loss of my teeth). Helping someone to grow teeth means helping the person to be established in life. Thus, inherent in the right *to be* is the right to live and the right to attain one's *holistic* self-development – moral, spiritual, physical, intellectual, psychological, aesthetic and emotional development. As a bundle, rights *to be* enable the individual to successfully harness and develop his or her talents and potentials for development. They include rights to a nurturing environment, to education, health, etc.⁵⁸

Attaining this stage in the self-development process helps lay the foundation for the individual to exercise his or her *rights to do* which has the goal of enabling the individual to *create* and *achieve*. *Creating* is an aspect of production and has to do with, for instance, the manufacture of tools. *Achieving*, on its part, involves the use of a tool to overcome the stumbling block to the satisfaction of needs. Rights *to do* are also

⁵⁶ These stages are explained in detail below.

⁵⁷ See Appendix B for a diagrammatic representation of these types of rights.

⁵⁸ See Appendix C for a detailed outline of the types of rights that are exercised at each stage of community metamorphosis.

referred to as *participatory* rights.⁵⁹ They include the rights to (or, depending on the stage of its exercise, the right to freedom of)⁶⁰ conscience,⁶¹ expression and association. Their exercise enables the performance of duties to meet one's needs and to pave the way for the exercise of the next line of rights – the *right to have*.⁶² The *right to have*, which manifests itself in the enjoyment of individual and collective property rights takes place in its inchoate form at the stage where rights *to be* are exercised. Also, the tool with which one is able to *create* as a means to *achieve* is another example of property. This type of property is, however, more often than not, intangible. For instance, the right to one's personality or the intellect. The ability to exercise the *right to have* lays the foundation, or *enables* the rights-holder to perform the duties owed to the other entities in the community so that the community will move closer towards realising its *holistic* development.⁶³ The Akan recognition of individual and community rights finds expression in such proverbs as *Nea adee wo no na odie*: literally, "it is the rightful person who is entitled to rule." This proverb, however, is extensive in application. It covers every situation where someone has the exclusive right to something. Another type of proverb is *Nsa nyinaa nye pe*: "All hands are not equal." Also, *Ebo me ho a emmo wo ho*: "What is mine is not yours"; and *Mmako nyinaa mmere pe*: literally, "All the peppers on a tree do not ripe at the same time." This expression recognises individuality and uneven development of community members.

⁵⁹ They encompass the following activities: assessing (and, where necessary, prioritising or privileging general community needs), decision-making, designing of a project in the community, implementation, etc. See details below.

⁶⁰ Appendix C.

⁶¹ An example of a proverb portraying the Akan traditional political system's respect for this type of right is expressed thus: *Ananse antonn kasa* (Ananse (the Spider) did not sell speech). Everyone has the right to speech and wisdom. They cannot be appropriated by a particular person.

⁶² One type of proverb that justifies this existence of this right is *Nea aduane wo no na odie, enye dea okom de no*: "The rightful owner of the food has the right to eat, not the hungry one." This denotes respect for Akan property and inheritance rights.

⁶³ These rights constitute the duties that the community owes to an individual rights-holder. For example, the community is supposed to help the individual to enjoy his or her rights *to do* by providing the individual with access to land to cultivate. The community is also not supposed to place stumbling blocks in the way of the individual to enjoy the fruits of his or her labour – in exercise of the *right to have*.

The performance of duties is further enhanced by a reintroduction of the rights *to be*, *to do* and *to have*. A right *to be* is re-exercised, for instance, when one has to undergo initiation rites into adulthood in order to assume higher responsibilities. Here, the person is given the opportunity to learn and acquire new knowledge and ideas. The initiation rites normally introduce a person into a group in the community in exercise of his or her right of association.

At the *advanced political* stage (in the context of a post-colonial African nation-state) the rights which exist are the rights *to receive*, in addition to rights *to be*, *to do* and *to have*.⁶⁴ This stage is associated with more serious denial of rights to majority of the members of the community principally by the state structure and apparatus. The denial of rights in turn does not afford the deprived the opportunity to attain their *being*, provoking a crisis. The deprived are people who in the course of passing through their various *rites de passage*⁶⁵ have had certain rights denied them. Such people would need to enjoy rights *to receive* to compensate for the deprivation suffered. The solution is for the state to concede to the people's demand and pave the way for them to exercise the rights that would enable them to make up for the lost exercise of rights. It is to set them on the stage to compete on an equitable footing with those who did not face the denial of rights or were involved in their suppression.

In light of the above analysis, rights from the Akan perspective is represented as having the indispensable goal of helping to create a fitting and conducive atmosphere within which a person is enabled to realise his or her potentials and talents and perform his or her duties. Rights are therefore necessary and essential tools for facilitating development. Without them initiative, incentive, motivation and drive are stifled, with

⁶⁴ Appendix B.

⁶⁵ In traditional African societies four rites of passage are identified: birth, adulthood, marriage and death. Each stage goes with the performance of elaborate ceremonies to initiate the person into that stage. The initiation into adulthood is of special significance when it comes to discussing civil society in African political communities.

detrimental effects on the development of the person and therefore on the community as a whole.⁶⁶

From the foregoing, it becomes clear that each duty has a correlative right or rights attached to it. Thus, if the community agrees that one of the means of contributing to the development of the community is by the payment of tax, that becomes a duty that is imposed on the individual members of the community. However, before that duty can be executed, the rights of the people to work and to own property need to be secured by the community or *oman* (state). The performance of this duty involves the fulfillment of the potentials with which the individual is endowed and constitute his or her contribution to the community's development.

There are, however, some rights which are enjoyed by some people in the community whether they have duties to perform or not. Persons who fall into this category include children, the sick, the aged, the physically and mentally challenged and the deprived. The challenged person also must enjoy the rights that would *enable* him or her to contribute his or her quota to development. Even if the person is unable to perform duties he or she is still entitled to some other rights which will *enable* the enjoyment of life in a dignified way. The aged also need to enjoy rights similar to those enjoyed by the challenged for similar reasons. Another reason for the enjoyment of special rights by the aged is to show appreciation for their role in the development process while they were young and fit.

Generally, the contribution of the deprived to development is *negative* or, at best, *passive*. *Passive* contribution results from depriving a member of the community some of the rights that each and every member of the community is entitled to enjoy for the purpose of realising development. This is called partial deprivation. In such a case, no matter how much such a member would like to contribute to development, he or she will be inhibited from fully executing his or her duties. He or she can be coerced, directly and indirectly, to contribute *actively* to development. But the contribution would not

⁶⁶ This assertion is supported by such proverbs as *Ti koro nko agyina* : "Two heads are better than one;"

lead to the full development of all the four entities of the community, except for those who tread the corridors of power. Such development is also unsustainable and is unable to offer a sense of fulfillment for the deprived person.⁶⁷

When a member of the community is denied a substantial part of his or her rights – substantial deprivation -- the contribution of such a person to the development of the community would be *negative*. Such a person's slogan will be: "if the community does not seek my good I also don't have to seek the community's good." He or she then becomes alienated from the community's values, norms and even legal rules. As a result, the person will, either consciously or otherwise, seek to define his or her own style of living contrary to the established order, and may engage in anti-developmental or anti-community acts for the sake of survival, or simply as an expression of a personal vendetta against the community. Another effect is that such negative contributions increase the needs of the community. Thus, instead of the individual contributing to meet those needs, he or she rather adds to the demand for them, thus putting extra burdens on other members of the community making *positive* contributions. Like the *passive* contributor, he can also be coerced into *active* contribution but the contribution would be even more unsustainable.

Against the background of the foregoing analysis, rights, in the context of the theory of community emancipation, can be defined as socio-economic and political claims and entitlements which are exercised and enjoyed by human beings *qua* human beings to enable the realisation of potentials, the utilisation of capacities and performance of duties that will lead to the meeting of needs and the attainment of development.

2: The Stages Of Community Metamorphosis

A: The *Communal* Stage

This stage corresponds with the first stage of human community metamorphosis. From the normative point of view, it also represents an ideal community that the human

⁶⁷ Appendix D.

society is supposed to strive towards. The theory of community emancipation supports the view that the three broad types of political systems identified as the “stateless,” the autonomous and the centralised are a development, one from the other.

The Akan political system evolved from the *communal* stage.⁶⁸ The *communal* stage is depicted as representing the metamorphosis of the family into a lineage and an amalgam of lineages to form the “acephalous” or “stateless” political system.⁶⁹ In general, this system underwent further metamorphosis into the other forms of traditional political societies. Yet, some naturally never metamorphosed beyond the communal level. Others would have done so had that projected metamorphosis not been aborted by the advent of colonialism. However, it is not all traditional political systems that pass through this process, since some political communities are breakaway groups from other systems. The Akan political system, however, was able to metamorphose beyond this level to the *political*.⁷⁰

At the *communal* stage, the “laws” of the land are based on the norms and belief systems of the community. There is no central political authority to enact laws and ensure social control and orderliness. However, orderliness is maintained through the prevalence of a sense of community feeling and fellowship and the presence of a priestly authority who has the authority from the Supreme Being and the gods to impose sanctions for breach of the community moral code. Thus, enforcement of law, order and respect for rights and performance of duties is strictly by communal and religious sanctions.

The *communal* community inhabits a “natural habitat” and makes the best effort to manipulate, overcome and bring it under its control. The needs of the *communal* community are simple. They cover food, shelter and clothing (physical), informal education and love and affection (mental, emotional and psychological), religious (moral/spiritual) and art (aesthetic). The needs at the family and community levels are

⁶⁸ One reason for the recognition of the royal family is that their ancestors are reputed to have formed the nucleus of that particular political organisation.

⁶⁹ Represented by the Band, the Classical Segmented and Universal Segmented systems under Potholm’s classification. C. Potholm, *supra* note 22.

the aggregate of the basic individual needs and the environmental constraints towards achieving those needs that the community faces. Therefore, the duties that arise are among others, to invent simple tools and implements for hunting and farming.

Community fellowship among the Akans involves the formation of communal associations. They are basically social and economic. The social ones include male and female associations through which the youth are initiated into adulthood. The young male adults are taught community responsibilities, including how to take part in decision-making, how to raise a family and be a responsible father, trade learning, etc. Women's training is basically in the art of home-keeping and how to be a subservient wife. Economically, groups are formed to help promote the economic development of members. One such group is the *Nnobia* (literally meaning "helping to weed") group where members take turns to help members weed their farms.⁷¹ There are also hunting associations.

In the *communal* community, the concept of rights emanates from the common belief that life is sacred and must not be violated.⁷² They realise that the only way to subdue nature and overcome it is to assign duties among themselves. The ability to perform duties is dependent on the realisation of talents, capacities and potentials. The realisation of these talents also hinges on imposing a further duty on one another to enable the creation of a conducive atmosphere within which one could realise his or her potentials and contribute to development. The second type of duties creates the correlative right on the members. These rights include rights *to be*, *to do* and *to have*. Rights *to be* include the right to life,⁷³ conscience,⁷⁴ religion,⁷⁵ fair treatment, education,

⁷⁰ See details below.

⁷¹ It is perhaps for the sake of the *Nnobia* concept that one proverb goes that *Okuafo se n'afuo dooso se sen koraa a odo ne nyinaa* (No matter how many farms the farmer has he is not daunted about weeding all of them).

⁷² This is not to say, however, that there were no violations. People were still killed for ritual and other purposes. Others were also subjected to forms of slavery and abuse. Confirmed by Osita Eze, in O. Eze, *Human Rights in Africa: Some Selected Problems* (Lagos: Nigerian Institute of International Affairs & Macmillan Nigeria Publishers Ltd, 1984).

⁷³ At this stage, this right simply implies the right not to be killed. As the community metamorphoses new meanings are acquired. See below.

health, recreation, marriage, family, care and communal fellowship. Rights *to do* are expressed in the right to movement, assembly, expression, association, to work and to raise a family. And, rights *to have*, in the right to property, private and communal, tangible and intangible. These rights are together labelled *communal* rights – a combination of socio-economic rights and *socio-economic* “civil” rights.⁷⁶

Socio-economic rights refer to the type of rights that the community members enjoy in relation to their proprietary and inheritance rights. *Socio-economic* “civil” rights, on their part, are so named because they are exercised at the non-political or micro level (eg., within the family, on the farm, at the workplace and in relationship with one another). They are qualified as “socio-economic” because at the *communal* stage no political institutions are established yet. These rights are not statist because there is no political authority to recognise them and police their observance, hence the “civil” rights being *socio-economic*, not *political* civil rights.⁷⁷ Besides, they did not arise at the *communal* stage by way of an effort to counter the excesses and arbitrariness by stronger and more domineering humans, or an oppressive government. Consequently, their exercise is not asserted against a governmental authority. They are exercised to enable the human person to attain his or her being, to realise the potentials and talents he or she is endowed with and to meet socio-economic needs. The socio-economic needs are enshrined in the promotion of good neighbourliness and fostering a sense of fellowship. It is also to create space for one’s neighbour so as to enable the community, acting in a joint effort, to overcome nature (*achieve*) and attain development that is commensurate with its stage of metamorphosis.⁷⁸ *Political* civil rights, on their part, help to create a

⁷⁴ The right to conscience here is the stepping stone to the exercise of the right to religion for it is the conscience that helps the individual to be religious. This situation is unlike the development of the right to freedom of conscience which is rather said to emanate from the right to freedom of religion the abused Christians claimed from their persecutors. See Ethel Groffier, “Les aspects juridiques de la tolérance: Essai de terminologies,” in E. Groffier and Michel Paradis, *The Notion of Tolerance and Human Rights* (Carleton: Carleton University Press, 1991) 67.

⁷⁵ One realises that the “fundamental rights” which usually have freedoms attached to them, such as right to freedom of expression are referred to without the “freedom” attached to it. The reason for this is given below in my analysis of rights under the political system.

⁷⁶ Appendix B.

⁷⁷ See details under *political* stage below.

⁷⁸ Appendix C.

protective and enabling environment for the exercise of *socio-economic* civil rights but the two are exercised in different contexts. The *political* are exercised at the governmental level, be it the national, district or village level, to, *inter alia*, articulate grievances against the government and other non-state actors, and to make claims against these entities.⁷⁹

The inter-connection between the various elements of *socio-economic* “civil” rights is as follows. Through a process of thinking, opinions are produced on what should constitute “needs.” The right of expression is then used to convey the opinions of individuals. In this regard, the right of thought, including rights of religion and conscience, provide the ingredients for expression. Without them, the right of expression is useless. The reverse is equally true, for the right of expression is meaningless absent human interaction and communication, and also in the absence of right of association, movement and assembly. This latter set of rights draws important relationships to right of expression in the sense that people cannot associate with others or assemble together if their movement is restricted. Equally, their meeting will be useless unless they can express their views and grievances, and articulate and channel them to whomever may be concerned. The other rights work together to make the right of expression complete, meaningful and worth exercising.

Development at the *communal* stage goes on unhindered (but at a relatively slow pace) since the needs-capacities-duties-rights framework and the development structure are not disturbed. This makes the *communal* community the most ideal environment for development to proceed on egalitarian basis.⁸⁰ Here, the relationship between rights and development is the *active* type. The *active* relationship rests on the principle that human rights is the key to development. Also, that human rights is a sub-set of development. So any notion of development which is not founded on human rights, does not recognise human rights, or is anti-human rights is not development *per se*. It is merely a type of change that is not *holistic* and is also *unsustainable*. Thus, the Akans believe that one

⁷⁹ See details *infra*, under “The Political Stage.”

⁸⁰ Appendix A.

cannot perform the duties he or she owes without recognition of the person's rights. This belief is captured by such proverbs as "One cannot blow the horn on an empty stomach." Also, it is said that *Obaako mmu oman* (One man rule is impossible and frowned upon). This means that without the respect for rights and the recognition of democracy a community cannot function and develop. These factors are also essential to promote peace in the community, expressed in the proverb, *Ohene nya ahotenafu pa a ne bere so dwo*: "in the abundance of counsellors a king's reign will be established in peace." Another proverb also seeks to place the dignity of human nature at the centre of development or progress: *Nnipa na ehia. Me fre sika, sika nkasa; me fre ntoma, ntoma nkasa*: "It is man that counts. I call upon gold, it does not answer. I call upon my drapery, there is no answer. It is man that counts."⁸¹

B: The Political Stage

When the *communal* community begins to expand with time, it reaches a stage where the limits of human altruism begin to show. The development of technology for manipulating the environment paves the way for more sophisticated material development. Through this process and other means, the more ingenious, aggressive and enterprising of the community membership become increasingly acquisitive and ultimately, greedy and domineering. Coupled with an increase in population and stress on supply and demand, the aggressive, the sly and ingenious emerge as the traditional economic elites. They engage in extravagance and tend to arrogate to themselves the power to control the economic life of the rest of the community.⁸² Some use that status to attain political power. The capture of political power goes with abuse of rights of the non-elite who become marginalised from their

⁸¹ K. A. Busia, *The Position of the Chief in the Modern Political System of the Ashanti: A Study of the Influence of Contemporary Social Changes on Ashanti Political Institutions* (London: Oxford University Press, 1951) at 35.

⁸² An *adinkra* symbol in this regard is expressed as *Koforidua frawase, dea mede wo reye!* It literally translates as: "The flowers (riches) of Koforidua, what use do I have of you!" It is associated with the ostentatious display of wealth that went with the urbanisation and prosperity of Koforidua, the current Eastern Regional capital of Ghana, in the wake of the success of the cocoa and mining industries within that locality.

community's development structures.⁸³ An Akan *adinkra* symbol that partly captures this assertion is stated thus: *Kookoo dua ye sika dua; kookoo see abusua, paepae mogya mu*: "Cocoa production is a source of wealth and development but it has the tendency to tear the family apart."⁸⁴

This phenomenon introduces a new entity (the ruling group) among the four original types that form the development structure of the community. The ruling group upsets the development structure by marginalising, co-opting or suppressing the original entities on the structure. It also arrogates to itself the power to apportion how much of what duties, rights and consequently development, should be owed and enjoyed by whom. In so doing it turns the development structure into a dependence structure.⁸⁵ Such a disturbance results in inadequate and lop-sided development.⁸⁶ The needs of the ruling elite are prioritised and the non-members of the ruling class are marginalised and forced to perform duties assigned by the ruling class in an environment of rights abuse in order to meet the needs of the ruling group. An Akan proverb that addresses this question goes thus: *Tumi te se kosua. Wo somu den a, epae; se woanso mu yie nso a, efiri wo nsa bo fam ma epae*. A literal translation of this is rendered thus: "Power is a fragile as an egg. When held too tightly it breaks; if too loosely, it would fall and break." This is a historical-political statement which expresses the need to learn from hindsight and share political power. Meanwhile, the needs of the average person are not catered for or are met only in a piecemeal fashion. As a result, most of their needs recycle

⁸³ Appendix D.

⁸⁴ Cocoa, which is one of the major export earners of Ghana, was introduced into the then Gold Coast from Fernando Po in the late nineteenth century by a Ghanaian called Tetteh Quarshie. It soon became Ghana's leading foreign exchange earner. It brought in its wake changes in land ownership and the land tenure system of Ghana. In addition cocoa contributed to deepening the level of social stratification in the country. It has also been a source of family disputes over land ownership, political upheavals and landlessness in certain rural communities in Ghana.

⁸⁵ It is to avert such occurrence in the future that the new chief is made to swear an oath of allegiance that purports to bind him to respect the principles of democracy and human rights: "We do not want you to abuse us. We do not want you to be miserly; we do not want one who disregards advice; we do not want you to regard us as fools; we do not want autocratic ways; we do not want bullying; we do not like beating. Take the Stool. We bless the Stool and give it to you. The Elders say they give the Stool to you." See K. Arhin, *supra* note 32 at 12.

⁸⁶ Captured by the proverb on the cocoa tree.

themselves and accumulate.⁸⁷ A proverb that relates to this issue of uneven development states thus, "All the peppers on a tree do not ripe at the same time."⁸⁸

The disturbance on the development structure occasions a break-down of the norms and traditions of the people, and their *communal* rights are disregarded. This state of affairs adversely affects the balanced, egalitarian, *holistic* development of the community, destroying the development-conducive environment. As a result, the best that the oppressed and deprived people are able to realise is a *passive* contribution to development.⁸⁹

This scenario reflects the practice of the *negative* relationship approach to development. The *negative* relationship is defined on the notion that rights are a result of development, so rights exercise can be denied till development is attained. It is also the view that development is attained through the performance of duties minus rights exercise. Rights are exercised after performance of duties as a reward.

The needs of the community at this stage are similar to those required at the *communal* stage. But they are more complicated due to advances in technology and increases in population. In addition, the effort that is necessary to control or curb the excesses of the emerging ruling group becomes an important need at the *political* stage for the dispossessed, the subordinate and the deprived in the community.⁹⁰ In order to arrest the declining trend in development and restore the development structure, the deprived members of the community organise themselves into different groupings but with one aim in mind: to engage in a struggle to dislodge the ruling group and set up a government to manage their affairs for them.⁹¹ This struggle takes place because the people believe that power cannot be bought with money. It is said that *Wo nya wo ho a*

⁸⁷ Appendix D.

⁸⁸ See explanation above,

⁸⁹ "One cannot blow the horn on an empty stomach."

⁹⁰ Appendix C, particularly column 2.

⁹¹ This is another form of "civil society" that one comes across in the history of traditional African political philosophical/systems but is absent in that of Western political philosophy. They are of the associative and communitarian types.

wo nye dehyee, which means that one cannot be considered a royal by mere reason of his riches.

These struggles occur during the *era of instability* or the inchoate period of the *political* stage. Those who break off end up establishing their own development structures while those who remain continue the fight for the recognition of their rights and for their re-instatement on the development structure.⁹² The resolution of the struggle ushers the community into its *era of stability*. In both situations, a representative and democratic form of government is introduced for the first time as part of measures to forestall a repetition of such events. Government is formed to replace the oppressive ruling elite and to restore the marginalised entities on the development structure. Government is then given duties by the community to perform. These include: (i) protecting the ensemble of rights that have matured for exercise at the *political* state; (ii) government itself not abusing these rights; (iii) consulting the community and mapping out with them strategies for development; (iv) ensuring just redistribution of, and access, to the community's resources;⁹³ and, (v) engaging in fair and equitable distribution of the resources of the community which are realised through the performance of their duties.⁹⁴ Thus, according to the theory of community

⁹² Ayittey refers to this struggle as "voting with their feet." According to him, due to availability of land, it was not difficult for those who feel abused or cheated to migrate and set up their own socio-political system or join up with another tribal organisation that are sympathetic to their needs. See G. Ayittey, *supra* note 22 at 79.

⁹³ Redistribution is to be structured in such a way as to benefit, predominantly, those whose rights were abused at the transition to the *political* stage. Here the object of redistribution is not merely redistribution of wealth for compensation sake. Therefore, this is not a right to property from the rich but the rights *to be* and *to do*, and access to public space in order for the deprived to struggle on their own to acquire their own property.

⁹⁴ One can discern these responsibilities of the government from the pre-installation oath that a Chief-elect is made to swear in the Ashanti kingdom. It is during this latter era of political stability that a new elected chief is made to swear not to follow the lines of his predecessor(s) or the previous political system under which they served. See *supra*, note 85. The Committee of Experts that drew up a proposals for a draft constitution for Ghana's Fourth Republic also referred to this quotation in its report. In their view, the address was a demonstration of hatred of oppression, demand for popular participation in the decision-making process, mutual respect between the ruler and the ruled and an insistence that government must be for and in the interest of the governed. In another version of the pre-installation address, Ayittey quotes Kwame Arhin as including this, "We do not want you to disclose the origin of any person." See K. Arhin, *supra* note 32. Also G.N. Ayittey, *Africa Betrayed* (New York: St. Martin's Press, 1992). The king or chief is asked to renew this pledge during the community's yearly festivals.

emancipation, democracy in the Akan society emerged as a crucial tool to preserve human rights, the traditional socio-political institutions and development. These concepts have consequently bunched together in a synergetic relationship, each helping the other to flourish. But the foundation or the structure is human rights and the superstructure is made up of the rest.

The duties imposed on the government become extra rights that the community members enjoy at this stage as citizens of the political community. The *socio-economic* “civil” aspect of the *communal* rights is combined with its political version – *political* civil rights – to form civil rights or “freedom rights.” The civil rights at the *political* stage are converted from rights simpliciter to “freedom rights,” eg., from right to expression to the right to freedom of expression. The qualification of these rights is to place an emphasis on them as the basis of all human development and thus to “free” them from further abuse.⁹⁵

The groups that fought to introduce democracy also mature into an important aspect of the democratic structure. They become watchdogs on the government they helped to elect. The most important groups in this regard include the *Mmerantee kuo* (Young men’s association) and the *Asafo* company. They also help to set up other structures to promote checks and balances on the government such as the Council of Elders,⁹⁶ the Kingmakers,⁹⁷ the Queen-mother,⁹⁸ and the Village Assembly.

Part of the historical process of the political stage of Akan community metamorphosis is located in its colonial past.⁹⁹ Colonialism came to disturb this indigenous metamorphosis and forced communities that were at the *communal* stage into the *political* and thence into the, *advanced political* stage, but prematurely.

⁹⁵ See above under the sub-section under “The Concept of Rights.”

⁹⁶ These are made up of heads of the various lineages that compose the political community. They are advisors to the King and in most cases their advice can be binding on the chief or king.

⁹⁷ The Electoral college who nominate the prospective chief for the people to endorse.

C: The *Advanced Political Stage*¹⁰⁰

This stage is reached when the distribution of resources becomes acute and skewed at the *political* stage. That is where the system of checks and balances to promote equitable distribution of resources and respect for rights breaks down again. The result is that a sizeable portion of the population become deprived and resort to living in poverty with no political power or influence.¹⁰¹ An *adinkra* symbol expresses this scenario thus: *Ebi te yie, ebi nso nte yie koraa*: literally, “Some enjoying life to the full, but others are struggling or living in abject poverty.”

The *advanced political* stage was precipitated by the arrival of colonialism. An interesting but important *adinkra* symbol that captures this contention is expressed thus, *UAC nkanea dwann mma yenhunu awam adwadifoo*. A literal translation is rendered thus: “The bright UAC (United Africa Company, a subsidiary of the multinational corporation, UNILEVER) lights blinds you and thereby shelters the colluding merchants.” Colonialism came with its own administrative machinery and concepts of human rights and civil society which failed to recognise, and rather sought to replace, local political institutions. It sought to achieve this goal through the institutionalisation of the system of indirect rule whereby puppet chiefs were imposed on certain communities. Also some chiefs already in power were insulated from destoolment (removal from office) and encouraged to engage in rights abuse in order to further the

⁹⁸ Also an advisor to the Chief and head or prominent member of the Kingmakers.

⁹⁹ See details of it in Chapter 2.

¹⁰⁰ The discussion here still centres on a discussion of Akan culture. However, with the amalgamation of the several tribes such as the Gonjas, Ewes, Gas, Dagombas, etc., together with the Akans to form the Gold Coast and present-day Ghana, it is difficult to limit the discussion to the Akans. Secondly, this scenario finds expression and reflects insights which are likely to reflect the evolution of other societies in Africa and therefore call for parallel research to test my hypothesis and theoretical framework. Therefore, where necessary Ghana and/or Africa will be used, in addition to, or instead of, the Akans.

¹⁰¹ This is not to say, however, that before this stage everything was rosy and perfect for all citizens in each political community. This would be romanticising about traditional African political systems. Indeed there were abuses in each system, since no human institution is perfect. One cannot deny the existence of such practices as human sacrifice, slavery, killing of newly born twins or deformed children, etc in certain communities. However, the nature of abuse and deprivation was not institutionalised nor large scale, nor was the state or polity and there were some means of redress in

goals of colonialism. As a result, there was a breakdown of the watchdog role of the elements of the socio-political groups. Another important factor that fostered the arrival of the *advanced political* stage in Akan society is the replacement of the African concepts of rights with the Enlightenment model of rights and development on the African continent to supposedly transform the continent's "underdeveloped" economies into a "developed" one. Other colonial policies such as the haphazard drawing of borders and separating families across borders, etc. are all to blame for the forced and premature graduation of African political systems from the *communal* and *political* to the *advanced political* stage.

The oppressive policies of the new ruling elite, inheritors of the colonial legacy, continued after the attainment of political independence under different guises and concepts. These policies and concepts include the "basic needs" approach to development, political conditionality regimes, structural adjustment, globalisation, etc. Because these policies have followed the *negative* and *passive* relationship¹⁰² approach to rights and development, the development policies shaped out of these concepts have only resulted in unemployment, homelessness, poverty, break-down of the family, drug abuse, environmental degradation, etc., for the majority of the citizenry who are given little or no place on the development-turned dependence structure.¹⁰³ Meanwhile, the ruling group lives in affluence and uses its wealth and influence to undermine the rights and interests of the majority.

In such a situation, civil and political rights as introduced by the colonialists from their perspective and background – and enjoyed by them together with the local ruling group -- are found to be inadequate to re-establish the needs-capacities-rights-duties

certain respects. But communities were not chaotic and anarchic. There were rules which were supposed to guide community behaviour and punish infraction of the same.

¹⁰² The *passive* relationship is a natural progression from the *negative*. Because the *negative* relationship approach to rights and development does not give room for rights exercise, development becomes unsustainable when the deprived resort to *negative* contributions to development. Thus, before human rights are enjoyed as a result of, or as a reward for, development, the kind of development that is so far attained suffers. The ruling elite would then allow some limited space and time for rights to be enjoyed to "satisfy" the people and prevent such a tragedy from recurring: a *passive* relationship results.

¹⁰³ This captures the analysis made in the rest of this work.

framework necessary to promote *sustainable holistic* development. To realise this objective, that is, to create conditions approximating those of the *communal* stage, economic, social and cultural rights need to be re-introduced as the “third generation”¹⁰⁴ of rights. They are to make up for the lost opportunity denied the deprived to achieve their self-development and contribute positively to general development. Thus, while the theory of community emancipation justifies the introduction and enjoyment of economic, social and cultural rights, it finds it unacceptable that these rights should be used for propaganda purposes by African governments and presented to the people as generous hand-outs to pacify the hungry masses. It is also not to be seen as a call for redistribution of wealth as such, in the Marxist-Leninist fashion, but the granting of space and opportunity for the late-starters to make up for their lost opportunities.

At the *advanced political* stage, some of the *positive* rights become *corrective* rights, while still maintaining their *positiveness*. Examples are the rights to education, to work and to raise a family. These are the very rights which used to be exercised at the *communal* stage as socio-economic *communal* rights.

The next stage of the work is devoted to an analysis of the emergence of the debate regarding African philosophy in general, and how best to link it with rights discourse and development initiatives on the continent of Africa. The goal is to pave the way for taking a stance as to where Akan political development as I have described it fits into the discourse of the two schools of African philosophy that come out of this discussion.

II: An Historical Analysis Informing the Emergence of the Philosophical Debate

African philosophical thought or traditional African philosophy, according to Kwame Gyekye, is expressed both in the oral literature and in the thoughts and actions of the people. Thus, a great deal of philosophical material is embedded in the proverbs,

¹⁰⁴ See why such a designation in Chapter 2.

myths and folktales, folk songs, rituals, beliefs, customs, and traditions of the people, in their art symbols (*adinkra*) and in their sociopolitical institutions and practices.¹⁰⁵

The debate over the existence of an African philosophy passes through several stages and finally resolves into two competing schools, both represented by distinguished African and Africanist scholars in philosophy. Of course, there are other discourses on traditional African philosophical thought. Oruka outlines four trends in African philosophy. These are ethnophilosophy, philosophical sagacity (represented by Oruka himself who argues a self-described middle position between ethnophilosophy and professional philosophy), national ideological philosophy (represented by K. Nkrumah, Sekou Toure, Nyerere, Senghor, Césaire and Fanon) and professional philosophy, including Hountondji, Towa, K. Wiredu, Peter Bondurin, etc.¹⁰⁶ Oruka can also be included in this group, which calls itself “the school” due to the similarity of approach. Where Oruka differs significantly is with regard to the contention that philosophical tradition in Africa is only presently – in their joint efforts – beginning to develop.¹⁰⁷

These four trends can be compressed for present purposes into two schools, the *holistic* and *contemporarist* schools. I identify the proponents of a traditional African philosophical thought as the *holistic* school in the sense that they adopt the stance of looking into the past and the present to find solutions to Africa’s contemporary problems.¹⁰⁸ The opponents of a notion of traditional African philosophical thought are labelled the *contemporarist* school for adopting the self-negation approach towards one’s cultural past. This school looks to contemporary solutions founded on an adoption of “the spirit of Europe.”¹⁰⁹ It is important to note that African

¹⁰⁵ Gyekye *supra* note 32 at 13. I adopt this framework as I see it as all-encompassing and comprehensive.

¹⁰⁶ See Oruka, *supra* note 27. In my analysis I will seek to touch on most of these issues in the context of the two competing debates.

¹⁰⁷ Serequeberhan, *supra* note 23 at 21. In my analysis I will seek to touch on most of these issues in the context of the two competing debates.

¹⁰⁸ K. Gyekye and his group, *supra* note 32.

¹⁰⁹ Hountondji and group. The “the spirit of Europe” (*l’esprit de l’Europe*) is the original idea of M. Towa. See Towa, *supra* note 29 at 52.

philosophers who write from the background of Akan philosophy belong to both camps.¹¹⁰ Two main issues divide the two schools that I have isolated: first, whether there is a traditional African philosophical thought that should be accepted as part of current African philosophy. The second issue concerns how philosophy should be employed to solve Africa's contemporary problems.

The ethnocentric attitude of eighteenth century Western philosophers¹¹¹ regarding, *inter alia*, what philosophy is, the environment in which philosophy or the exercise of reason can take place, and the mentality of the people who are supposed to be philosophical, is largely responsible for sparking this debate. Enlightenment philosophers such as John Locke, Adam Smith and Montesquieu are on record as espousing derogatory views of non-European societies, especially in Africa. For example, Montesquieu opined:

Most of the people on the coast of Africa are savage or barbarian, they are lazy, they have no skills, they have an abundance of precious metals which they take straight from nature. All civilised people therefore are in a position to trade with them to their advantage. They can get them to value many things which are of no value, and get a very high price for them.¹¹²

This tradition was continued in the works of G.W.F. Hegel,¹¹³ David Hume,¹¹⁴ Immanuel Kant,¹¹⁵ Karl Marx,¹¹⁶ and others. For example, relying on the theory of

¹¹⁰ Prominent among them are K. Gyekye and K. Arhin, belonging to the *holistic* school and K. Wiredu in the *contemporarist* camp.

¹¹¹ I contend that the ethnocentrism inherent in much of the European philosophical tradition falls under Kopytoff's first categorisation of ethnocentrism: "the vulgarized meaning of the denigration of other societies." which restricted the researchers to observe issues and phenomena through the spector of Western liberalism. Igor Kopytoff, "Socialism and Traditional African Societies," in William Friedland and Carl Rosberg, eds., *African Socialism* (Stanford: Stanford University Press, 1965), 53.

¹¹² Montesquieu, *De l'esprit des lois*, XXI, 2 in *Oeuvres Complètes*, Paris, Gallimard, 1951, Vol. II, 602-603. cf. Jean-Francois Bayart, *The State in Africa: The Politics of the Belly* (New York: Longman, 1993) at 2. Also L. Trakman, "Hate Speech Hurts: A Community Perspective," (Unpublished essay. Copy on file with writer). Adam Smith, *Lectures on Jurisprudence* (Oxford: Clarendon Press, 1978).

¹¹³ Eg., Hegel, *Philosophy of Right*, Trans. T.M. Knox (Oxford: Oxford University Press, 1967).

¹¹⁴ D. Hume, *Essays* (London: George Routledge & Sons Ltd,), esp 152, 153.

¹¹⁵ See E.C. Eze, "The Colour of Reason: The Idea of "Race" in Kant's Anthropology," in E.C. Eze *supra* note 28 for an in-depth analysis of Kant's philosophy on race.

¹¹⁶ J. Hampden Jackson, *Marx, Proudhon and European Socialism* (London: English Universities Press, 1951), esp at 144. Also Ladimeji, "Nationalism, Alienation and the Crisis of Ideology," Vol. 46 (Oct/Dec 1974) *Transition* at 40.

social darwinism,¹¹⁷ some twentieth century European philosophers have argued that the “mythical primitive world” was not adaptable to change, and therefore, as dictated by the tenets of the Enlightenment model of industrial development, it had to wither away. Jan Berting, by way of criticism, writes:

It is evident that the universalism on which the [industrialist] model is based contrasts with the cultural and social diversity of the world in which the industrial – and postindustrial – development take place. According to the logic of this model, all of the social institutions and cultural differences that hamper the logic of industrial development are doomed. Social and cultural differences between nations, regions, and peoples continue to exist only as long as they not stand in the way of progress or when they contribute to a nation’s specific advantage, for example when traditional values help to discipline the workforce and to comply with the exigencies of organization change.¹¹⁸

It was no wonder then that G. Gusdorf argued that “confronté a des situations neuves, le “primitif”, pris dans l’univers mythique, tout comme l’animal, se trouve desarmé et sans ressources pour s’y adapter.”¹¹⁹ Gusdorf continues that it is this inability to adapt that accounts for the disappearance of colonised peoples under the shock of European expansionism.¹²⁰ In support, Hegel also writes that the disappearance of the American Indians was caused by the fact that their “civilisation was wholly natural and that it had to collapse when the [European] spirit appeared.”¹²¹ With regard to Africa, Hegel states:

[Africa] is not interesting from the point of view of its own history, but because we see man in a state of barbarism and savagery which is preventing him from being an integral part of civilisation. Africa, as far back as history goes, has remained closed and without links with the

¹¹⁷ Jan Berting, “Technological Impacts on Human Rights: Models of Development, Science and Technology, and Human Rights,” in C.G. Weeramantry, ed., *The Impact of Technology on Human Rights: Global Case-Studies* (Tokyo: United Nations University Press, 1993), 13.

¹¹⁸ *Ibid*, 24. This model, also referred to as the “technological imperialism” model, was to rely on two main driving forces to determine the development of society: first, the march of rationality, resulting from the inquiring mind that follows the rules of positivist – logico-empirical – science, while analysing the physical and social world in the pursuit of truth. Second, the open international large-scale markets which compel industry to adopt quickly the best available technology in production processes. Failure to do so by an enterprise or branch of industry would result in quick deterioration of its international competitive position. *Ibid*, 23.

¹¹⁹ Towa *supra* note 29 at 11. Translated by myself thus: “confronted with unfamiliar conditions, the primitive person, steeped in mythology, completely like an animal, finds himself helpless and without the necessary means to adapt.”

¹²⁰ *Ibid*.

¹²¹ Author’s translation from Hegel, *Leçons sur la philosophie de l’Histoire* (J. Gibbelin, trans.) (Paris: Vrin, 1945) 78. cf Towa, *supra* note 29 at 12.

rest of the world. It is the country of gold which is closed in on itself, the country of infancy, beyond the daylight of conscious history, wrapped in the blackness of night.¹²²

Thus, in his reaction to Hegel's *Philosophy of History* which he describes as "a celebration of the European spirit," Irele argues that "the way in which Africa features in Hegel's speculations serves further to underline this direction of his philosophy, for excluding Africa totally from the historical process through which, according to him, the human spirit fulfills itself, Hegel places Africa at the opposite pole to Europe, as its ideal and spiritual antithesis."¹²³

Regarding the role of the exercise of rights and freedoms in civil society, Hegel argues that freedom cannot be exercised in a vacuum by an isolated individual, but only in the midst of other individuals. He went on to suggest that since it has been historically proven that philosophy only flourishes in an ambiance of political freedom and among elements of civil society, and that such freedom does not exist among the aboriginal peoples of America and Blacks because of their being steeped in "naturalness", one could not talk of rights as being part and parcel of their heritage.¹²⁴ Thus, in reaction, Bondurin laments: "for too long, the Western conception of Africa has been a continent that has contributed little or nothing to human ideas and civilisation."¹²⁵

These shocking, yet unfounded, conclusions laid the ground for the "civilising," "christianising" and colonising mission of Europeans in Africa.¹²⁶ Chukwudi Eze contends that "for Hegel, the imperial and colonial expansion of Europe is the necessary and *logical* outlet for resolving the problem of poverty inherent in capitalism." For, according to Hegel, it is poverty and the need for market that

¹²² Hegel, *La raison dans l'histoire. Introduction a la philosophie de l'Histoire* (Paris: U.G.E., 1965) at 247. cf J.-F. Bayart, *supra* note 112 at 3.

¹²³ Irele, *supra* note 1 at 11.

¹²⁴ Hegel, *supra* note 113 at 78 cf Towa, *supra* note 29 at 18.

¹²⁵ Peter Bondurin, "The Problems of, and Prescriptions for, an Action Philosophy in Africa," paper delivered at the Colloquium on the Place and Role of the Humanities in Africa Today, University of Ghana, Legon, April 1975, at 5. cf Irele, *supra* note 1 at 11.

¹²⁶ Frantz Fanon, *Wretched of the Earth* (New York, NY: Grove Press Inc., 1963).

drives it [the capitalistically “mature” European society] to push beyond its own limits and seek markets and so its necessary means of substance, in other lands which are either deficient in the goods its overproduced, or else generally backward in industry.¹²⁷

The forms of the modern state and institutions of civil society which arose in Europe were then imported into the African colonies to create a public domain for the legitimization of colonial rule¹²⁸ and to facilitate the exploitation and plunder of the continent.

Meanwhile, social anthropologists were employed by their colonial home governments,¹²⁹ and even by security services,¹³⁰ to continue the foundational work of their philosophical collaborators. They arrived in Africa with pre-conceptions conditioned by the philosophical and historical writings about Africa. In fact, in the case of Immanuel Kant – who is described by Earl W. Count as having produced “the most profound raciological thought of the eighteenth century”¹³¹ – he did teach anthropology and geography as well. He is responsible for introducing the former subject in German universities in 1772-73 when he started his lectureship.¹³² It was said that anyone who disagreed with Kant’s idea of compacting the whole species into one and the same form as the European *humanity* would be “treated as a rebel against *fundamental principles of human nature*.”¹³³

¹²⁷ Quoted from E.C. Eze, Introduction, in E.C. Eze *supra* note 28 at 9.

¹²⁸ Partha Chatterjee, “A Response to Taylor’s ‘Modes of Civil Society’,” (Fall 1990) Vol.3 No. 1 *Public Culture*, 119 at 130.

¹²⁹ Kwesi Wiredu, for instance mentions R.S Rattray, one of the most famous European anthropologists in Ghana (then Gold Coast), was officially employed as Gold Coast Government Anthropologist. See also, Talal Asad, “Introduction,” *Anthropology and the Colonial Encounter* (New York, NY: Humanities Press, 1973), 9. Gerard LeClerc, *Anthropologie et Colonialisme* (Paris: Librairie Arthème Fayard, 1972) K. Gough, “Anthropology: Child of Imperialism (April 1968) Vol 19, No 11 *Monthly Review*; J. Banaji, “Crisis in British Anthropology,” (1970) No. 64 *New Left Review* 71, etc.

¹³⁰ Peter Forster, “Empiricism and Imperialism: A Review of the New Left’s Critique of Social Anthropology,” in A. Talal, ed., *supra* note 129, 23 at 24, 26.

¹³¹ E.W. Count, *This is Race: An Anthology Selected from the International Literature on the Races of Man* (Schuman, New York, 1950) at 704. cf E.C. Eze *supra* note 115 in E.C. Eze, *supra* note 28.

¹³² Eze, *ibid*, 103 at 104.

¹³³ Quoted by Eze from Steven Lestition, “Kant and the end of the Enlightenment in Prussia,” (Mar. 1993) Vol.63 *Journal of Modern History* 57, esp. 95-96. See Eze, *ibid*, 131.

The task of the anthropologist was to “stud[y] primitive societies directly, living among them for months or years ... The social anthropologist studies societies as wholes – he studies their ecologies, their economics, their legal and political institutions, their family and kinship organization, their religions, their technologies, their arts, etc as parts of general social systems.”¹³⁴ The object was to confirm what had already been said about Africa and to facilitate the efficient administration of the colonial territories through a dual process. First, to demonise and suppress African cultural practices, simultaneously inculcating the “superior” European values and attitudes into the African psyche.¹³⁵ And, secondly, to justify the colonisation of the continent for its exploitation and plunder in the name of civilisation and christianity.

One well-known anthropologist whose works, like Hegel’s, in the philosophical domain, sought to further tear the African spirit apart, was Lucien Levy-Bruhl.¹³⁶ He is responsible for theorising about the inferiority of the African peoples and providing a justification for the mutilation of their cultures and their possible annihilation. Although his works did not specifically relate to civil society, by limiting the ability to reason to the European mind, he was making the point that it was only the European nations that would have notions of civil society. For civil society could only thrive in an environment where public opinion is allowed to flourish.¹³⁷ Thus, in arguing that a logical mind and rationalist philosophy was the exclusive preserve of European peoples who have emerged from the Mediterranean civilisation and that all other societies are relegated to the status of the “primitive,” Levy-Bruhl was effectively arguing that civil society could not exist in African societies and the exercise of rights was non-existent.

¹³⁴ Evans Pritchard, *Social Anthropology* (London, 1951), at 11. cf Talal Asad, *supra* note 129, 23 at 11-12.

¹³⁵ E.C. Eze, *supra* note 28 at 10.

¹³⁶ Lucien Levy-Bruhl, *Les fonctions mentales dans les sociétés inférieures* (London: Allen and Unwin, 1926); *La mentalité primitive* (Oxford: Clarendon Press, 1931).

¹³⁷ Charles Taylor, “Modes of Civil Society,” in (1990) Vol. 3 No. 1 *Political Culture*, 95 at 108, 109.

The social anthropologists confined themselves principally to the cultural aspect of the communities they studied, claiming to be politically neutral,¹³⁸ and finding excuses to overlook the economic and political circumstances of the colonised peoples. Where they ventured into the political, they concerned themselves solely with the pre-colonial political systems. Even in this context, they failed to venture into an analysis of the internal contradictions, tensions, discontinuities and confrontations occasioned by elements of traditional “civil society” agitating for and exercising their rights and democracy within traditional political contexts. They also failed to link the past to the present or to examine how the pre-colonial African political systems could be tailored to suit the liberation struggle then being waged to topple colonialism. Neither were they interested in what ways a post-colonial Africa could learn from its pre-colonial heritage. As a result, these anthropologists arrived at unfounded conclusions, *inter alia*, that African societies did not possess a system of democracy. Human rights were not noticed at all. Since democracy was not “found” within the traditional African communities and rights were inextricably linked with (western-style) democracy, the conclusion they came to was that rights simply did not exist. In any event, to recognise any indigenous rights would have fettered the colonialist enterprise.

Before African writers and intellectuals themselves could “de-ethnocentrise” the work of Levy-Bruhl and his group there arose the ethnophilosophical school whose leading proponent is Placide Tempels. Tempels’ work marks the watershed of African philosophy. It came to deconstruct “the intellectual edifice of slavery and colonialism” which sustained the claims of the Enlightenment philosophers and anthropologists about the “primitive” and “pre-logical” state of African society. Tempels contended, *inter alia*:

¹³⁸ T. Assad, *supra* note 129.

To declare on *a priori* grounds that primitive peoples have no ideas on the nature of being, that they have no ontology and that they are completely lacking in logic, is simply to run one's back on reality."¹³⁹

Ethnophilosophy engages itself in locating African philosophy in "ethnology, linguistics, psychoanalysis, jurisprudence and sociology and study of religions"¹⁴⁰ of the people: in their mythical-religious conceptions, and lived ritual practices of ethnic Africans.¹⁴¹ The term "ethnophilosophy" is attributed to Towa who describes the methodology involved thus:¹⁴²

Leur façon de procéder n'est ni purement philosophique, ni purement ethnologique, mais ethno-philosophique. L'ethno-philosophie expose objectivement les croyances, les mythes, les rituels, puis brusquement, cet expose objectif se mue en profession de foi métaphysique, sans se soucier ni de réfuter la philosophie occidentale, ni de fonder en raison son adhésion à la pensée africaine. De la sorte l'ethno-philosophie trahit à la fois l'ethnologie et la philosophie. L'ethnologue décrit, expose, explique, mais ne s'engage pas (du moins pas ouvertement) quant au bien-fondé de ce qui est ainsi décrit, expliqué. Elle trahit aussi la philosophie parce que la pierre de touche qui lui permet d'opérer un choix entre les diverses opinions est avant tout l'appartenance ou la non appartenance à la tradition africaine, alors qu'un exposé philosophique est toujours une argumentation, une démonstration ou une réfutation.¹⁴³

Related to the ethnophilosophers are the "progressive"¹⁴⁴ or "sympathetic" ethnologists – the cultural pluralists. This group sought to debunk the

¹³⁹ P. Tempels, *Bantu Philosophy* [English Trans.] (Paris: Présence Africain, 1959), at 10.

¹⁴⁰ *Ibid.*

¹⁴¹ T. Serequeberhan, *supra* note 23 at 17.

¹⁴² One can identify two types of African ethnophilosophers: the academic and the political (although Hountondji founds his categorisation on whether the writer builds his concept of philosophy on religion or not). The former include Alexis Kagame, "La philosophie bantou-rwandaise de l'être," in Alphonse Smet, *Cahiers philosophiques africains* (July-Dec 1972) No 2, text 294; William Abraham, *The Mind of Africa* (Chicago: University of Chicago Press & Weidenfel and Nicolson, 1962) etc. The latter include, Senghor, *Liberté I. Négritude et humanisme* (Paris: Editions du Seuil, 1964).

¹⁴³ M. Towa, *supra* note 29, at 31. Personal translation: "Their approach is, in all respects, neither philosophical nor ethnological, but ethno-philosophical. The ethnophilosopher engages in an objective exposition of the beliefs, myths, rituals, and then abruptly, this objective expose is changed into a profession of metaphysical faith, without a concern for, or a refutation of Western philosophy, neither to provide a reason on which to found an African thought. In a sense, ethnophilosophy in one breath betrays both ethnology and philosophy. Ethnology describes, exposes, explains, but does not involve itself (at least not explicitly) in analysing the validity of what it describes and explains. It also betrays philosophy because the basis for allowing it to make a choice between various opinions is above all the idea of belonging or not belonging to African tradition. But a philosophical expose is always an argumentation, a demonstration or a refutation."

¹⁴⁴ Hountondji's term. See Hountondji, *supra* note 1, at 159. They include Melville Herskovits, *The Human Factor in Changing Africa* (New York: Vintage Books, 1967); Jaques Maquet, *Civilisations of Black Africa* (New York: Oxford University Press, 1972); Lucy Mair, *Primitive Government* (Baltimore: Penguin Books, 1962), S.N. Eisenstadt, 'Primitive Political Systems: A Preliminary Comparative Analysis,' (1959) *American Anthropologist*, 61, 200.

monoculturalist theory embodied in European philosophy and anthropology. It consequently contends for the richness of other cultures and the need to recognise their importance. The conclusion of their findings is that traditional African political systems were generally democratic.¹⁴⁵ However, according to Hountondji, when this school tried to reconstruct the colonial past of African societies they failed to appreciate “the evolution, revolutions and discontinuities that may have affected them.”¹⁴⁶ Cultural pluralism in Africa was largely attributed to the impact of Western civilisation on the continent. The “pluralists,” however, also continued to divorce human rights from their analysis. I attribute this attitude to the fact that the latter-day anthropologists were influenced by the liberal rights perspective of seeing rights as being associated with a bill of rights or a constitution, individualism, cosmopolitanism and modernisation.¹⁴⁷ Their focus was upon the abuse of power by individuals in the community against his or her neighbour, and upon governmental abuse. As for Tempels, he had a hidden agenda of his own which is exposed in the title for the concluding chapters of his work: “Bantu philosophy and our mission to civilize.” Thus, according to Eze, Tempels intended *Bantu Philosophy* as “a “handbook” for the missionary-cultural worker: a plea to the European colonialist administrator or missionary that the African’s “philosophy” and culture ought to be understood and respected in order for the “civilizing” mission to succeed.”¹⁴⁸

¹⁴⁵ Meir Fortes and E. Pritchard, eds., *African Political Systems* (London: Oxford University Press, 1940).

¹⁴⁶ Hountondji, *supra* note 1, at 163.

¹⁴⁷ This view is reflected in the works of contemporary Africanist writers on human rights and democracy in Africa, like Rhoda Howard and Jack Donnelly who still cling to this belief, and whose works are examined later below. I label this less insidious type of ethnocentrism, described by Kopytoff as “a universal tendency of all people to see other culture patterns through categories and concerns of their own,” “normal” ethnocentrism. Kopytoff’s second definition falls into his concept of *social mythology*. He argues that the biases in normal ethnocentrism derive from a single ethnocentric core of the observer’s culture, consisting of the assumptions and myths about his own society and, by projection, about society in general. Langley shares similar views on Kopytoff’s definition of normal ethnocentrism when he defines ethnocentrism as bringing one’s “mental sets and possibly preconceived paradigms [to] bear on an alien culture.” See Ayo Langley, *Ideologies of Liberation in Black Africa 1856-1970* (London: Rex Collings, 1979) at 10; also, Igor Kopytoff, *supra* note 111, 53.

¹⁴⁸ E.C. Eze, *supra* note 115 at 11.

The admission of the existence of an African philosophy, and an African reason, and consequently an African humanity, was embraced by Africans engaged in nationalist, anticolonial projects.¹⁴⁹ Thus, following in the trail of the “progressive” ethnographers, African nationalist writers began writing with the aim of refuting the negative claims made against them and their cultures. Writing in sympathy with the nationalist writers, Abiola Irele warrants that:

The intellectual presuppositions of colonialism represented a formulation in negative terms of African identity; its racism was a large statement about the nature of the African which called for a refutation. In the intellectual confrontation with imperialism, it was necessary to enforce this refutation by elaborating a new set of valuations which reversed the terms of the colonial ideology. In the event, it can be observed that the terms of reference of modern African thought came to be defined largely by the colonial ideology and its vicissitudes within the discipline of anthropology.¹⁵⁰

Chatterjee argues further that the institutions of civil society that the European colonisers brought into Africa did not confer citizenship on them, but subjecthood. As a result,

The crucial break in the history of the anticolonial nationalism comes when the colonized [the nationalist leaders] refuse to accept membership in this civil society of subjects. They construct their national identities within a different narrative, that of the community. They do not have the option of doing this within the domain of bourgeois civil-social institutions. They create, consequently, a very different domain – a cultural domain – marked by the distinctions of the material and the spiritual, the outer and the inner.¹⁵¹

The core message of African nationalist writings was to present African traditional thought as philosophical. Yet, according to the *contemporarists*, in so doing most of this writing did not meet the strict standards of definition imposed by Western philosophy. The work of the nationalists also embodied notions of ethnology mixed up with their own conceptions of African philosophy. While I take objection to the use of Western standards of philosophy to measure Africa’s, I share the view that

¹⁴⁹ *Ibid.*

¹⁵⁰ A. Irele, *supra* note 1 at 17-18.

¹⁵¹ P. Chatterjee, *supra* note 128 at 130-131. I believe Chatterjee was referring here to the creation of a cultural community by the nationalist leaders, but not that of the colonised people themselves. The creation of community is not a colonial accident but rather a development which was already in place before colonialism in which African peoples defined themselves and built up their own institutions such as civil society and such concepts as rights and democracy. What the nationalist leaders created

African nationalist ethnophilosophers coloured their work to suit their political agendas. Their works, and in fact, ethnophilosophy in general, fall into the category of philosophical idealism which involves putting the ideas before the facts:

In the idealist exercise, the attempt is made at a methodological explanation or exposition of ideas before then integrating them or superimposing them onto the empirical facts of life – ideas are then given the attributes of autonomous reality.¹⁵²

Towa's definition of ethnophilosophy reveals an attempt by African ethnophilosophers to kill two birds with one stone: to attack and liberate both African philosophy and African ethnology which had been labelled with negative, ethnocentric attributes. Noble as this objective may have been, it is unfortunate to note that the African ethnophilosophers were in such haste to make a defence of their race and dignity that they did not take time to study their own traditions. Rather, they launched their arguments on the platform mounted by the cultural "pluralists," as well as the European philosophers and anthropologists. An example is Aime Césaire who, in response to the philosophico-anthropological onslaught unleashed against Africans as lacking the rational mind to develop technologically, argued that the lack of technological ingenuity on the part of the Black was a symbol of pride, and a virtue, rather than a fault.¹⁵³ Thus, Césaire failed to realise that Africans had already attained levels of development that included technological innovation.¹⁵⁴ Another example is Senghor's popular statement that "Emotion is African, as Reason is Hellenic," implying thereby, and confirming Levy-Bruhl's theory of the "primitive mentality," that Africans indeed have a pre-logical mind, trying to suggest that this "fact" does not make the African mind any less inferior to the European mind. Worse was to

was an artificial community which in most cases did not correspond with or have roots in Africa's cultural past, though they falsely claimed it did.

¹⁵² K. Quashigah, *supra* note 24, at 25. This definition of philosophical idealism is used by Quashigah to describe the development of social contract theory. While this involves a complete idealisation *in abstracto* and out of the realm of empirical facts, that is not so in the work of ethnophilosophers. They did rely on some empirical facts but twisted, or unduly generalised or wrongly interpreted them to suit a particular political agenda.

¹⁵³ A. Césaire, *Cahier d'un pays retour* (Paris: Présence Africaine, 1956) at 71-72.

¹⁵⁴ See, eg., Walter Rodney, *How Europe Underdeveloped Africa* (London: Bogle-L'Ouverture Publications, 1978), who devotes significant portions of his work to the technological achievements of African peoples.

come from African political ethnophilesophers,¹⁵⁵ including Senghor himself.¹⁵⁶ The majority went so far as to project “an implicit, unexpressed world-view which never existed anywhere but in the anthropologist’s imagination”¹⁵⁷ as representing indigenous African philosophy. The anthropologist’s imagination is what Hountondji and others refer to as the notion of cultural nationalism which is projected as a monolithic, ossified and essentialist representation of what pertains to the culture of a particular African people:

This is what happens to the word ‘philosophy’: applied to Africa, it is supposed to designate no longer the specific discipline it evokes in its *Western context* but merely a collective world-view, an implicit, spontaneous, perhaps even unconscious system of beliefs to which all Africans are supposed to adhere.¹⁵⁸

Another aspect of ethnophilesophy involves invoking a local tradition and sheltering behind it to project one’s own theses and beliefs on to that tradition.¹⁵⁹ This fault was particularly pronounced in the academic ethnophilesophers. But for the political ethnophilesophers the adoption of an essentialist African philosophy seems to represent a calculated political move aimed at twisting and misinterpreting tradition to suit political ends.¹⁶⁰ These two steps were used by political ethnophilesophers to develop the ideology of African socialism which ironically became both a vehicle of oppression and a collaborative tool with the former colonialists in ensuring a successful execution of the neo-colonialist agenda.¹⁶¹

¹⁵⁵ They represent the nationalist-ideological approach to African philosophy, the third facet in Oruka’s four-fold categorisation. See Oruka, *supra* note 27.

¹⁵⁶ See Stanislas Adotevi’s critique of Senghor and his negritude in *Négritude et négrologues* (Paris: Paris: Union générale d’éditions, 1972). His criticism is directed at the ideological use of the concept by Senghor in the post-independence era and also the false biological claims that the concept seeks to confirm in favour of the “mentalité primitive” theory.

¹⁵⁷ Hountondji, *supra* note 1, at 63.

¹⁵⁸ [Emphasis added]. *Ibid*, 60.

¹⁵⁹ *Ibid*, 63.

¹⁶⁰ Negritude first started as a self-consciousness and self-confidence building mechanism for Black people to assert themselves in the face of White racism and “scorn for the Negro.” It was later elasticised to cover the whole complex of civilized values which characterize the black peoples, or more precisely the Negro-African. Later it adopted a less militant tone to embrace a wider brotherhood of man. See William Friedland and Carl Rosberg, *Introduction*, in William Friedland and Carl Rosberg, eds., *African Socialism* (Stanford: Stanford University Press, 1965), at 3.

¹⁶¹ See details in Chapter 2.

III: A Critique of the *Contemporarist* School

Of the two schools, the *contemporarist* school, at first glance, seems to offer a more systematic approach to using philosophy to solve Africa's problems. Therefore, in trying to analyse how African philosophy can be relevant to the ordinary person, it becomes important to start from the *contemporarist* perspective.

It is important that to find lasting solutions to the problem of development, the solutions offered should be culture-based or should have a deep cultural context. It is therefore expected that any analysis of African philosophy should be related to Africa's cultural past in a bid to use philosophy to address Africa's problems. However, the problem with the *contemporarist* approach is that it does not focus on the cultural past of African traditions. It limits the focus to the effects of the colonial and post-colonial experience and how this has shaped life and brought misery and hardship to the African. Another problem is that the *contemporarists* narrow their emphasis to examining "what is Philosophy" and consequently, what is "African philosophy."¹⁶² This approach is disempowering in that it diverts the discourse of African philosophy from the crucial perspective of asserting its capability to be employed as a deconstructive and reconstructive tool. African philosophy is then consigned and confined to accepting Western notions of civil society, human rights and development,¹⁶³ thereby razing to the ground the positive foundation the *contemporarists* built to counter ethnophilosophy.¹⁶⁴ In seeking to tackle the question of what is philosophy they end up falling into the same trap as that of the nationalist ethnophilosophers by letting Western philosophy dictate the terms of what should

¹⁶² Hountondji, *supra* note 1, at 48.

¹⁶³ See the analysis below on the origin and relevance of these concepts for Africa's development.

¹⁶⁴ It is interesting to read such a radical statement from Hountondji: "From this perspective, ethnophilosophy appears as a by-product of underdevelopment, a consequence, among many others, of cultural amnesia. Questioning ethnophilosophy is therefore a first step on the long road toward self-recovery and self-confidence. It is a pre-condition for the rediscovery of Africa's age-old civilization and history." Hountondji, *supra* note 1 at xxiv. But it is unfortunate to see him deviate from this trend to tow the line of Eurocentricity.

constitute “philosophy properly-so-called.”¹⁶⁵ They fail to realise, as Ayodele Langley argues, that these methodologies are defined in such a way as to suit a particular culture’s interest:

Two variants of the ‘tradition of intellectualizing’ we mentioned earlier are attempts on the part of the commentator or historian to look for systematic treatment of political ideas, or to insist on the coherence of political ideas as paradigms of explanation – we begin to look for ‘central themes’, ‘inner coherence’, ‘ideas scattered within the theory’ and whether such ideas ‘can express further ideas’ (implying that we can, like magicians, make them do so), and so on ... The trouble about these approaches is that we come to the writings of an author, or of a political leader, with preconceived notions about models, systems, concepts, ‘classic questions of political theory’ etc; we bustle about as judges, condemning here, giving absolution there, according to what we have already decided we ought to find in these works or speeches. It is then regarded as a matter of ideological, professional or exegetical urgency that an African ideologue ought to have his utterances arranged within some system, must be ‘coherent’, etc.¹⁶⁶

The *contemporarist* approach therefore is anti-thetical towards the development of an indigenous African notion of rights; seeking to use the Western standard of philosophy to determine whether “African philosophy” has come of age implies that the same insensitive yardstick would be used in measuring human rights in the African context.

Another *contemporarist* flaw is with respect to the direction they adopt in using philosophy to find solutions to Africa’s problems. Hountondji’s real concern, as has been poignantly emphasised by Abiola Irele, is: “for the improvement of the quality

¹⁶⁵ Hountondji, eg., does not see anything wrong with Hegel’s philosophy of history, rather praising his work and all others which have taken the form of a system, as “erudite philosophies, well informed about the history of philosophy.” It can be said that Hountondji also becomes an accomplice with latter-day Western critics of African philosophy like Robin Horton, etc who adopt similar standards of criticism against nationalist ethnophilosophy. Indeed Horton and group use the same lazy analysis of African tradition to criticise African ethnophilosophers. See Robin Horton, “Traditional Thought and the Emerging African Philosophy Department: A Comment on the current Debate,” (Jan 1977) Vol. VI No. 1, *Second Order, An African Journal of Philosophy*, 64. See also Glickman, “Dilemmas of Political Theory in an African Context: the Ideology of Julius Nyerere,” in Jeffrey Butler and A.A. Castagno, eds., *Boston University Papers on Africa* (New York, 1967), eg., at 196. I level a similar criticism against Gyekye for not condemning the African ethnophilosophers in his work in spite of singling out Horton and others for criticism.

¹⁶⁶ Langley, *supra* note 147 at 15. One can here quote the standard of measurement adopted by Tempels, which Hountondji severely criticises: “Using the methods of analysis and synthesis of our own intellectual disciplines, we can and therefore must do the ‘primitive’ the service of looking for, classifying and systemizing the elements of his ontological system.” See Hountondji, *supra* note 1 at 57.

of life on our continent ..., a concern of a very practical order,” which makes “the technical and theoretical debate about African philosophy ... turn, in reality, most essentially upon the question of intellectual direction to give, in this day and age, to a continent beset by a multitude of problems.”¹⁶⁷ The major problem, or the milieu in which the multitude of problems is located, is forcefully and vividly painted by Hountondji:

On one side, there is a force – a brute, blind, savage force, a direct heir to colonial violence – trying to dictate to the minds and hearts of all; on the other, there are the bare hands of men and women so exploited and mystified that they make themselves active accomplices of their executioners: this is as close as you can get to a true description of the real face of contemporary Africa, behind the ideological folklore and the carnival variety of political ‘colours’, of official labels, and the divisive ‘options’ which nearly always turn out to be no more than superficial verbalisms.¹⁶⁸

In the light of these grave concerns, the *contemporarists* argue that the way out is to destroy Africa’s traditional idols “which is the only option available to open the way for embracing and assimilating the spirit of Europe, the secret of its power and victory over us.”¹⁶⁹ And that means adopting “the European concept of philosophy that goes hand in hand with this [European] science and technology and by developing free and critical thinking on the subject of our present realities.”¹⁷⁰ Towa goes on to justify this stance thus:

Parce que la philosophie européenne, en raison de sa parenté étroite avec la science et la technologie, semble être à l’origine de la puissance européenne, elle nous aidera à opérer la révolution des mentalités qui conditionne l’édification de notre propre puissance; en révélant le savoir philosophique conceptuel comme seul fondement de l’universalité et du dialogue sur l’Absolu, elle nous fournit des indications précieuses pouvant orienter nos efforts pour surmonter les divisions africaines fondées sur la diversité de confessions religieuses fanatiques et mettre sur pieds une unité africaine politique aux dimensions de notre temps. Quant à la liberté qui constitue un des principes les plus essentiels de la philosophie

¹⁶⁷ Hountondji, *supra* note 1 at xiv.

¹⁶⁸ *Ibid*, 170.

¹⁶⁹ Author’s own translation. The original French version reads thus: “qui seule permettra d’accueillir et d’assimiler l’esprit de l’Europe, secret de sa puissance et de sa victoire sur nous.” Towa, *supra* note 29 at 52.

¹⁷⁰ Hountondji, *supra* note 1 at 172. Fanon is in this school but his writings strongly reject this particular approach towards development for Africa. Fanon’s approach is influenced by his analysis of the negative role of ethnicity in numbing the liberation struggle. See, eg., Fanon, *Black Skin, White Masks* (New York: Grove Press, 1967).

européenne, elle rencontre directement le sens même de notre projet: une Afrique libre dans un monde libéré.¹⁷¹

Irele also argues for the adoption of Western philosophy but in a more cautious way. He contends that although Africans have suffered greatly from the derogatory insults of the Enlightenment, “we must separate the ideals of universal reason and equality from their historical implementation. We must, as it were, trust the tale and not the teller, for though the messenger be tainted, the message need not be.”¹⁷² Eze’s criticism of Irele is directed at how to separate the “ideal” from the way it has been practised:

Furthermore, to speak of ideals or ideas as universally neutral schemes or model which we historically perfectly or imperfectly implement obscures the fact that these ideals and ideas are already part and parcel of – i.e., always already infused with historical practices and intentions out of which ideals are, in the first place, constituted as such – judged worthy of pursuit. Ideals do not have meaning in a historical vacuum.¹⁷³

It is not only because the Enlightenment model was used to enslave and exploit Africa that it should be rejected as a basis for African philosophy. The analysis should go beyond that and establish that science and technology alone (often the indicators of “Enlightenment”) have not been the source of Europe’s strength, but also the type of political and economic ideologies adopted to support science and technology. Part of this ideology is the discourse and praxis of human rights. The defect in the Western notion of rights which was exploited against African peoples was that human rights was only rooted in Western culture and has been spread through the impact of Western civilisation. For this reason, it could be and was

¹⁷¹ Author’s own translation: “Due to its close relationship with science and technology, European philosophy seems to be linked to the source of European power and it will help us to undergo the mental revolution which is responsible for the strengthening of our own power. By exposing the conceptual philosophical knowledge as the only foundation of universality and of dialogue regarding the Absolute, it gives us some important signposts which have the capacity to direct our attention towards overcoming the divisions in Africa, influenced by the diversity of fanatic religious beliefs. This way, we will be in a position to initiate a common African policy that is related to the circumstances of our time. With regard to freedom, which is one of the fundamental principles of European philosophy, it directly dovetails with the direction of our own project: a free Africa in a liberated world. Towa, *supra* note 29 at 68.”

¹⁷² A. Irele, “Contemporary thought in French-speaking Africa,” in Albert Mosley, ed., *African Philosophy: Selected Readings* (Englewood Cliffs, NJ: Prentice-Hall, 1995) 296. cf. E.C. Eze, *supra* note 28 at 12.

¹⁷³ *Ibid*, 12-13.

argued that until the civilising mission was accomplished, colonised peoples were not fit to exercise and enjoy rights. Thus, for Africans, it was not until independence was attained that the departing colonialists “saw it fit” to incorporate human rights provisions into the constitutions of African states.¹⁷⁴

The flourishing of human rights in Western Europe contributed significantly to development. Nabudere attributed “the rapid developments” and “great advances”¹⁷⁵ to the rise of the natural sciences. But the natural sciences flourished as a result of the free-thinking environment which reigned at the time through the exercise of the right to academic freedom and freedom of thought.¹⁷⁶ Following this analysis, one would agree with Asbjorn Eide that “individual freedom was essential [as well] for the functioning of the new patterns of ownership and production (economic liberalism).”¹⁷⁷ However, it must be noted that these positive aspects of the exercise and enjoyment of rights in relation to development possess their own inherent contradictions. In spite of the superficially noble goals of the Enlightenment, some of the theories which were formulated, such as social contract theory and some liberal economic theories,¹⁷⁸ were tailored largely to suit the interests of the ruling class of the time.¹⁷⁹ McPherson makes us aware of the underlying reason for the enjoyment of individual rights under capitalism. According to him, the classical liberal theory was dedicated to “the individual right to unlimited acquisition of property, to the capitalist market economy, and hence to inequality, and it was feared that these might be endangered by giving

¹⁷⁴ See further analysis of this debate below.

¹⁷⁵ Dan Nabudere, *The Political Economy of Imperialism: Its theoretical and polemical treatment from Mercantilist to Multilateral Imperialism* (London: Zed Press Ltd, 1977), at ii.

¹⁷⁶ This environment emerged through the contribution of the then emerging middle class to the destruction of the monopoly of power then exercised by the Church and the mercantile imperialists whose interests lay in landed feudalism. *Ibid.*

¹⁷⁷ A. Eide *supra* note 5 at 9.

¹⁷⁸ By Adam Smith, David Ricardo, Malthus, Bentham and others.

¹⁷⁹ However, it must be noted that social contract theory is only an ahistorical, mythical concept formulated to rationalise the basis of individual freedoms *vis à vis* the authority of the State.

votes to the poor.”¹⁸⁰ In fact, the origins of liberal theory, like the liberal state itself, were not at all democratic; much of it was expressly anti-democratic.¹⁸¹

The conclusion from this brief excursion into Enlightenment thinking is that human rights were selectively enjoyed and exercised. Individual freedoms were promoted for the sake of the middle class,¹⁸² those who could afford higher education, fill management positions and engage in research.¹⁸³ The poor slaves, serfs, etc who turned into the working class were effectively left out of the rights exercise. For them, like the economic gains of capitalism, rights exercise was to “trickle down” ultimately, but not imminently.

This historical snapshot calls into question the high hopes placed by the *contemporarist* school in science and technology and rights exercise as the prompters of development in Europe. To replay the same evolution in Africa as in Europe of two centuries ago is likely an illusion.

It is also interesting to read Hountondji and Towa opining upon the negative effect of imperialism and how to counter it with the power of Europe, source of that same imperialism. First, they fail to realise that it was imperialism that helped to ensure the scientific and technological development of Europe. Until Europe made contact with the East around the 1500s it was “often inferior, never superior, in extensive powers ... Most innovations which proved to have great implications for extensive power (notably gunpowder, the mariner’s compass and printing) came from the East.”¹⁸⁴ This disproves the argument of the *contemporarists* that European science and technology was equivalent to power. Rather, it was the power acquired from other sources that helped put science and technology in place in Europe. Moreover, the flourishing of an ambience of rights and emerging democracy also helped to build this power and to

¹⁸⁰ C.B. McPherson, “Politics: Post-Liberal Democracy?,” in Robin Blackburn, ed., *Ideology in Social Science* (Glasgow: Fontana, 1976), 19.

¹⁸¹ Stephen Gardbaum, “Law, Politics and the Claims of Community,” (1992) *Michigan Law Review*, 685.

¹⁸² K. Quashigah, *supra* note 24 at 31ff.

¹⁸³ Berting, *supra* note 117 at 24.

foster science and technology. But due to the selective manner rights were exercised, they could not sustain the achievements of science and technology. For example, the low pay offered the workers, based on a strict application of Bentham's starvation-avoidance theory, disabled them from acquiring strong purchasing power to acquire the goods made with their own labour and sweat. The concentration of wealth in the hands of the merchant class, and its consequent fetter on industrialisation, is one of the reasons that led to imperialist "adventure" abroad to find markets outside Europe. Part of the mission was to amass illegal fortunes.¹⁸⁵ It was also to acquire cheap labour and raw materials¹⁸⁶ in order to help speed up the industrial revolution and to integrate the entire world into a global capitalist economy.

European power was consolidated through the slave trade, colonialism and neo-colonialism, and it continues now through post-Cold war globalism. If Towa asserts that Africa can attain this capitalist power along the same lines in this age, it should be obvious from the above analysis that Africa is more than four centuries late. The idea of mirroring European development patterns in Africa is therefore an anachronistic concept, and mere wishful thinking.

It must also be noted that the high hopes that engendered the industrial model of development have not been realised. Economists are still grappling with how to articulate the best developmental concept. The United Nations Development Programme (UNDP) has, for example, identified three crises linked to the neo-classical economic blueprint that goes with the industrialist model of development: the crisis of the state, the market and science.¹⁸⁷ These crises have been occasioned by the adoption of a linear mode of development that is, *inter alia*, anti-traditional, ahistorical and physical capital-based.¹⁸⁸ Thus, Ozay Mehmet warns that "both the universality and the

¹⁸⁴ Michael Mann, "European Development: Approaching a Historical Explanation," in Jean Baecher, *et al*, eds, *Europe and the Rise of Capitalism* (Oxford: Basil Blackwell, 1988), 6 at 7.

¹⁸⁵ Nabudere, *supra* note 175 at 30.

¹⁸⁶ Hegel, *The Essential Writings*, Ed., F. Weiss (New York: Harper Press, 1974) at 282-283.

¹⁸⁷ UNDP, *Sustainable Human Development: from Concept to Operation. A Guide to the Practitioner*. A UNDP Discussion Paper, at 6.

¹⁸⁸ *Ibid*, 12.

scientific attributes of Western economics are myths. In place of universality, meaning here universally shared values and tastes, there is Western cultural specificity whereby European economic history is taken for granted as universally valid for theory construction.”¹⁸⁹

Another key argument against the *contemporarists*, flowing from the above historical analysis of capitalist development, is that it becomes obvious that capitalism thrives on development of a few nations through the underdevelopment of others. Thus, even if it were possible to attain this type of capitalist power in Africa, it is politically naïve to believe that it will be possible for the Western world to relinquish or at best share its power with Africa. It would amount to digging one’s own grave.¹⁹⁰ If, on the other hand, by reference to the “spirit of Europe” Towa meant only that Africa should “borrow” current European philosophy, science and technology, then the *contemporarists’* suggestions are redundant. Indeed, the West itself has been willing to let Africa inherit its philosophy since time immemorial, as part of the imperialist power strategy to disempower Africa. This is in fulfillment of the Eurocentric mission: a Western-centred world-view which seeks to project the interest of Western states at the expense of others while at the same time seeking to justify this world-view by ethical norms that proclaim universal benefits to all.¹⁹¹ In this regard, it is pertinent to quote Chatterjee:

The provincialism of the European experience will be taken as the universal history of progress; by comparison, the history of the rest of the world will appear as the *history of lack, of inadequacy – an inferior history*. Appeals will be made all over again to philosophies produced in Britain, France, and Germany. The fact that these doctrines were produced in

¹⁸⁹ O. Mehmet, *Westernizing the Third World: The Eurocentricity of Economic Development Theories* (London: Routledge, 1995) at 6. See also Wolfgang Sachs, ed., *The Development Dictionary: A Guide to Knowledge as Power* (London: Zed Books Ltd, 1992).

¹⁹⁰ Paradoxically, the *contemporarists’* two-point view on finding the panacea to Africa’s problems – co-operation, science and technology – is no different from the stance of Africa’s post-independence leaders at the time of independence. They also had high hopes that through economic co-operation and the adoption of science and technology they would catch up with the West by attaining in ten years what it took the Europeans centuries to attain and in so doing be in a position to rub shoulders or share power with them. The only thing that separates the two approaches is that the ideological basis of African leaders was “African philosophy” or ideology and the *contemporarists* is “European philosophy.”

¹⁹¹ O. Mehmet, *supra* note 189 at 8.

complete ignorance of the histories of the other parts of the world will not matter: they will be found useful and enlightening.¹⁹² [Emphasis added].

The *contemporarists*, consciously or unconsciously, fall prey to this trap as predicted by Chatterjee.¹⁹³

IV: A Case for the *Holistic School*

Kwame Gyekye details certain aspects of African philosophy which meet what he calls a universal or common criteria of assessing what constitutes philosophy. Gyekye argues that philosophy is generally premised on three key concepts: epistemology, metaphysics and logic, all of which are present in African philosophy.¹⁹⁴

Gyekye contends, in arguing for a distinct African philosophy, that philosophy “responds at the conceptual level to the fundamental problems posed at the given epoch.”¹⁹⁵ An Akan proverb affirms this point: *Se asem ba a na abebuo ba* (literally, proverbs are woven out of real fact situations). Proverbs arise out of the experiences of the people and are philosophical in that they are an emblem of collective wisdom repeated by wise people and accepted as part of the people’s culture, as their way of life.¹⁹⁶ This view is denied by the *contemporarists* who contend that philosophical tradition is only beginning to develop in Africa.¹⁹⁷ But to deny African peoples philosophical thought is to imply that they are unable to reflect on or conceptualise their experiences.¹⁹⁸ According to Gyekye, people who have studied proverbs have described them as “situational,” that is they arise from certain social situations. One may add that they not only arise from social, but also from political, economic and religious circumstances. Since philosophy (at least in the African traditional sense)

¹⁹² P. Chatterjee, *supra* note 128 at 131-132.

¹⁹³ Thus, Hountondji, for example, denies African thought as philosophical simply on the grounds of its inability to keep a diary or write a memoir on the intellectual debates or thought that informed the *result* or *conclusion* of a philosophical idea. He argued that the *result* or *conclusion* is therefore impoverished and unphilosophical. Hountondji, *supra* note 1 at 105; also Wiredu, *supra* note 31 at 48, 49.

¹⁹⁴ Gyekye *supra* note 32 at esp., Chapter 1.

¹⁹⁵ *Ibid*, 39.

¹⁹⁶ *Ibid* 32, 18.

¹⁹⁷ Serequeberhan *supra* note 23 at 21.

¹⁹⁸ *Ibid*.

concerns itself with situational issues and human problems, it goes without saying that it should be grounded in the culture, experiences and mentalities of the people who produce it, in order for it to persist and shape behaviour. Gyekye therefore suggests that:

*the starting points, the organizing concepts and categories of modern African philosophy be extracted from the cultural, linguistic, and historical background of African peoples, if that philosophy is to have relevance and meaning for the people, if it is to enrich their lives.*¹⁹⁹

Hountondji shares a similar view:

The philosopher does not own his ideas, true. He just finds them in his path, they “come to his mind,” as is usually said, suggested by circumstances and drawn from a common fund inherited from tradition.²⁰⁰

One can locate the cultural component of the Akan notion of rights in the above analysis.²⁰¹ Some of the proverbs in traditional Akan thought that embody and express its notion of rights include the following. *Ti koro nko agyina*: “Two or more heads are better than one.” This proverb symbolises the importance attached to joint decision-making, participatory government, respect for freedom of expression and contempt for dictatorship.²⁰² A similar proverb is, “Power is as fragile as egg. When held too tightly it breaks; if loosely, it might fall and break.” This symbol/proverb signifies the fragile nature of political power and the need for sharing political power. Another proverb also expresses the need to consider individual rights and interests vis-a-vis community interests and needs: *Funtumfunafu, denkyemfunatufu, won afuru bomu nso wodidi a na worefom efise aduane ne de ye di no mene twitwi mu*. Literally, “Two-headed crocodiles fight over food that goes to a common stomach because each relishes the food in its throat.”

¹⁹⁹ *Ibid*, 42.

²⁰⁰ Hountondji, “Sens du mot ‘philosophie’ dans l’expression la ‘philosophie africaine’,” in (1977) *Le Kore*, 5. cf. Hountondji, *supra* note 1 at xvi.

²⁰¹ I identify three factors as informing an African notion of rights. These are the cultural, historico-colonial and developmental. They are discussed in detail below.

²⁰² Similar proverbs in a Malawian dialect say that: “A river without rocks cannot hold water” and “One head cannot carry a roof.” Referred from George Ayittey, *supra* note 94 at 206.

The special emphasis placed on freedom is expressed in the proverb which equates the denial of this right to a person as committing murder on him or her: *Woamma m'anka m'asem, busufo ne wo.*²⁰³ The principle of equality is expressed in a proverb such as, *Wura mu mmoa, ebi ara ne ntontom*: "The mosquito, however tiny, is a significant part of the animal kingdom."²⁰⁴ Busia also makes reference to an Akan proverb which illustrates the importance attached to life: "It is man that counts. I call upon gold, it does not answer. I call upon my drapery, there is no answer. It is man that counts."²⁰⁵ The relationship between rights and duties is also expressed in the proverb: "It is your responsibility to see to my welfare in my old age after I helped raise you up."²⁰⁶

But philosophy does not look to the past only. This is a major pitfall of the ethnophilosophers. They dug almost exclusively in the past in an attempt to counter the derogatory, ethnocentric and colonising claims of European philosophy and anthropology. This approach, in turn, has offered the *contemporarists* room to argue that African philosophical thought cannot be philosophical. They contend that the so-called African philosophical thought is uniform, essential and ossified, and that it is created by the whole society. But this assumption is unsupported. While looking to the past to find what may be contrary to the accepted norms of the community, philosophy may find an old norm no longer relevant due to changed circumstances. Philosophy then defines new courses of action for the community in the light of past thought and traditions.

Akan traditional society exhibited this process in the creation and development of norms, beliefs and traditions. The confusion of the *contemporarists* is caused by their

²⁰³ Quoted from Mike Oquaye, "Human Rights and Conflict Resolution in Ghana's Fourth Republic: The Case of the Commission on Human Rights and Administrative Justice" at 3. Unpublished. (Copy on file with the author).

²⁰⁴ *Ibid.* Interpretation expanded without deviating from the core meaning.

²⁰⁵ K. A. Busia, *The Position of the Chief in the Modern Political System of the Ashanti: A Study of the Influence of Contemporary Social Changes on Ashanti Political Institutions* (London: Published for the International African Institute, by Oxford University Press, 1951), at 35.

²⁰⁶ This is in the sense of parent-child responsibilities but it is also applicable in the individual-community context. See *supra* for similar expressions.

inability to differentiate amongst who creates philosophical thought in a typical African society. Gyekye is of the view that the *contemporarists*, as well as the Western critics of African ethnophilosophy, have come to this crossroads because they are not able to distinguish between collective thought and collective decision-making. The latter is done by the whole community and the former by individuals within the community. In my view, however, the process of thought and decision-making are not so different. In each case, it is typically an individual who introduces an idea which is then debated and endorsed by the people. This is usually, but not exclusively, done by an old person. Old people are considered to be sage because Akans believe that old age connotes wisdom. A symbol that expresses this is called *Mate asie*: "I heard it and kept it." Thus, the one who has heard a lot is the one who has kept a lot and that is the old person. Hence, this related proverb which is in the form of a question: *Kyemfere se odaa ho akye, na onipa a onwenee no nso nye den?*: "If the potsherd claim to be old, what of the potter that molded it?"²⁰⁷ Collective decision among the Akans comes about through debate at the village assembly, involving various groups or associations.²⁰⁸ Thus, though the old were always considered to be wise, they were not allowed to impose their thoughts and views on the rest of society because the Akans believe that "He who claims to know all knows nothing." Therefore everybody was given the opportunity to consider the views of the elderly and to see if they agree with it. Consensus-making was thus a typical form of decision-making,²⁰⁹ though it was at times difficult to find a common agreement in the collective decision-making process.²¹⁰ But since it is such collective decision-making which acts as the foundation of the development of collective

²⁰⁷ But it was not always the case that wisdom was attributed to old age. As noted above, Akans also believe that the one who is well-travelled can also be considered a wise person due to the experiences he or she acquires as a result.

²⁰⁸ This forms the Akan communities' notion of "civil society" and the use of freedom of expression to form public opinion.

²⁰⁹ Wiredu, *supra* note 41 at 303.

²¹⁰ Thus, the idea of African political ethnophilosophers – a view which, ironically, is shared by Wiredu – that the notion of consensus-making involved the absence of opposition was false. Differences did exist and were recognised and respected, and illustrated in proverbs such as "even the tongue and teeth do fight at times;" and also *Funtummireku ne Denkyemmireku won afuru bom onso*

thought it becomes more binding, the people having already taken part in its formulation. The proverb or folktale therefore becomes an economic means of preserving decision-making through a concept or a summary form for explanation to posterity. It then becomes the responsibility of the aged who took part in the formulation of the decision or who inherited the proverb from the original creators to explain the wisdom in the proverb and the circumstances that led to its formation.

This aspect of proverb formation within a conceptual framework involves the relating of concrete circumstances to an empirically and logically explanatory scheme.²¹¹ In the Akan context, it was more of an empirical scheme since it was based on experience.²¹² If a decision or norm becomes outdated it is changed through the same process of public opinion or the direct enunciation of a proverb by a sage. In the latter case, the philosophical significance of the proverb would lie in the establishment of moral standards to judge the desirability or otherwise of a political theory and demand change.²¹³ Thus, philosophy within the traditional Akan society is developed by an individual who shares a cultural and traditional background with the community and who has been influenced by the community's general beliefs and circumstances:

*A particular thought or idea is, as regards its genesis, the product of an individual mind ... [which becomes] accepted and gains currency among other people.*²¹⁴

This process is what Oruka refers to as philosophic sagacity:

Some sages go beyond mere sagacity and attain a philosophic capacity. As sages they are versed in the beliefs and wisdom of their people. But as thinkers, they are rationally critical and they opt for or recommend only those aspects of the beliefs and wisdoms which satisfy their rational scrutiny. In this respect they are potentially or temporarily in clash with the diehard adherents of the prevailing common beliefs. Such sages are capable of conceiving and rationally recommending ideas offering alternatives to the commonly accepted opinions and

woddi a na wo ko: "Funtummireku and Denkyemmireku are two crocodiles with one stomach, yet when they eat they fight."

²¹¹ Ayo Langley, *supra* note 147 at 8.

²¹² Contra W. Abraham, *supra* note 142 at 106.

²¹³ I adopt Langley's definition of political philosophy which "not only involves linguistic analysis of political concepts but establishes moral standards by which to judge the desirability of a variety of political theories." See Langley, *supra* note 147 at 8.

²¹⁴ Gyekye, *supra* note 32 at 24.

practices. They transcend the communal wisdom. They are lucky if people recognize this special gift in them. Then they are treated with special respect and their suggestions peacefully and positively reform the people.²¹⁵

Thus, Wiredu's contention that the thought or idea coming from the sage and thinker is imposed on the rest of society simply because it comes from an elder cannot hold. Wiredu's view is informed by his conclusion that African traditional society was authoritarian. It is true that certain African political systems were authoritarian²¹⁶ but to make such a sweeping generalisation is unfounded. Even in societies where the political system was democratically decentralised, such as the Akan which Wiredu studied, he still comes to the conclusion that the society was authoritarian.²¹⁷ Wiredu fails to differentiate between the varying structures that constitute the Akan political system, eg., national, village, family and individual levels.²¹⁸ At each level of this structure the practice of "authoritarianism" was different. It was more prevalent at the family level. It was here that adults had greater say than children and between adults, the views and interests of men were privileged over those of women. Yet when talking of proverbs becoming a shared heritage, such development occurred at the community or state level and became a community asset that was not "imposed" in an authoritarian manner. In support of the respect that was accorded freedom of expression, at least with the set up of the Council of Elders in the Akan society, Busia writes:

The members of a traditional council allowed discussions, a free and frank expression of opinions, and if there was disagreement, they spent hours, even days if necessary, to argue and exchange ideas till they reached unanimity. Those who disagreed were not denied a hearing, or locked up in prison, or branded as enemies of the community. The traditional practice indicated that the minority must be heard, and with respect and not hostility.²¹⁹

Be that as it may, the situation is no different in the evolution of Western philosophical thought. In Greek philosophy, Plato delineated the philosopher king

²¹⁵ Oruka, *supra* note at 51.

²¹⁶ Potholm, *supra* note 22, Chapter 1. Also Ayittey, *supra* note 22.

²¹⁷ Wiredu, *supra* note 31 at 2-5, esp 4. However, he contradicts himself in his latter work. See Wiredu, *supra* note 41. An observation about the *contemporarists* is that there is inconsistency in their contentions. Others are pointed out below.

²¹⁸ This can be compared to Hegel's analysis of a three-tier composition of the ethical life as composed of the family, civil society and the state. See details *infra*.

whose main job was to eat, enjoy life and think for the people. His enlightened thoughts became binding on the people as law.²²⁰ The same process in essence applies to the works of all Western philosophers. Locke was an individual thinker but his thoughts on the state of nature and natural rights were embraced by the people of his time and even imported to America where it was whole-heartedly accepted and became the *agent provocateur* in the struggle for independence. Also it is interesting to note that even the ancient Greek states, the cradle of modern democracy, did not tolerate expression of views that were considered to be destructive to religion, morality and the city. The trial and sentence to death of Socrates is an outstanding example. The situation was no different in Rome and England.²²¹ Therefore, Wiredu's critique of authoritarian imposition of thought is not supported.

The conclusion Gyekye reaches regarding the existence of African philosophy is that one can differentiate between traditional African philosophy and modern African philosophy. He argues that the thinker – the creator of philosophy – perforce operates on the diffuse and inchoate ideas of the cultural milieu. But for modern African philosophy to be African and have a basis in African culture and experience, “[it] must have a connection with the former, the traditional.”²²² Hence the ability to connect, say, Plato to Greek Philosophy, Burke to British philosophy and some anonymous thinkers to Akan philosophy. Gyekye then concludes that there is an African philosophy based on the fact that there are certain core qualities that unite Africans.²²³ He identifies these qualities as relating to the beliefs, customs, traditions, values, socio-political institutions, and historical experiences of African societies.²²⁴

But while Gyekye argues that Africa is united by certain world views, sociopolitical ideas, values and institutions he does not talk of Africa's contemporary experience as

²¹⁹ cf. Ayittey, *supra* note 22 at 240-241.

²²⁰ See Plato, *The Republic* (Indianapolis: Hackett Publishing Co., 1974). See Claude Colliard, *Les Libertés Publiques* (Paris: Dalloz, 1972), 4th ed., at 330.

²²¹ See Claude Colliard, *Les Libertés Publiques* (Paris: Dalloz, 1972), 4th ed., at 330.

²²² Gyekye, *supra* note 32 at 11-12.

²²³ *Ibid*, esp. Chapter 12.

²²⁴ *Ibid*.

playing a part in uniting a concept of African philosophy. In my view the experiences that unite Africa in the colonial and post-colonial eras are more than what unite Africa at the pre-colonial level.²²⁵ I base this view on the effect of the infliction of the “spirit of Europe” on Africa. This infliction includes the re-designation of the boundaries of traditional political systems in a haphazard manner and massing differing socio-political communities together to form the modern African nation-state. By such a capricious act, colonialism was able to reduce Africa’s plurality to roughly fifty states. Another reason is with regard to the motive that drove the colonialist agenda. Although executed in various styles by different European colonial states and in different colonies by the same colonial power, the rationale for the introduction of colonialism was the same, to exploit the people and their resources. Therefore, talking of a common African philosophy, I would argue that one may have to recognise plural *traditional African philosophies*, such as the Akan, but *a modern African philosophy* that may still be diverse in outlook²²⁶ but united by the experiences mentioned above.

In sum, my position is that *holistic* tradition represents a more realistic exposition of African philosophy and offers a better stance of using philosophy to address Africa’s multi-dimensional problems. It is also contended that Akan philosophy is more related to the *holistic* school. The final question then is what role Akan philosophy can play in the promotion and protection of rights in Africa. This question becomes relevant in view of the fundamental claim of the theory of community emancipation that the gateway to development is through the exercise and enjoyment of rights.

²²⁵ It is my contention that each political tradition would have a concept of philosophy which would differ from another. I believe that it is out of this observation that Hountondji talks about internal pluralism in Africa generated by confrontation, etc. As we learn below, different political systems and the concept of human rights developed due to the severing of allegiance by disaffected people over an oppressive system and/or ruler and separating to set up their own system. Thus, for example, among the Akans there is a proverb *Obi nsi ne ho hene* (no one imposes himself on the people as chief). This proverb will not apply in a stateless or “headless” community which does not have a chief. Thus in each of the political environments the political philosophy will differ in certain respects. Likewise, in the context of rights discourse, the stateless society will not concern itself with political rights such as the right to vote, etc. Thus, their legal philosophy in that context would also be different. Even within

V: Conclusion: The Role of Akan Philosophy in the African Rights Struggle

A critical reflection of the general project of African philosophy indicates that its principal goal has been to critique European philosophy and to assert the existence (or emergence)²²⁷ of an African philosophy. This is reflected in Outlaw's notion of the deconstructive challenge facing African philosophy which, according to Serequeberhan, is "aimed at unmasking these European residues [in the form of its educational, political, juridical, and cultural institutions] in modern Africa that still sanction – in the guise of science and enlightenment – the continued subordination and intellectual domination of Africa."²²⁸

On the other hand, the "reconstructive challenge" aims at "critically revitalizing – in the context of the modern world – the historico-cultural possibilities of the broken African heritage."²²⁹ In sum, the discourse of African philosophy is "indirectly and historically linked to the demise of European hegemony (colonial/neocolonial) and is aimed at fulfilling/completing this demise."²³⁰ In its indigenised form, African philosophy is also to concern itself with "class struggle"²³¹ and empowerment of the oppressed:

The deeper issue is one with much higher stakes: it [the question of African philosophy] is a struggle over the meaning of "man" and "civilized human," and all that goes with this in the context of the political economy of the capitalized and Europeanized Western world.²³²

However, it is my observation that no concrete concept has yet been formulated in African philosophy to launch the project of emancipating the people from the clutches of the global economic system and from the appendages of this system who parade as

the same political system divergent views held by different interest groups forming "civil society" are discernible.

²²⁶ Refer to Oruka, *supra* note 27.

²²⁷ In the case of the *contemporarists*.

²²⁸ T. Serequeberhan *supra* note 23 at 22.

²²⁹ *Ibid.*

²³⁰ *Ibid.*, 22-23.

²³¹ It is my contention, however, the concept of "class struggle" is not indigenously African.

²³² Lucius Outlaw, "African 'Philosophy': Deconstructive and Reconstructive Challenges," in Guttorm Floistad, ed., *African Philosophy* [Vol.5, *Contemporary Philosophy: A New Survey*] (Martinus Nijhoff Publishers, 1987).

the local representatives of the people. What is crucial is a conceptualisation of pragmatic concepts of African philosophy which are rooted in the diverse African traditional political systems, such as represented in the theory of community emancipation.

It is observed that the major contribution of the *contemporarists* is the constructive and comprehensive critique they have offered against the local ruling group who sit comfortably on the dependence structures of African states. The *contemporarists* have strongly rejected "the conception of philosophy as an ideological comment on politics."²³³ This latter approach represented the stance of African political ethnophilosophers whose "discourse has lost its critical charge, its *truth*.":

Yesterday it was the language of the oppressed, today it is discourse of power. Formerly a romantic protest against European pride, it is now an ideological placebo. The function of ethnophilosophy has changed: it is no longer a possible means of demystification but a powerful means of mystification in the hands of all those who have a vested interest in discouraging intellectual initiative because it prompts not living thoughts in our people but simply pious rumination of the past.²³⁴

Hountondji argues that the object of the *contemporarist* framework is to liberate philosophy and enable it to provide the pre-condition for developing a critical "theory of politics" as part and parcel of philosophy. Such a theory would concern itself with analyzing the real functioning of ideologies and identify the forms, the modalities and the multiple sources of political mystification.²³⁵ However, this is as far as the *contemporarists* are ready to go in involving African philosophy in political discourse. Their next step, unfortunately a *faux pas*, is to use African philosophy as "the "handmaid" of science and (unfettered) modernization."²³⁶ This approach, which is devoid of a political contextual analysis, presents an obstacle towards the implementation of the "scientistic"²³⁷ project itself. The means of dismantling the stumbling block in order to facilitate the use of science as a stepping stone to

²³³ Hountondji *supra* note 1 at xiv.

²³⁴ *Ibid*, 171.

²³⁵ *Ibid*, xiv.

²³⁶ Serequeberhan *supra* note 23 at 21.

²³⁷ Serequeberhan, Introduction, in T. Serequeberhan *supra* note 23, xvii at xix.

development has a political dimension to it. This is expressed in the frustrated reaction of Wamba dia Wamba, prompting him to ask:

But, how is science related or articulated to politics? What stand does Hountondji take on this debate? What position does he hold in the ideological struggle around the problem of science and technology?²³⁸

Lansana Keita seems to extend the trend of thought of the *contemporarists* to use African philosophy to promote the natural and social sciences. He argues:

Its [African philosophy's] function should be to help in the imparting of knowledge of the natural and social world and to assist in the constant discussion of the optimal set of value judgements and cultural assumptions that social individual must make to take the fullest advantage of the sum of scientific knowledge available.²³⁹

While appreciating the usefulness of Keita's methodological approach as being more broad-based than that of the rest of the *contemporarists*, it is elitist and overly "academic," not allowing room for the role of the ordinary person in the struggle to reconstruct Africa. It is worth quoting Wamba again:

The African philosopher is now neither an organic intellectual of the masses of African people who resist imperialism (a possible meaning of the term African philosopher), nor quite exactly an organic intellectual of imperialism (which is also a possible meaning of the term philosopher in Africa).²⁴⁰

African philosophy must move beyond this level and be used as a tool by the oppressed, the deprived and the marginalised to regain their status on the development structures of their countries. The question of developing a practical political as well as legal philosophical framework within each major traditional African political system that the popular sectors can identify with and utilise is what should pre-occupy African philosophy now. Thus, the next fundamental step is to embrace the language of rights as conceptualised, for instance, in the theory of community emancipation (which represents the Akan notion of rights and philosophy) and to use it as a tool for development. That is, the deconstructive challenge of African

²³⁸ Wamba dia Wamba, "Philosophy in Africa: Challenges of the African Philosopher," in T. Serequeberhan *supra* note 23, 211 at 230.

²³⁹ L. Keita, "Contemporary African Philosophy: The Search for a Method," in T. Serequeberhan, *supra* note 23, 132 at 146.

²⁴⁰ W. dia Wamba *supra* note 238 at 230.

philosophy should be geared towards an unmasking of the disempowering effect of enjoying abstracted civil and political rights disconnected from the struggle for economic justice.

In this regard, Shivji comes closest to arguing for a reconceptualisation and revolutionisation of rights by detaching oneself from the dominant discourse of rights embodied in the ideological Western construct of civil and political rights. Shivji's problem, however, is that while the *contemporarists* look to Western Europe he looks to Eastern Europe and adopts a narrow and outdated Marxist discourse of rights struggle as the key to organising the people to attain development. This is not unexpected since, like the *contemporarist* school of African philosophy, he turns his back to Africa's cultural past which depicts the rights struggles of the common people in the form of debates, revolts, separation from a tyrannical leader or majority group, etc. Nonetheless, Shivji's categorisation of the "working people" – all people who do not belong to the *compradorial* (bourgeois) – is broad enough and usefully applicable to the African situation.

The lack of emphasis in locating human rights in African culture seems to be resolved in Quashigah's work.²⁴¹ Quashigah analyses how the conception of human rights emerged in the Western world through the application of the methodologies of philosophical idealism and philosophical materialism. He concludes that if the Western concept of human rights was so developed, then

The irresistible inference is therefore that each and every human society, whatever its stage of development, from absolute primitivity to modern statehood, logically recognizes some rights which could be rightly termed human rights. The concept of human rights is, therefore, not alien to African societies; if anything at all, it is absent only in any articulated philosophical form.²⁴²

But, this analysis was not done in the context of evolving an African concept of human rights. It was only to counter the notion that human rights is inherently western. Also, Quashigah falls into the same trap as the *contemporarists* by not recognising the fact that the concept of human rights as expressed in proverbs, folklores, etc is philosophical.

The role of developing an indigenous African human rights philosophy falls back into the hands of two members of the *contemporarist* school, Hountondji and Wiredu.²⁴³ While Wiredu dwells basically on Africa's past cultural experience to evolve an Akan conception of rights, Hountondji digs into the past as well as the contemporary times – thus covering all three aspects of the theory of community emancipation. For example, on the cultural aspect, Hountondji argues that any analysis of human rights in the traditional political setting should involve “a critical history of the contradictions and struggles within our apparently immobile culture.”²⁴⁴ On the historico-colonial front, he analyses and denounces the violence done to Africans in the name of development for Western Europe and disputes the Western European claims to being the repository of human rights:

Supposing that the facts invoked are correct, and that the power of the West was consistently built upon violence, why should the pattern, build their power on the same basis and develop along the same lines? On the contrary, should not the terms of the argument be reversed, so as to see in this disregard for human beings an indication that the European roads to development are unacceptable?²⁴⁵

He goes on to suggest that the role for philosophers is to be interested in examining the ideological discourse that the powers-that-be use to justify their acts, or even to pass for defenders of liberty, when in reality all that they do is to trample on human dignity.²⁴⁶ Finally, Hountondji recognises human rights in the daily struggles of the people and contends that “nothing sensible or pertinent can be said about human rights if one ignores this daily, universal fact of revolt ... [O]nly by remaining silent about this commonly experienced fact, or by considerably reducing its implications, is it possible to make human rights an invention of Western culture.”²⁴⁷ It is therefore lamentable that after taking such a strong stance on human rights in the African

²⁴¹ K. Quashigah *supra* note 24.

²⁴² *Ibid*, 30.

²⁴³ See Hountondji *supra* note 1; and, K. Wiredu *supra* note 41.

²⁴⁴ Hountondji *supra* note 1 at 321.

²⁴⁵ *Ibid*, 326.

²⁴⁶ *Ibid*, 325.

²⁴⁷ *Ibid*, 320.

context, Hountondji should turn back and endorse “the spirit of Europe” and its science as the gateway to Africa’s development.²⁴⁸

What remains undone in this theorising, and what has been covered by the theory of community emancipation, is the conceptualisation of this notion of rights as a tool for development; being exercised as *power to create* and *achieve* and to overcome all stumbling blocks standing in their way to development, but not *power* (by the ruling class) *over* the people. Thus, the way out for African peoples is to use the exercise of rights as a tool to confront the development agenda that Western governments claim to have for Africa and to disassemble the dependence structure that the joint ruling groups (local and foreign) are settled on. One can only use rights as a tool to achieve fundamental democratic change if one is able to appreciate the hidden agenda behind the human rights rhetoric of governments and become conscientised about how rights exercise can be used to promote self and community development. Fortunately, Africans have a guide in their historical past to let them appreciate the intentions of Western governments and corporate interests for Africa, and their culture as a guide on how to use rights exercise as an effective tool to attain the goal of *sustainable holistic* development.

Adopting African notions of rights and integrating them into the discourse of international human rights law will not make African leaders any less responsible for their human rights commitments at the international level, as the universalists fear. The goal is not to allow oppressive leaders or their captive intellectuals to formulate “African concepts” of rights. It is important not to just replace one master’s voice with another. Rather, African ideas of rights should be formulated by a voice representing the experiences of the deprived and oppressed. It need be derived from their pre-colonial, colonial and post-colonial experiences.

²⁴⁸ Towa, *supra* note 29 at 52.

CHAPTER 2

ESTABLISHING THE RELATIONSHIP BETWEEN HUMAN RIGHTS, CIVIL SOCIETY AND DEVELOPMENT

In our view, African socialism misinterpreted democracy and the place of human rights in the traditional African political systems. It failed to draw the necessary link between traditional human rights and the traditional democratic system. Rather, it presented the myth of an idealized, conflict-free traditional society – *Merrie Africa* – and blamed the colonizers for disrupting this paradise.

– E. A. El Obaid and K. Appiagyei-Atua.¹

Introduction

The previous chapter examined the role of the cultural, historical-colonial and developmental experiences of Africa in shaping the notion of human rights² inherent in the socio-economic and political lifestyles of African societies, taking the example of the Akans for a case-study. This analysis was done in the context of the on-going debate on African philosophy between the *contemporarist* and *holistic* schools. I examined how the *contemporarist* school's analysis of African philosophy helped expose the political agenda of African political ethnophilosophers. At the same time, it was observed that the *contemporarist* proposition for the solution to Africa's developmental problems – calling for a wholesale adoption of the “spirit of Europe” -- was antithetical to their otherwise significant exposition on African ethnophilosophy. In the context of the historico-colonial African experience, I related how European philosophers' ethnocentric perspective on African people and their culture helped lay a foundation for their colleagues in the field of anthropology to continue in their biased analysis of Africa. On the other hand, it was noted that the approach of the *holistic* school bears close relationship to that adopted in formulating the theory of community emancipation. The *holistic* school looks to the past and present in postulating its concept of African philosophy. The theory, on its part, while seeking to find a way to address Africa's present raging problem of underdevelopment through a concept of rights, derives this

¹ E. A. El Obaid and K. Appiagyei-Atua, “Human Rights in Africa: A New Perspective on Linking the Past to the Present,” (1996) 41 *McGill Law Journal*, 819 at 828.

concept from traditional Akan proverbs, symbols, institutions. The conclusion I reach then, in seeking to merge the African discourse on human rights and philosophy is that one can locate the African concept of rights, from the perspective of Akan culture, in African philosophy.

This chapter is devoted to a discussion of the various views espousing African notions of rights. The study is pursued in the context of the theory of community emancipation and the analysis of African philosophy. The object is to use the theory of community emancipation to critique the extant perspectives on human rights in Africa with the ultimate goal of arriving at a comprehensive Akan concept of human rights that speaks to the lived experiences of the Akan people of Ghana. I then use this analysis to draw a connection to civil society, both from the Western European and African traditions. The relevance of civil society in the debate here results from its re-emergence and promotion as the tool to foster democracy in Africa.³ It is important to analyse what has prompted this development, and to ask whether or not the concept as evolved since then in Western Europe is the same as what is being advocated for and applied in African countries today under the “new international order.”⁴ It is also pertinent to assess to what extent the contemporary notion of civil society tallies with the African traditional notion of civil society; and finally, to pave the way for an examination of the analytical utility of the concept of civil society for Africa’s development.

I: African Scholarship on Human Rights

As in the case of philosophy and anthropology, in the discourse on human rights there is an on-going debate on whether there are indigenous African notions of rights. The contemporary source of the debate lies in the position expressed by leaders of many

² “Civil society” and, to some extent, “Democracy” are examined in detail in Chapter 3 below.

³ OECD, *Participatory Development and Good Governance* (Paris: OECD, 1995); also, World Bank, *Governance: The World Bank’s Experience* (Washington: The World Bank, 1994).

⁴ The “New international order” refers to the post-Cold War Order which is under the influence of the Western world and premised on the promotion of human rights and democracy and market reforms in the former communist/socialist states and other less industrialised states. See Kiaras Gharabaghi,

new African countries and other newly independent colonies at the United Nations.⁵ For economic, political and cultural reasons, African leaders called for a “special dispensation” regarding the protection of human rights in their countries. Economically, it was argued that human rights was a bane to development; politically, that full respect for civil and political rights would unleash centrifugal forces on to the political scene to disturb the fragile African nation-state; culturally, that human rights (in the form of civil and political rights) was a foreign ideology because of its individualistic nature (while African society was claimed to be communalistic).⁶ Therefore African leaders preferred to support economic, social and cultural rights and to supposedly delay the enjoyment of civil and political rights until “development” was attained.

These arguments remained a source of contention between African states and their Western counterparts. At the level of academia, the cultural-relativist argument put forward by African nationalist leaders to excuse abuse of human rights in their respective countries was used as a basis by Western anthropologists to confirm their earlier claims that traditional African political systems did not possess a concept of rights. The exposition of an African notion of rights by African scholars was initiated more as a response to the Western claim. They picked up the debate and introduced the discourse of an African notion of rights on the platform of cultural relativism. African scholarship responded by propounding the primary African theory on rights based on the traditional African political institutions.⁷ While they did not share the view of the “progressive” ethnologists that pluralism was a colonial accident, they did follow their argument that pluralism was only *inter*-cultural, not *intra*-cultural. There emerged from this project an essentialist and limited notion of human rights from the

“Introduction: The “New World Order Discourse” in Perspective,” in (Summer 1995) Vol. 11, No. 2 *International Insight*, 1.

⁵ See details in Chapter 3.

⁶ A. Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986) at 307-308.

⁷ Eg., see C.C. Mojekwu, “International Human Rights: The African Perspective,” in J.L. Nelson and V.M. Green, eds., *International Human Rights: Contemporary Issues* (Stanfordville, New York: Human Rights Publishing Group, 1980); L. Marasinghe, “Traditional Conceptions of Human Rights in Africa,” in C.E. Welch and R.I. Meltzer, eds., *Human Rights and Development in Africa* (Albany: State University of New York Press, 1984).

African perspective.⁸ Finally, such works were later to be challenged by the more culturally informed and balanced perspectives of other African scholars. I have delineated 6 perspectives that characterise the approach of various scholars on the question of indigenous African concepts of rights.⁹ While some of them are unique, the work of others reveals similarities in style which cut across classifications. The common strands are linked together as composing a group and representing a common perspective on the subject of African notions of rights. A review of the trend of the discourse is presented below.

A: The Community Perspective

Those propounding this notion of rights¹⁰ can also be denominated as the culture-specific group.¹¹ An important element of the community perspective, one that I share, and that is expressed in the theory of community emancipation, is that human rights, and other moral precepts and values, inhere in a community's culture. Advocates of the community perspective contend that African culture is entirely communalistic because of their preference for the cultural unanimity argument. Consequently, the concept of human rights must be equally communalistic (that is, supporting collective, but not individual rights). Thus, Mojekwu, for instance, asserts that "the [communitarian] concept of human rights in Africa was fundamentally based on ascribed status ... One who has lost his membership in a social unit or one who did not belong -- an outcast or a stranger -- lived outside the range of human rights protection by the social unit."¹² This concept of rights is therefore taken to be the direct opposite of the Western model. For instance, Josiah Cobbah argues:

The pursuit of human dignity is not concerned with vindicating the right of any individual against the world. The African notion of family seeks a vindication of the communal well-

⁸ These writings seems to reflect the direct influence of African socialism. African socialism is given detailed treatment in the Chapter 3.

⁹ See below at 74.

¹⁰ They include Mojekwu and Marasinghe. See *supra* note 7.

¹¹ See Shivji, *The Concept of Human Rights in Africa* (London: CODESRIA, 1989) at 12. Fernyhough, however, labels this group as the cultural relativists. See Timothy Fernyhough, "Human Rights in Pre-Colonial Africa," in Ronald Cohen, ed., *Human Rights and Governance in Africa* (University Press of Florida, 1993) at 42.

¹² Mojekwu, *supra* note 10 at 85.

being. The starting point is not the individual but the whole group including both the living and the dead.¹³

Asmarom Legesse writes in support:

If Africans were the sole authors of the Universal Declaration of Human Rights, they might have ranked the rights of communities above those of individuals, and they might have used a cultural idiom fundamentally different from the language in which the ideas are now formulated.¹⁴

The writings of these scholars echo those of African socialists with regard to the *Merrie Africa* idea.¹⁵ The only difference between them is that African socialism focused on governmental institutions and the socio-economic setting while the community group focuses on human rights.

1. Reaction to the Community Rights Debate from a Western Perspective

Two Western writers who have devoted part of their writings to human rights in the African context are Jack Donnelly and Rhoda Howard.¹⁶ Some of their works are a reaction to the Community debate. They can be compared to the critics of the nationalist ethnophilosophers in the sense that they also rely on the very monolithic cultural claims of the Community perspective (without seeking independent confirmation) to argue about the existence, or otherwise, of human rights in traditional African societies and political systems.

Relying on the false cultural monolithic stance of the Community school, the critics of the Community school hold that traditional African societies did not have a concept of rights. The basis of their claim is that human rights are inherent in one's humanity and not in a community because human rights are fundamental and

¹³ Josiah Cobbah, "African Values and the Human Rights Debate: An African Perspective," in (Aug. 1987) Vol. No. 3 *Human Rights Quarterly* 9, 309. Though in theory agreeing with the Community school, in terms of policy Cobbah's view is somewhat different. See *infra* under the "Cultural Relativist school."

¹⁴ Asmarom Legesse, "Human Rights in African Political Culture," in Kenneth W. Thompson, ed., *The Moral Imperatives of Human Rights: A World Survey* (Washington, DC: University Press of America, 1980), 123 at 129. Also included in this school is Dunstan Wai, "Human Rights in Sub-Saharan Africa," in Pollis and Schwab, eds., *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger, 1979).

¹⁵ This is a term used to refer to the romanticisation of African culture as possessing a perfect past which was egalitarian and conflict-free. For details on African socialism see Chapter 3 of this work.

universal in scope and application.¹⁷ Therefore, Howard claims that “human rights” in Africa could not have been human rights since the enjoyment of such rights was based on one’s ascribed position, membership or status in the community, but not on one’s humanity. They were thus not “personal, *human* rights.” What African societies had were, at best, notions of human dignity, but not human rights.¹⁸

Regarding the *Merrie Africa* argument, Howard argues that the traditional communal-setting in Africa has been destroyed through colonialism and European contact which introduced in its wake urbanisation, the radio, the television, the newspaper, the cinema, etc.¹⁹ This change of circumstances has therefore induced a cultural change that has individualised the composition of African societies today. As a result, African societies have arrived at a stage which requires respect for individual rights, as opposed to collective or community rights.²⁰

The “human dignity” argument suffers from two major defects. One is that Howard and Donnelly, for instance, base their prescription of a notion of “human dignity” for Africa principally on Mojekwu’s analysis.²¹ Yet the latter’s work is challenged and deconstructed for being both an over-simplification and an exaggeration.²² In any event, even if one accepted the truth of Howard and Donnelly’s position, it must be noted that rights were not enjoyed in the same manner or to the same extent by all the people who lived at the time and place where rights are said to have developed – Western Europe. In fact, the rationale behind the evolution of the concept of natural

¹⁶ R. Howard, *Human Rights in Commonwealth Africa* (Totowa: Rowman and Littlefield) and J. Donnelly, *The Concept of Human Rights* (London: Croom Helm, 1985).

¹⁷ R. Howard, *supra* note 16, especially Chapter 2. See also R. Howard, *Human Rights and the Search for Community* (Boulder: Westview Press, 1995).

¹⁸ Howard, *supra* note 16 at 18, 19.

¹⁹ *Ibid*, 27ff.

²⁰ This analysis by Howard exposes the danger in her and Donnelly’s view regarding their universalist approach to human rights: that human rights is a Western cultural artifact which should now be considered to have diffused to all parts of the world through Western contact. The danger here is that in so arguing, Howard and Donnelly and African leaders are sharing the same platform. For African leaders have also argued, based on the concept of African socialism, that human rights is not part of the African culture. Perhaps the only difference between them is that for Howard and Donnelly, human rights arrived at the time of independence. But for African leaders, human rights are yet to arrive because Africa is yet to attain development. See Howard and Donnelly, *supra* note 16.

²¹ See Mojekwu, *supra* note 7.

rights was largely a means to affirmative action by the middle class male to acquire the right to property. In support of this view Kathleen Lahey writes:

The notion of equality was originally devised by men in order to promote wider distribution of political and economic power among male members of the state ... In Locke's view, women had to be enslaved within the family if property relations were to be legitimated and maintained.²³

But one can even extend Lahey's analysis: Locke's conception of equality not only excluded women, but also slaves, serfs and persecuted peasants (both male and female). Thus, if the Western concept of human rights was based on humanity *per se* but not on "ascribed status," then at least women, slaves, serfs and the poor in Western Europe should not have been denied the exercise of their right to property and other rights.²⁴ The suppression of rights of these categories of people was facilitated by the inadequacy of the Western notion of rights in not recognising *socio-economic* civil rights. This is the private aspect of civil rights which is meant to empower people at the domestic level and prepare them to use it at the political level against governments and abusive non-state actors.

Secondly, it is noted that the exercise of such rights was not only initially denied the categories of people mentioned above, but also the people of other communities who were enslaved and colonised. Eide's contribution on this subject is relevant:

... genocidal actions ... were carried out by self-proclaimed freedom-lovers emigrating from Europe at a time when human rights jargon was blossoming there and was warmly endorsed by the emigres -- in so far as their own society was concerned, but not embracing the peoples they met.²⁵

²² See below.

²³ Kathleen Lahey makes a similar claim regarding the denial of rights, under the liberal notion of rights, to women. Lahey, "The Charter and Pornography: Towards a Restricted Theory of Constitutionally Protected Expression," in J.M. Weiler and R.M. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell Co. Ltd., 1986), 265.

²⁴ L. Trakman, "Hate Speech Hurts: A Community Perspective," (Unpublished essay. Copy on file with author). See also John Locke, *Two Treatises of Civil Government, 2nd Treatise* (London: J.M. Dent & Sons, 1955) at 17 and 24; and, Ruth Grant, *John Locke's Liberalism* (Chicago: University of Chicago Press, 1987). Indeed, C.B. McPherson extends the net covering those denied the opportunity to exercise their rights to include the poor, which may include those who were free but not rich. See C.B. McPherson, "Politics: Post-Liberal Democracy?," in Robin Blackburn, ed., *Ideology in Social Science* (Glasgow: Fontana, 1976), 19.

²⁵ Asbjorn Eide, "Linking Human Rights and Development: Aspects of the Norwegian Debate," in Irving Brecher, ed., *Human Rights, Development and Foreign Policy: Canadian Perspectives* (Halifax: The Institute for Research on Public Policy, 1989), at 8.

Moreover, with regard to the traditional Akan society, for instance, the goal of pursuing an exclusionary policy on the exercise of rights was not to deny rights absolutely to strangers, as Mojekwu claims.²⁶ In fact, in some of the traditional African traditional political systems there are situations where strangers and slaves could rise to the status of citizens and hold public office. Busia says that among the Ashantis of Ghana, strangers could attain the position of leader of the "Opposition party" which is made up of the youths of the community. Slaves could also own property. Among the pre-installation pledges which an elected chief is supposed to swear allegiance to is the commitment that he would not disclose the origin of the people falling under his jurisdiction. It is said that one reason is to protect the interests of slaves.²⁷ One can also mention the fact that an outcast in most traditional African societies was typically one who was either physically expelled from the community to suffer and die in the forest or in a foreign land. Another type of "exile" remained within the community but was shunned and denied certain privileges though he or she still had some rights, such as the right to life. I therefore do not share Mojekwu's view that outcasts lose every right they used to possess. In fact, the position of the outcast is not different from the punishment meted out to present-day criminals who are denied parts of their rights, such as privacy and freedom of movement, when incarcerated or even when on parole.²⁸ The situation was more on the lines of the contemporary situation in national laws where a country limits the enjoyment of certain rights to its citizens only. For example, the right to work is not automatically enjoyed by non-citizens and even in the International Covenant on Economic, Social and Cultural Rights, less industrialised states are given the right to "economically discriminate" against foreigners.²⁹ Regarding ascribed status, the

²⁶ Mojekwu, *supra* note 7.

²⁷ See K. A. Busia, *The Position of the Chief in the Modern Political System of Ashanti: A Study of the Influence of Contemporary Social Changes on Ashanti Political Institutions* (London: Oxford University Press, 1951). Also, Kwame Arhin, *Traditional Rule in Ghana: Past and Present* (Accra: Sedco Publishing, 1985).

²⁸ The one physically cast out of the community is compared to someone who has been sentenced to capital punishment, though the African traditional penal system looked more "humane." This is because the outcast had a chance of survival (in fact, he or she was given some water, food and clothing to accompany him or her) to escape and begin a new life in another community. But the one condemned to die in the electric chair or by firing squad has no such a chance.

²⁹ Article 2 (3) of the International Covenant on Economic, Social and Cultural Rights (AG. Res. 2200A (XXI), 21 UN GAOR Supp. (No.16) at 49.

situation in the Akan community was that community leaders enjoyed some “special” rights or privileges to facilitate the performance of their duties. This is similar to the modern political context where presidents, parliamentarians and diplomats, to mention a few, are given certain immunities and privileges to enable them to perform their public duties with efficiency.³⁰ Thus, the issue in many, but admittedly not all, cases was one of efficiency and reward but not of discrimination *per se*. The conclusion, therefore, is that either both the Western and the African rights are “personal, human rights” or neither is. The first position is more acceptable.

Howard’s related argument on the debate over human rights versus human dignity is based on her perception of *personhood* in the traditional African context. She contends that one can better appreciate the notion of communitarianism in African tradition through an analysis of the African concept of *personhood* (*onipa* in Akan). The attainment of this *personhood* is portrayed by Howard as enabling a person to attain human dignity or humanity through the fulfillment of one’s social obligations.³¹ Based on this analysis, Howard contends that “the argument that different societies can have different concepts of rights is based on an assumption that *confuses human rights with human dignity*. All societies have concepts of human dignity, but few accept the notion of human rights, in the sense that individuals have the right to make claims on or against the state.”³²

Yet, the concept of *personhood* that Howard discusses is problematic. For example, her notion of *personhood*, in fact, represents only one aspect of three notions of *personhood* in Akan society. The first notion of the person or human being, *onipa*, is

³⁰ As concerns diplomats, the special legal status is referred to in international law as the *functional* theory of diplomatic immunity. This involves the freedom of the envoy to perform official business on behalf of his country without disturbance, interference or interruption. See, e.g., J.G. Starke, *Introduction to International Law* (London: Butterworths, 1984) at 402-403.

³¹ The fulfillment of social obligations then led to the attainment of ascribed social status in the traditional African community. According to Mojekwu, whose work is criticised by Howard and Donnelly, the difference between western European and African concepts of rights is that the latter were based fundamentally on ascribed status.

³² Emphasis added. Howard, *supra* note 16 at 17.

the descriptive type.³³ The second type -- which Howard uses to generalise for the whole -- is used to imply the recognition of status attained through one's contribution to the community's good, especially in terms of bravery. The third, which is related to the second, has to do with the performance of acts of compassion. Thus, while the first type is ascribed from birth, the second and third go with achievement. It can thus be said that in view of the second and the third notions one person is "more *onipa* [human] than another." It is such people who are most often able to win contested political office. The core idea of human dignity, that is equality by birth, is assigned automatically to everyone. Thus, ascribed status was not the sole, or even the principal, criteria for determining access to rights.

It is observed that Howard and Donnelly's positions on the place of individual rights in a community have been largely influenced by the core ideas of social contract theory which ascribes rights only within individualistic, industrial societies. This must be why Howard argues that in pre-capitalist, agrarian, non-state societies where slavery existed, there were no rights.³⁴ Consequently, having come under colonial rule and been immersed into the capitalist economy, the time has long arrived for African states to accept human rights as part of the operative mechanism of their socio-political organisation and practice.³⁵ This is untenable.

B: The "Romantic" Concept

The arguments presented above also go to critique another perspective on human rights in the traditional African society, the Romantic concept.³⁶ This perspective is

³³ K. Wiredu, "Akan Perspectives on Human Rights," in Shepherd and Anikpo, eds., *Emerging Human Rights: The African Political Economic Context* (Westport: Greenwood Press, 1990), 240. This describes the distinction that one, for example, draws between a human being and an animal. *Onipa*, in this sense then, is identified as one made up of blood *nton* (spirit, from the father), *mogya*, (blood, from the mother), and a soul from God. See also K. Gyekye, *An Essay on African Philosophical Thought: The Conceptual Scheme* (Cambridge: Cambridge University Press, 1987) esp. Chapter 6 for an analysis of the concept of the person in Akan philosophy.

³⁴ Though there were states in traditional African political systems.

³⁵ Howard, *supra* note 16 at 20.

³⁶ This phrase is borrowed from Eze who criticises the father of this school, Keba M'baye for romanticising about rights in Africa. See Osita Eze, *Human Rights in Africa: Some Selected Problems* (Lagos: Nigerian Institute of International Affairs & Macmillan Nigeria Publishers Ltd, 1984).

no different from the community counterpart in terms of the *Merrie Africa* notion.³⁷ But in addition to the community argument, emphasis is placed on duties. For example, Keba M'baye, then a proponent of this concept, writes:

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 duties. They take the form of a rite which must be obeyed because it commands like a "categorical imperative." In this, they tie, through their spiritualism, with the philosophy of Kant.³⁸

The Romantic perspective therefore bears close resemblance to African socialism, in terms of the rights/duties argument. The difference between the Community and Romantic debates is based on the link that M'baye seeks to establish between the Romantic theory and the Western concept of rights.

It is important to note that the notion of human rights in the traditional political systems was not systematically conceptualised. Moreover, to acknowledge the existence of rights does not mean that the rights that M'baye tabulates as pertaining to the traditional African society³⁹ were duly respected and guaranteed at all times. There were clear instances of abuse of rights. Secondly, those rights that M'baye mentioned were not all ripe for recognition and exercise in all societies, as the theory of community emancipation makes us aware. Eze's important assertion that the exercise of rights depends on the community's level of development becomes appropriate here to counter this contention by M'baye.⁴⁰

The ambivalent position of M'baye in mixing up of the traditional with the Western notion of rights might be explained by the fact that he sought to portray and prove the presence of a rights concept in traditional Africa by using the Western concept of rights as the measuring rod. But this means of analysis is inappropriate as it endorses

³⁷ One can even say that the Romantic school glorifies *Merrie Africa* further by arguing that respect for rights was more or less absolute, unlike Mojekwu, for instance, who talks about abuse of rights of strangers.

³⁸ Keba M'baye and B. Ndiaye, "The Organisation of African Unity," in Karel Vasak, ed., *The International Dimensions of Human Rights* (Westport: Greenwood Press, 1982) 583. The community/duty argument is treated in some detail in Chapter 5, under my analysis of the African Charter on Human and Peoples' Rights.

³⁹ These include the right to life, to work, to education, freedom of expression, of association, religion, and of movement. *Ibid*, 589-591.

⁴⁰ See *infra*, under The Human Dignity Perspective.

the ethnocentric bias attached to human rights in traditional Africa. Fernyhough's reaction to such an approach is that "it would be bizarre to simply list basic rights in Western human rights conventions and try to match precolonial Africa against them."⁴¹

C: The Cultural Relativist Notion

This group is represented by Josiah Cobbah, Fasil Nahum and others. In some ways, the writings of some of the scholars have trappings of the *Merrie Africa* romanticism and the community/duty arguments. What it contributes though is that the African conception of rights need not simply be recognised but should be shared with the international society as Africa's contribution to international human rights;⁴² for it is only in this respect that the world can have a "comprehensive" and "harmonious" body of human rights.⁴³ This position which is proffered by the cultural relativists represents a very important contribution to the debate. The difference between them and the culture-specific group is that while the former calls for amalgamation of Western and African notions of rights, the latter advocates a distinction between them.⁴⁴

Abdullahi An-Na'im's analysis on human rights from the African perspective reflects this approach, though he does not found his theory on *Merrie Africa*, but on the Islamic religion. A distinct feature of his work is that he does not repudiate international human rights instruments as Eurocentric. Rather, he recognises the validity of international norms as well as the fact that human rights emanate from a people's culture and religion. His view is that a religious concept of human rights, in his case Islam, can be merged with international human rights covenants through a

⁴¹ See Fernyhough, *supra* note 11 at 55.

⁴² Cobbah, *supra* note 13 at 331ff. This view is reflected in the linguistic theory of international law mentioned in the introduction. But see also, Christopher Joyner and John Dettling, "Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law," (1989) Vol. 20 *California Western International Law Journal*, 275.

⁴³ Fasil Nahum, "African Contribution to Human Rights." Paper presented at the *African Seminar on Human Rights and Development*, National Institute of Development Research and Documentation, University of Botswana, Gaborone, May 24-29, 1987), cf. Shivji, *supra* note 11 at 14.

⁴⁴ These two schools, together with the Romantic school are placed in the category of African human rights ethnophilosophy.

progressive reconciliation of the former with the latter, relying on the discretion of the particular religious community.⁴⁵ The importance of An-Na'im's view to this discussion is that it supports the argument in the theory of community emancipation that rights emanate from a community's culture, which in non-industrialised societies is founded primarily on religion. It therefore confirms the contention that the root of human rights in Africa is its traditional religions which in turn gave birth to traditional African political systems. The theory also raises the fundamental issue of cultural change and calls for acceptance of the fact that though Islam and Christianity did not start in Africa, they have now become part of African culture. Hence in talking about human rights in the African context, religion cannot be ignored. Secondly, the fact that these religions, including the traditional religions, profess individual responsibility means that it is important to admit that individual rights exercise should be respected in Africa. With respect to the cultural relativist assertion on the reconciliation of tradition/religious rights with the international rights, I contend that this approach should not be seen as indicating that human rights emanating from non-Western communities are defective, hence the need for the "reconciliation." Nor should we imagine that the international system is perfect. Rather, it should be recognised that human rights in every community today have been corrupted by human greed and selfishness. The best approach therefore is to give and take and thereby create a "comprehensive" whole, but only if the contribution of Africa is rid of its *Merrie Africa* bias.

D: The Human Dignity Perspective

I place in this category the works of Eze,⁴⁶ Asante⁴⁷ and others.⁴⁸ The name derives from the fact that the work of these writers is not based on a narrow cultural notion of rights, but a concept that adds to the cultural, the notion of human dignity.

⁴⁵ See e.g., Abdullahi An-Na'im, "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights. The Meaning of Cruel, Inhuman and Degrading Treatment or Punishment," in A. An-Na'im, ed., *Human Rights in Cross-Cultural Perspectives* (1992); also, An-Na'im, "Religious Minorities under Islamic Law and the Limits of Cultural Relativism," in (Feb. 1987) Vol 9 No. 1 *Human Rights Quarterly*, at 1.

⁴⁶ Eze, *supra* note 36.

⁴⁷ S.K.B. Asante, "Nation-Building and Human Rights in Emergent African Nations," (1969) Vol. 2 *Cornell International Law Journal*, 72.

Asante argues that "human rights, quite simply, are concerned with asserting and protecting human dignity, and they are ultimately based on a regard for the intrinsic worth of the individual."⁴⁹ Asante's conclusion, based on this view, is to reject "the notion that human rights concepts are peculiarly or even essentially bourgeois or Western, and without relevance to Africans."⁵⁰ Shivji critiques Asante for entrenching his analysis "within a liberal thought", though doing so in a less sophisticated fashion.⁵¹ But Shivji seems to be misrepresenting Asante. Asante is simply arguing for an African conception of rights that is founded on the individual and respect for his or her dignity and worth as a human being. This may indeed sound Western, due to the implicit focus upon individualism, but the concept of the individual is not the preserve of the Western concept of rights.⁵² What is missing though is the development to fully indigenise the debate.

Eze's position seems to go beyond Asante's.⁵³ As noted earlier, Eze criticises M'baye's community/duty idea as "romantic." Eze therefore deviates from the *Merrie Africa* idea and presents a more holistic, practically relevant and philosophically coherent theory of traditional Africa conceptions of rights. The gist of his argument is that human rights exercise is a variable which is dependent on the

⁴⁸ This is contrary to Fernyhough's view which seems to say that the two writers present two contrasting views on human rights. See Fernyhough, *supra* note 11 at 47. But at least he would agree that there is one thing that unites them: their deviation from the *Merrie Africa* argument.

⁴⁹ This view concords with Howard-Donnelly argument on the nature of human rights. Yet, Asante, on the one hand, and Howard-Donnelly on the other, use this foundation to come to different conclusions on whether Africa had concepts of human rights.

⁵⁰ Asante, *supra* note 47 at 102. This shows that Asante believes in the recognition of individual rights in the African context while Howard and Donnelly do not.

⁵¹ See Shivji, *supra* note 11 at 11.

⁵² El Obaid and K. Appiagyei-Atua, *supra* note 1. Also, refer back to Chapter 1.

⁵³ The difference that Fernyhough notes between Asante and Eze seems to be that the former is more universalist in his approach than the latter. See Fernyhough, *supra* note 11. But I think that the contrary is true. The basis for so arguing is that, in the first place one has to be wary of how we define "universalism" here, based on An-Na'im's theory: that it should start from a cultural specific angle to universalism through a culturally relative perspective. Asante's view does not seem to follow this path. His universal concept of rights is simply that one can, for instance, extend the Black struggle against colonialism to cover apartheid and then to cover discrimination against Blacks in America. Eze's universalism, on the other hand, is based on his simple argument that rights are part of every culture and that the bundle of rights that is enjoyed in each community would depend on the level of development of that particular community.

stage of development of a particular society. Based on this, he advances the argument further that African societies had concepts of rights *qua* rights. However, having rejected the *Merrie Africa* argument, Eze adds that African societies did experience rights abuse.⁵⁴ This represents a very pragmatic position on human rights in the traditional African context. Yet, it is not without its difficulties. While Shivji seems to endorse it as perhaps the most radical discourse on African conceptions of human rights,⁵⁵ he criticises Eze's definition of human rights as being inadequately socialistic.⁵⁶ Fernyhough's criticism is that Eze advances us little further with his final assertion that precolonial Africa witnessed only a limited concern for human rights.⁵⁷

E: The Popular Rights Notion

This concept is associated with Fernyhough. "Popular rights" is the label he adopts for his notion of rights. He writes:

Under the rubric popular rights I include individual and collective rights, embracing specifically human rights, which African peoples enjoyed, shared, and molded and which gave meaning to their lives.⁵⁸

His work is the most important contribution yet. It is useful not only for his thesis on human rights in traditional Africa, but also, in terms of the relationship he draws between his traditional African rights theory and human rights and democracy in contemporary Africa.

Fernyhough begins by dismissing the *Merrie Africa* idea as presented by African socialists, the community group, the Africanists and others.⁵⁹ His rejection of the communitarian notion is based on the fact that such an approach would lead to

⁵⁴ See Eze, *supra* note 36.

⁵⁵ In note 15 of Chapter 2 of his book, Shivji claims that Eze's book has been sidelined simply because it refused to toe the line of the mainstream.

⁵⁶ See Shivji, *supra* note 11 at 21. Here I see a consistent approach by Shivji towards defining his radical concept of rights, that hinges on deviating from the terminology as well as the notion of rights on the basis that it is the "dominant," "imperialistic," "western" discourse.

⁵⁷ Fernyhough, *supra* note 11 at 47.

⁵⁸ *Ibid*, 53.

⁵⁹ In so doing he voices support for the Human Dignity tradition albeit he goes on to critique Eze's work as being inadequate in terms of, eg., not going far enough in his critique of the imperialist nature of the Western notion of rights. This criticism provides the backdrop for him to launch into his theory.

accepting analytical imprecision and acknowledging the impossibility of empirical testing. He writes:

In this ambiguity [of analytical imprecision and impossibility of empirical testing] lies our inability to define accurately a particular community's physical and moral needs and thereby establish a basis for concepts of human rights.⁶⁰

Inherent in this remark is the importance Fernyhough attaches to "man's basic physical and psychological needs" or "goods" as forming the basis for his theory of popular rights. Related to this approach is the emphasis on "the moral view of human nature."⁶¹ These insights identify closely with the theory of community emancipation which, *inter alia*, grounds the basis of rights in the peculiar needs of a community as defined by its culture and religion. The theory also interprets the presence of the moral Being or Authority as the first entity on the development structure as providing the moral basis for the exercise and enjoyment of human rights.

Another important line of argument that Fernyhough pursues is that human rights in African societies not only derived from a struggle against tyranny and elitism, but also through individual claims among members of acephalous societies. This insight is important in two major respects. One is that the analysis concerning the fight against "ideological dominance of ruling elites" supports the relationship between the diverse political forms that traditional Africa possessed and how traditional Africans cherished their freedom and dignity.⁶² This indicates that many of the different African political systems emerged through the reaction of oppressed peoples severing allegiance from their tyrannical leadership and setting up their own political communities.

F: The Revolutionary Concept

This perspective, like the *contemporarist* school of African philosophy, looks to the future and does not give room for accommodating the past of traditional African communities. In fact, its proponent, Issa Shivji, uses the ethnophilosophy argument to critique and reject the propositions of all the above-named schools, apart from the

⁶⁰ *Ibid*, 46.

⁶¹ This is with reference to the role of morality in a cultural setting.

popular rights school. Yet, this stance marks the point of departure between Shivji and the *contemporarist* African philosophers. Before launching into an exposition of his revolutionary African theory of rights, Shivji presents a sharp attack on the Western notion of rights. He argues, *inter alia*, that the

‘Human rights ideology’ is an ideology of domination and part of the imperialist world outlook. Like other ideologies of domination in yester-epochs, the dominant human rights ideology claims and proclaims universality, immortality and immutability while promulgating in practice class-parochialism, national oppression and ‘patronising’ authoritarianism.⁶³

One can therefore describe Shivji as an Afrocentric *contemporarist*, although as I will expose later, despite his rhetoric, he also betrays some leanings towards the Eurocentric approach. The Afrocentricism of his work refers to the fact that he concentrates his analysis on historical-colonial grounds in arguing for an African notion of rights. Thus, unlike the theory of community emancipation which adopts a three-pronged approach covering the cultural, historico-colonial and developmental contexts to argue for an African notion of rights, Shivji adopts only one.⁶⁴

Having established that the justification for a new perspective on human rights in Africa should be historically situated and socially specific,⁶⁵ Shivji explains the historical and social discourses. He mentions attempts by imperialist forces to transform Africa with the support of domestic social groups and forces, both traditional and modern, to provide the social basis for imperialism in Africa. Socially, he argues further that we have to identify the oppressed and exploited social classes who form the motive force for an anti-imperialist and democratic revolution.

⁶² See below.

⁶³ Shivji, *supra* note 11 at 3.

⁶⁴ Shivji adopts the three-pronged approach in his criticism but then leaves the other two behind. Like the *contemporarists*, his position probably rests on the fact that so long as the idea has been tainted and corrupted there is no need to go back to it and take the original good side of it which was buried underground to satisfy parochial class interests. Yet, somehow he agreed on a selective adoption of traditional African rights by consenting to the Butare Colloquium on Human Rights and Economic Development in Francophone Africa. The colloquium rejected the wholesale adoption of traditional rights. One reason was that African societies had now become individualistic with the disappearance of the traditional hierarchical structures which characterised most pre-colonial societies. The colloquium therefore called for the selective adoption of traditional African rights and to determine how the positive values of traditional society can best be translated into modern African reality. See Hurst Hannum, “The Butare Colloquium on Human Rights and Economic Development in Francophone Africa: A Summary and Analysis,” (1979) Vol 1. No. 2 *Universal Human Rights* 63 at 67.

⁶⁵ Shivji, *supra* note 11 at 69.

According to Shivji, this task should have fallen to the bourgeoisie who raised the battle cry for democracy in Europe.⁶⁶ In the absence of a bourgeois class Shivji falls on the workers to deliver the revolution.

The rationale for the need to revolutionise human rights discourse in Africa is grounded in the following issues: first, that the new perspective on human rights in Africa need be “thoroughly anti-imperialist, thoroughly democratic and unreservedly in the interest of the ‘people.’”⁶⁷ Secondly, it must “distance itself openly from imperialist ideology of human rights at the international level and cultural-chauvinist/developmental ideology of the compradorial classes, at the national level.”⁶⁸ Thirdly, “the historical, social and ideological perspective suggested above at once generates a new conceptualisation of an ‘human rights’ ideology at a theoretical level.”⁶⁹

These new conceptions include the idea that the rights holder should not be seen as an exclusive autonomous individual but a collective: “a people, a nation, a nationality, a national group, an interest/social group, a cultural/oppressed minority, etc.”⁷⁰ Shivji also argues that rights should not be seen as an entitlement or a claim since they are static. Rather, it should be conceptualised as a means of struggle.⁷¹ Based on these and other “revolutionary” concepts, Shivji arrives at what type of rights should constitute the new perspective on human rights in Africa. These are what he refers to as the *central* (or ‘integrated’) rights: the ‘right to self-determination’ and the ‘right to

⁶⁶ *Ibid.*, 46. But this argument by Shivji is antithetical to his discourse since he has already condemned the bourgeois rights revolution and its deals with a sympathetic Parliament. Moreover, it has already been noted that democracy was not immediately established during this era. In fact, as stated earlier, the system was anti-democratic. It is therefore untenable to expect the African bourgeois to deliver a human rights/democratic revolution.

⁶⁷ *Ibid.*, 70.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ But he argues that this conception of the collective must be differentiated from the fascist concept where the ‘collective’ is in the oppressor state, etc. *Ibid.*, 71.

⁷¹ His reason is that the existing paradigm of a legal rights is static and absolutist. *Ibid.* But I dispute this. It is my contention that a claim and entitlement are revisable concepts. I argue elsewhere that Hohfeld’s concepts of correlatives are all claim rights. See K. Appiagyei-Atua, *Re-Discovering the Relationship Between Rights and Development through the Theory of Community Understanding: The*

organise.’⁷² The right to self-determination is defined “to extend up to and include the right to make a revolution where the people find that their interests are not served by a particular social, economic and political order.”⁷³ The right to organise, on the other hand, expresses the individual right of every person to associate with a fellow person, on the basis of certain common interests.⁷⁴ He relies on the enunciation of the *central* rights from the *Universal Declaration on the Rights of Peoples*⁷⁵ and the International Labour Organisation Convention on the *Freedom of Association and Protection of the Right to Organise*, 1948.⁷⁶

As part of his effort to present the revolutionary perspective on human rights in Africa, Shivji condemns the African Charter on Human and Peoples’ Rights for being statist, anti-people and carved out to serve the interest of the ruling classes in Africa. He also rejects, among others, the right to development. I find the position of Shivji on these grounds to be very positive.⁷⁷ For example, I find the so-called third generation of rights that the African Charter on Human and Peoples’ Rights express, which includes the right to development, to be incoherent and the legal, political and moral foundations for their recognition as unfounded or, at best, unconvincing. It is a redressing of the claims represented in the moribund “New International Economic Order” (NIEO) which African and other less industrialised states initially tried unsuccessfully to push through the UN in order to obtain better deals with their more industrialised Western counterparts. One major pitfall with the NIEO is the fact that

Experiences of Ghana and Canada (Unpublished LL.M Dissertation, Dalhousie Law School, Halifax, NS, 1994).

⁷² Shivji, *supra* note 11 at 72. He argues that these rights are *central* but not *exclusive*. Thus other rights such as those pertaining to integrity and security of a person are still important.

⁷³ Another antithetical stance Shivji embroils himself in is with regard to his earlier condemnation of the American Declaration of Independence of 1776 thus: “But the declared universality was fundamentally ideological. Language did not correspond to life. ‘Man’ did not include ‘woman’ or ‘slave.’ Yet, he later refers to “the famous American Declaration of the Rights of Man of 1776” and the French Declaration of 1789 as the basis of support for his *central* rights theory which is premised on the right to self-determination and the right to organise. The problem with Shivji, like the *contemporarists*, is that they both cut their umbilical cord with their past. So without any indigenous past to ground their work in, they had no course but to adopt the European past. See *ibid*, 86.

⁷⁴ *Ibid*, 84.

⁷⁵ Known as the Algiers Declaration. Adopted by a group of “jurists, political scientists, sociologists, representatives of trade unions and political parties of various countries, as well as members of several liberation movements” at a meeting held in Algiers on 4 July, 1976. See Shivji *supra* note 11 at 93.

⁷⁶ *Ibid*, 85.

it sought to blame only the Western states for the economic woes they were facing. Human rights was not factored in as a necessary ingredient for development.⁷⁸

On a whole, it is observed that the contribution of African scholars to the human rights debate has progressed towards a stage where the *Merrie Africa* conceptions and the biases that were initially presented in defence of a human rights concept in traditional African societies have been done with, or at least reduced. The recognition and admission of the defects inherent in the African conception of rights is significant. The readiness to critique and to put it in the right perspective the modern attempt by African governments to improve the human rights regime in Africa through, principally, the African Charter is also very positive. What remains undone is the link of the rights discourse to African philosophy and African development. I seek to address these issues in the following sections with some detailed attention being placed on the impact of Western colonial development policies on Akan traditional concept of rights and civil society.

II: Merging African Philosophy and African Notions of Human Rights

As expressed in the *holistic* notion of African philosophy, for philosophy to be recognised as African it need be rooted in African culture, traditions and values of the people.⁷⁹ This grounding is to be found in the traditional political systems. It is also in the same realm that one finds and draws conclusions from the concepts of rights that the various traditional systems developed, guaranteed and exercised.

African philosophy has only been presented as a tool to liberate the oppressed people and to promote development for them. But so far it remains reified and out of organic touch with the ordinary African person. To make it respond to the daily needs and expectations of the people, modern African philosophy must adopt the traditional African philosophical approach which is linked to the struggles, confrontations, etc that oppressed individuals, communities and peoples waged to assert their rights

⁷⁷ See similar analysis below, and especially in Chapter 5.

⁷⁸ K. Appiagyei-Atua, *supra* note 71.

⁷⁹ See Chapter 1.

during the passage from the *communal* to the *political* stages of community metamorphoses.

After critiquing and refuting the claims of the nationalist or “progressive” ethnophilosophers, Hountondji contends that Africa had its own internal pluralism, spawned by perpetual confrontations and occasional open conflicts between Africans themselves.⁸⁰ The confrontation, debate and tension come about through the ability of the people to meet together in groups, exercising their rights of association and assembly, as well as freedoms of expression, conscience, religion, etc. They talked till consensus was reached.⁸¹ The ideas flowing from such debates constitute the community’s public opinion which becomes one of the sources relied on by the sage in the community to formulate proverbs or philosophical thoughts that become a moral yardstick to guide the community, and a reference point for the recognition of the rights of the people. Thus, these conflictual discourses offer a foundation to support the contention of this work that Africa has its own concepts of rights which are shaped by each locality’s socio-political evolution and structure.⁸²

Writing in the *holistic* African philosophical tradition, Potholm also argues that it makes sense to look at the political forms that manifested themselves in the African context and to take them as expressions of political philosophy. The forms can be regarded as indicators of the basic societal values that underpinned the political system and permeated the political value systems of the group. By building on the premise that the various African peoples developed their political systems to conform to the political philosophies operative within their societies, we can deduce the nature and scope of that political thought through the forms themselves.⁸³

⁸⁰ This amounts to an admission that the *contemporarist* discourse is made the poorer by omitting reference to Africa’s past.

⁸¹ See K.A. Busia, *Africa in Search of Democracy* (London: Routledge and Kegan Paul, 1967) at 28. This meant that there were differences of opinions, and tensions attended their meetings but in the name of solidarity they were able to iron out their differences. This attitude has unfortunately been misconstrued by African socialists, for example, to say that there was no opposition in the traditional African societies.

⁸² See Fernyhough *supra* under “Popular Rights.”

⁸³ C. Potholm, *The Theory and Practice of African Politics* (Englewoods Cliffs: Prentice-Hall, 1979) at 1-4. Potholm’s analysis leads him to discern another defect of the work of the pluralist ethnologists and

Potholm's analysis confirms the stance of the *holistic* school that philosophy is forged out of past experiences and is at the same time supposed to be forward-looking. For that matter, if a new political system is formed out of an old one which the rebels did not approve of, which philosophical thought or backing can they look up to in the past on which to model their new political system? They may look up to a general philosophical construct – a basic societal value – eg., as expressed in this Akan proverb: *Onipa nye aboa*: "The human person is not an animal (and so need not be treated as one)" – to argue for change. Akans also believe that the rule of a king is not everlasting. It is the people that last: *Nyanskonsoromma na oman wo no, na nnye osrane*: literally, "the state belongs to the people, not the king." But at the same time, the crusader for change should be able to articulate a more effective and better protective model to support the new political enterprise that will in turn appeal to the people to embrace change or support dissension and consequent separation.

Based on the above analysis, Potholm is able to identify at least eight types of traditional political systems, each with some variations. The principal types include the Band type;⁸⁴ the Classical Segmented system,⁸⁵ the Universalistic Segmented system,⁸⁶ and the Ritually Stratified Segmented system;⁸⁷ the Autonomous Village Group,⁸⁸ the Pyramidal or Federated Monarchy,⁸⁹ the Associational Monarchy,⁹⁰ and

political scientists. That is their confusing structure with process, overestimating the ritual aspects of political offices, and occasionally failing to appreciate the deep-seated complexities in such apparently "simple" systems as those termed segmented. Potholm, above at 10.

⁸⁴ Whose political relationships were coterminous with the kinship relations so that the society and polity were one. Examples are the Tindiga and Bahi of Tanzania and the Anaguta of Nigeria. *Ibid*, 13.

⁸⁵ They differed from the band on the basis of size and scope of individual segments, the amount of interaction among them, and the often rich and dynamic interplay between political authority and community cohesion. They include the Kikuyu of Kenya and the Lobi of Bourkina Faso. *Ibid*, 14, 15.

⁸⁶ The emphasis here is on the decentralisation of power, the egalitarian nature of the political process, individual subgroup autonomy and greater level of socialisation among different groups. Another unique feature is the assumption that one leader was more qualified for one issue or situation than the other. Thus they had two sets of leaders, the village elders and war chiefs. Examples: The Masai of Kenya and Tanzania and Nandi, Kipsigi and Meru of Kenya. *Ibid*, 15-17.

⁸⁷ The difference between them and the classical is with regard to the disparity among religious offices and some social stratification based on the possession of certain sacred objects. Central religious figures were only symbols of unity and exercised no political authority. Examples are: the Swazis and Zulus from southern Africa and the Amharas of Ethiopia. *Ibid*, 17.

⁸⁸ In West Africa, this type is identified by their urbanised background with some relative ethnic homogeneity yet kinship linkages broken down due to urbanisation. Examples are the Ibibios of Nigeria and the Baule of Cote d'Ivoire. In East Africa, among the Swahili-speaking tribes it took the form of city-states. There are three types of city-states: first, political unit under despotic control;

the Centralised Monarchy.⁹¹ Potholm's work supports Peter Lloyd's observation that "... there is a wider range in traditional African political systems than exists today among the industrialized nations in spite of the oft proclaimed communist-democratic dichotomy."⁹² The plurality of forms and types was made possible, according to Potholm, by the fact that "Africans, far from passively accepting the political systems, chose forms, altered them, and developed entirely new ones."⁹³ This remark is significant in highlighting the confrontation, debates, tensions and conflicts that were inherent in traditional African societies.

Therefore, pulling together the observations of Fernyhough with that of Potholm and Hountondji, we see a unity of the concepts of African philosophy, democracy and human rights: that all of them recognise the presence and role of dissent, tension and confrontation in provoking change in traditional African political societies.

These conclusions lay the foundation for the provision of a *modus operandi* for a practical application of the rights struggle in Africa. One important concept that acted as the vehicle to rights exercise and thereby provoke debate and discussion, tension and consensus were the various groups and associations that formed part of the development structures of traditional African political communities. Before analysing

second, political unit run by a collective leadership -- the council; third, strong central political authority that nevertheless accepted the idea of collective leadership but provided for a recognised head of the polity, a "first among equals." Examples of the third include the Ghana, Songhai and Mali empires of the eleventh to the sixteenth centuries. *Ibid*, 18, 19.

⁸⁹ It had a strong central authority and a recognised head of state with considerable subgroup autonomy. Membership in the total community depended upon membership in one of the subgroups. The inner council is a major decision-making body composed of the leaders of the various subgroups. Examples: the Ashanti of Ghana and Baluba of Zaire. *Ibid*, 19-21.

⁹⁰ They differ from the Pyramidal in the sense that instead of the subgroups forming the political base there were rather associations that cut across the subgroups. Example: the Mende of Sierra Leone. *Ibid*, 21.

⁹¹ This type is characterised by a strong central political administration, a firm territorial base, and heterogeneous membership. This membership was based by directly pledging allegiance to the king. It was thus not based on kinship or through joining one of the subgroups. Subgroup autonomy was limited and though there were instances of sub-chiefs exercising considerable power. This system showed strong absorptive capabilities, the ability to amalgamate conquered peoples and permit cultural pluralism. Examples: the Tswana of southern Africa and Mossi of Bourkina Faso. *Ibid*, 22-24.

⁹² See Peter Lloyd, "The Political Structure of African Kingdoms," in *Political Systems and the Distribution of Power*, American Sociology Association Monograph No. 2 (New York: Praeger, 1956), at 107. cf. *ibid*, 7.

⁹³ Potholm, *supra* note 83 at 11.

what should go into a *modern* African notion of rights and philosophy, it becomes necessary to undertake a comparative analysis of the Western notion of civil society and its counterpart in the traditional African context.

III: An Historical Analysis of Akan Traditional Concept of “Civil Society”

I have sought to contend that the elements of “civil society”⁹⁴ in the traditional Akan political environment played no mean role in provoking debate and creating tension and conflict, and consequently, Akan traditional philosophy. Similar structures and institutions may be found among other types of traditional political systems in Africa.⁹⁵ Yet, as noted above, one of the institutional components of traditional African political systems that European philosophy, anthropology, ethnophilosophy and political science failed to recognise is its “civil society.” The suppression of a traditional notion of “civil society” paved the way for importation of the Western European colonialists’ own version of civil society into the Gold Coast (covering the Akans) and Africa as a whole, imposing it on African peoples and assigning to them the status of subjects, not citizens, in this civil society.

“Civil society” is now back. It is one of the concepts that has come to define the post-Cold war agenda of the Western capitalist states – mainly members of the Organisation of Economic Co-operation and Development (OECD) – with the World Bank and the International Monetary Fund (IMF) as its chief agents. It is necessary, therefore, to examine the concept as originally applied in the African context and the difference between this and the modern application of the concept under the auspices of the World Bank.

A: Traditional Akan Notion of “Civil Society”

It is noted that under the Akan traditional political system “civil society” existed at all the three stages of community metamorphosis. At the *communal* stage “civil society”

⁹⁴ Like “rights,” “civil society” is used here as a Western terminology but with a peculiar meaning located in Akan traditional system and referring to socio-economic and political organisations that exist in the community.

⁹⁵ *Ibid.* Also, See G. Ayittey, *Indigenous African Institutions* (Transnational Pubs., Inc., 1991).

remained mainly inchoate, informal and socio-economic in focus. The principal goal was to help overcome the stumbling blocks to development in the form of how to conquer the natural habitat and make it habitable and survivable.⁹⁶ Thus, at the *communal* stage, the structural pre-determinations that affected development were not economic and political power, but the natural environment. The concern was how to subdue it and bring it under human control. The principal goal was to determine the type of duties and rights that would need to be exercised to perform those duties and attain development. Government had not been formed, so one could not differentiate between what is governmental and non-governmental. Therefore one is unable to discern traces of traditional non-governmental structures or entities in action at the *communal* stage in Akan communities. In line with the tenets of the theory of community emancipation, participation at this stage can be defined as efforts to control the natural environment within a particular community by its members. This is designated as full participation.⁹⁷

At the incipient *political* stage, the government-people relationship is not structurally delineated since the formation of government is at its incipient stage and participation is more or less face-to-face and direct, but not representational and corrupted. The gap between the people and government is very thin. It is therefore advisable to talk of the presence of “quasi-non-governmental organisations.”

At both stages, the *communal* and *political*, participation involves mobilisation, organisation, decision-making, planning, implementation, evaluation, sharing the

⁹⁶ Some detailed analysis is offered below.

⁹⁷ Appendix E.

benefits of the project and protecting the benefits.⁹⁸ A political culture of group action was deeply embedded in pre-colonial Akan society and in Africa as a whole.⁹⁹

A proliferation of civil society structures, however, was to occur at the *political* stage. One of the associations that composed civil society at this stage is identified among the Akans as the *Asafo* companies (or mobilisation squads).¹⁰⁰ This group had their own chief who was a member of the Council of Elders. The principal function of this quasi-governmental group was military: to act as a watch group, provide early warning systems against invasion by other tribes, and to go to war. Responsibilities also covered non-military issues such as mobilising people at short notice to deal with emergencies flowing from natural disaster, disease, etc. The people therefore had a significant input into the effectiveness of the *Asafo* companies since they acted as the source of information, the mobilising agents and actors all wrapped up in one.

There were principally two types of associations that were membership-based. One was economic-focused and the other founded on age. They therefore cut across kinship lines.¹⁰¹ The age-set associations dominated the political life of most traditional African communities and was a popular concept among the Universal Segmented and the Ritually Stratified Segmented systems. Similar association groups existed under the Association Monarchy. Examples include the Poro and Sande societies which were exclusive men and women clubs, respectively.¹⁰² The third type was economic in orientation and was devoted to promoting the economic interests of its members

⁹⁸ Appendix E. Similar institutions formed in other African political communities. Eg., the *Elegbe* age-group among the Yorubas. See O. Omoni, "Formation of Town Associations among the Yoruba: A Response to Colonial Situation," Jan/July 1991, No. 38 *A Journal of West African Studies*, 128 at 129. Also, talking about institutions among Ibos, Ayittey writes that they were so distrustful of central government that they dispensed with chiefs. They adopted a segmentary type of government which consisted of two basic institutions: the *Ama-ala* (council of elders) and the village assembly of citizens. Ayittey, *Africa Betrayed* (New York: St. Martin's Press, 1992), at 258.

⁹⁹ Naomi Chazan, *et al*, *Politics and Society in Contemporary Africa* (Boulder: Lynne Rienner Publishers, 1988), at 73.

¹⁰⁰ "Asafo" is derived from two Akan words, "asa" for war, and "fo", used as suffix for people. Asafo therefore literally means warriors or war people. Some of its characteristics resemble those of modern-day development NGOs. See Chapter 3 for some details.

¹⁰¹ Ayittey, *supra* note 96 at 15-17.

¹⁰² *Ibid*, 21,22.

basically in the area of farming, hunting and fishing. For example, Ashanti farmers had what they called *Nnobo*¹⁰³ groups.

One type of pressure group was associated with the Pyramidal Monarchy in traditional African political systems. Among the Akans, this group was made up of the *young men* in the polity.¹⁰⁴ One needed not be a member of the royal family to be a leader or a member of this group. Membership was offered to, indeed, all the *youth* of the village and the group had a larger agenda that embraced the interest of other non-royal members of the village or town. They acted as a pressure group on the government. Unlike the Asafo companies, the *young men* took part in government “outside parliament,” the reason being that the office of their leader, the *Nkwankwaahene*,¹⁰⁵ was not included in the Council of Elders. The Council, together with the chief, formed the government. Yet, though not occupying any official place among the elders, the *Nkwankwaahene* was officially recognised as the representative of the commoners. Busia describes the group thus:

They [the *young men*] would come as members of their respective lineages, but they also formed an unofficial body having a recognised and effective way in which they expressed their will not only about elections of the chief but on all matters affecting the tribe.¹⁰⁶

Thus the *young men* committed themselves to promoting, protecting and instilling the basic tenets of human rights and democracy in the community by holding the government accountable to the people. Unlike the age-set associations, these groups had a wider mandate to protect the interests of all. It need be noted, however, that the categorisations made above are not perfect. For example, among the Fantis of the Central Region of Ghana, the role performed by the *young men* here are performed by their Asafo company. This is in addition to the social/civic functions performed by Asafo group among the Asantes and Akims. Chukwukere describes it thus: “Asafo companies, for example, performed an important political function, viz. they formed the 3rd estate without which no native form of government is possible ... Their role here is

¹⁰³ *Nnobo* literally means ‘helping to weed.’ Thus *Nnobo* groups involved themselves in weeding the farms of their members in turn.

¹⁰⁴ Busia refers to them as the *commoners*. See K.A. Busia, *supra* note 26 at 10.

¹⁰⁵ *Nkwankwa* is another word for youth or youngmen and *hene* is chief. *Ibid.*

¹⁰⁶ *Ibid.* 9.

the equivalent of the young men led by the Nkwakwahene in Ashanti political organisation ... In modern parliamentary government they would be an "opposition" of a type."¹⁰⁷

IV: Political Participation among "Civil Society" in Colonial Africa

"Civil society" in most traditional African communities was to undergo a two-way transformation under colonialism. First, the pre-colonial traditional civil society remained in the rural setting but in a weakened position.¹⁰⁸ Second, their offshoots, with new foci and characteristics, began to emerge in the burgeoning urban centres.

But, as is examined below, the nature of the development agenda the departing colonial powers implemented in Africa did not enable the continued functioning of these organisations so that they would be able to resist subordination and demand their inclusion into national political structures.

The principal causes for this development were political and socio-economic. Politically, the imposition of indirect¹⁰⁹ and direct¹¹⁰ rule by the colonial authorities is to blame. Indirect rule was packaged as "the progressive adaptation of native institutions to modern conditions."¹¹¹ While Busia seems to agree with these definitions, I find them ethnocentric as they imply a devaluation of traditional African political systems. In reality, indirect rule was only a face-saving attempt to rule the colonised people through their traditional political

¹⁰⁷ See B.I. Chukwukere, "Cultural Resilience: The Asafo Company System of the Fanti," Research Report Series Paper No. 3, Cape Coast, 1970.

¹⁰⁸ This view challenges that of Chazan *et al* that "in the colonial period, the associational basis of social life continued and often intensified." Chazan *et al*, *supra* note 99.

¹⁰⁹ Mainly in British colonies. Eg., see Ray Y. Gildea, *Nationalism and Indirect Rule in the Gold Coast 1900-1950: The Specific Economic and Cultural Factors leading up to the Current Situation* (New York: William Frederick Press, 1964); and, J.A. Atanda, *The New Oyo Empire: Indirect Rule and Change in Western Nigeria 1894-1934* (New York: Humanities Press, 1973).

¹¹⁰ Principally in French colonial territories. For detailed analysis of this concept and its application in French colonial territories, see, eg., Raymond Betts, *Assimilation and Association in French Colonial Theory, 1890-1914* (New York: AMS Press, 1970); and, Michael Crowder, *Senegal: A Study of French Assimilation Policy* (London: Banners and Noble, 1967).

¹¹¹ Busia, *The Position of the Chief in the Modern Ashanti Political Kingdom: A Study of the Influence of Contemporary Social Changes On Ashanti Political Institutions* (London: Oxford University Press, 1951) at 105. He quotes Lucy Mair, *Native Politics in Africa* (London: Routledge, 1936) at 56. Busia also cites another definition: "the system by which the tutelary power recognizes existing African societies and

authorities. In some cases, it involved an effective foisting of colonial government-sponsored chiefs on the people where the legitimate chiefs were unwilling to collude with the anxious colonialists. It was at the same time a means to provide a short-cut to the checks and balances inherent in the traditional political systems and facilitated plundering of the resources of the colonised people. Chazan *et al* are therefore right in arguing that "colonial administrations in most parts of the continent viewed coherent groups as desirable precisely because they facilitated control."¹¹² However, I do not agree with Chazan *et al* in arguing that this arrangement "encouraged the persistence of existing social structures, and frequently, traditional political units."¹¹³ By incorporating groups into the colonial structures their original traditional roles became compromised. This situation is actually one of the causes behind the youth migration to the cities.

A: Traditional "Civil Society" in the Urban Setting

Politically, indirect rule led to reduction in the status and prestige of the chiefs and dissatisfaction, especially among the youths who hitherto had been able to exercise their panoply of rights under the umbrella of the *young men* associations.¹¹⁴ Socio-economically, colonialism had to create towns with seaports and/or warehouses to facilitate trade with the satellite states. Hodgkin puts it this way:

The cause of their [the towns'] existence, the basis of their economic life, is not factory industry but commerce. They have been brought into being to meet the needs of European trade. Their main function is to drain out of Africa its ground-nuts, palm-products ...; and to pump into Africa European consumer goods.¹¹⁵

The emergence of urbanism and the imposition of indirect or direct rule in the rural areas led to an influx of youth into the towns to find a new life and identity.¹¹⁶ Yet, the harshness,

assists them to adapt themselves to the functions of local government." But indirect rule is only part of the process of the political modernisation that was imposed on Africa at independence. See *infra*.

¹¹² Chazan *et al*, *supra* note 9996 at 73.

¹¹³ *Ibid*.

¹¹⁴ For detailed analysis see, Busia *supra* note 111 at 105-110; and, the *Colonial Reports: Ashanti, 1909-26*. Eg., Busia quotes the report, *inter alia*, that "in the case of Bekwai, for instance, the "youngmen", that is say the lower classes, those who were not Elders, complained that they were not consulted in the choice of the Headchief, that they did not regard him as a credit to the Stool ..." *Ibid*, 107. See also O. Omoni, *supra* note 98 at 129 who argues: "The non-recognition of such associations and their political importance removed this machinery for consultation between the younger and older elements in the society. This thus reduced the number of people or groups involved in the administration of the Yoruba communities."

¹¹⁵ Thomas Hodgkin, *Nationalism in Colonial Africa* (New York: New York University Press, Inc., 1957) at 65.

¹¹⁶ See O. Omoni, *supra* note 98. Yet, one cannot rule out other factors such as the prospect of jobs and also the fact that the African political system itself could be oppressive, as one finds, eg., under the Centralised

uncertainties and individualism associated with town and city life, the fear of losing one's identity and background, and most importantly, of the rights that they enjoyed under traditional rule¹¹⁷ led to the formation of tribal/lineage affiliations, improvement associations and village and town youth groups.¹¹⁸

Colonialism represented the arrival of the *advanced political* stage under the theory of community emancipation. The new ruling group was the colonialists who came to dislodge the youth and the rest of the colonised people from the development structure. The youth/tribal/improvement associations therefore represented a means by which the people sought to restore themselves on the development structure. In addition, the more politically conscious elements of civil society focused their opposition to indirect rule upon both their chiefly and colonial authorities. One can mention the Ashanti Youth Association (AYA) which was an offshoot of an amalgam of disenchanted young men from the various *commoners* in their villages.¹¹⁹ In most cases, however, these tribal/youth/improvement associations were only politically assertive in an indirect, unconscious and unorganised manner. Their principal goal, at the start of their formation, was to promote and protect their rights in a negative fashion. That is to say, not to demand new rights which were ripe for exercise, but rather to fight to preserve what had been present under the traditional political structures. The goal was to use these traditional rights as a basis to develop themselves and thereby continue to contribute to the development of their village communities.¹²⁰ These

Monarchy. See also Eze who contends that certain abuses were prevalent in the traditional political systems. Osita Eze, *Human Rights in Africa: Some Selected Problems* (Lagos: Nigerian Institute of International Affairs & Macmillan Nigerian Publishers Ltd., 1984).

¹¹⁷ They were not just on the verge of losing their traditional rights but also no new rights were in place for them under colonial rule in the cities and towns. As argued in Chapter 1, new situations, conditions and needs create the urge for the articulation and claim for new rights to be exercised and/or enjoyed. Such a situation occurred under colonialism but there was no room for their recognition and exercise of such new rights.

¹¹⁸ Hodgkin outlines some other related factors and enumerates some of the names they are identified with as "Improvement Unions, Improvement Leagues, Welfare Leagues, Community Leagues, Patriotic Unions..." Hodgkin *supra* note 115 at 86.

¹¹⁹ One can also mention *Jeunesse Togolaise* in Togo and *La Goumbe* in Cote d'Ivoire. *Ibid*, 89.

¹²⁰ For the less political/radical associations, the focus was therefore upon socio-economic and cultural rights. Under the cultural was merged the political. The reason is that the rights exercised by these original youth/tribal/improvement associations did not have the goal of challenging the colonial authority in terms of demanding new rights for exercise or demanding the overthrow of colonialism. These groups were more of the "expressive" type identified by Gordon and Babchuck, "A Typology of Voluntary Associations," (Feb 1959) *American Sociological Review*, 24 at 22-29 (attending to the needs of fellowship, security, etc

associations, therefore, in a sense, provided the basis for a social/traditional security net. One notices that today such bodies are derivatives of "civil society" that existed under the traditional political systems. For example, the idea of youth groups today developed from the age-set and *young men* associations. The improvement associations are also conceptually linked to the Asafo companies.¹²¹ However, because their development was not encouraged, the human rights NGOs of today do not trace their roots to the traditional human rights "NGOs" such as the *young men* associations and the political aspect of the Fanti Asafo company.

The above analysis shares Ross' two-fold approach to the study of ethnicity in urban areas.¹²² One approach views the role of ethnic associations as a demonstration of "certain cultural forms" or "ethnic behavior," and the other as providing a form of identification and a basis for social action. The first sees urbanisation as a cultural assimilation and detribalisation factor and looks at how to adopt manifest actions to maintain one's identity in the melting pot. The other focuses on group difference within the urban environment and sees the ethnic organisation as a basis of social organisation "that mobilises people to act as corporate groups for social and political purposes."¹²³ The second approach deals with how immigrants who move to towns and cities use the skills and experience they acquire in the city as a tool for political action and social change.¹²⁴

for its members only). For the more radical groups one has to delineate the political factor from the cultural since they fall into the instrumental type of organisation.

¹²¹ A good number of these groups are still registered in Ghana today (and most probably other African countries) as NGOs by the Ghana Association of Private Voluntary Organisations in Development (GAPVOD).

¹²² Marc Howard Ross, *Grass Roots in an African City: Political Behavior in Nairobi* (Cambridge, Mass: The MIT Press, 1975) at 56. Ross' first and second approaches share similar trends with the "instrumental" and "expressive" forms of associations, respectively. The difference lies in the fact that Ross limits his work to ethnic associations only.

¹²³ *Ibid.*

¹²⁴ See Ross' argument against the "Melting Pot" approach to ethnicity at *ibid.* 60. Gerry Salole's analysis of the Edirs in Ethiopian urban life depicts the Edirs as playing both roles. In one breath he describes the Edirs (which began as "innocuous burial, mutual, and rotating credit societies) as "essentially *coping mechanisms par excellence* which have evolved in the urban and rural context, and played a crucial role in the *building of social infrastructure* in the absence of family, ethnic group and government *security or social welfare systems*. The *Edir* institution provides, therefore, a safety net which especially protects the vulnerable." He mentions further that they functioned as "incipient labour organisations." See G. Salole, "Not Seeing the Wood for the Trees: Searching for Indigenous Non Government Organisations in the Forest of Voluntary Self Help Associations," (1991) Vol. 6 No. 1, *Journal of Social Development in Africa*, 5 at 8, 9.

Applying both approaches in the analysis of transformed traditional “civil society” in the nationalist struggle, one may discern three ways in which these tribal/youth associations contributed to the development of African nationalism. First, by acting as the link between the towns and the villages and disseminating information and directives from the former. Second, by offsetting the Europeanising influences that culturally assimilate, detribalise and disempower the people. Third, by providing education for an African elite through scholarships and the founding of their own schools.¹²⁵

B: Non-Ethnic-based “Civil Society.”

Among these societies are old boys clubs and market women’s associations. Patterned on the lines of age-set associations, the membership of these associations cuts across ethnic lines and yet had an initial inward focus for members only.¹²⁶ The former was basically social in outlook, devoting itself to sporting, cultural and related activities. Yet, it is interesting to note the political transformation most of these old boys associations underwent to promote or engender trade unionism and become political frameworks in which nationalist leaders sought refuge to articulate and share nationalist ideas, plan anti-colonial strategies and train leaders.¹²⁷ For example, Hodgkin makes us aware that the *Bamako Association des Anciens Eleves du Lycee Terrasson de Fougères* was the force behind the formation of the first trade union in the French Sudan in 1937.¹²⁸ Chazan *et al* also observe that almost every nationalist leader made his political career in a voluntary or economic organisation.¹²⁹ The women’s associations were committed to improving the lot of women by organising cooperatives (for bakery, weaving, etc), social events, etc. Yet they also

¹²⁵ Hodgkin *supra* note 115 at 87.

¹²⁶ Another active group in the anti-colonial struggle was the church (in some of its manifestations). A church, however, *stricto sensu*, does not fall under the definition of an NGO, though it is a voluntary association. They are therefore not covered under this sub-heading. Yet, one need be appraised of the fact that a church-related international NGO, the Universal Negro Improvement Association led by Marcus Garvey, was instrumental in establishing the radical independent African churches as a mechanism for liberation. For detailed analysis see *ibid*, Chapter 3.

¹²⁷ Chazan *et al*, *supra* note 99 at 73.

¹²⁸ Hodgkin also mentions the role of the Old Achimotan Association of the then Gold Coast in organising and conducting evening classes for workers in the city of Kumasi, and the formation of the Workers’ Affairs Association, the trailblazer of the modern Sudanese trade union movement, by the Technical School Old Boys’ Club at Atbara. Hodgkin *supra* note 115 at 88, 89.

¹²⁹ They mention, *inter alia*, Houphouët-Boigny as having belonged to the *Syndicat Agricole Africain*, Nnamdi Azikiwe in the Ibo State Union and Julius Nyerere in the Tanganyika Teachers’ Association. Chazan *et al*, *supra* note 99 at 73.

became a force to reckon with in anti-colonial politics, not only fighting for the rights of women worsened under colonialism but also fighting alongside to overthrow the vestiges of colonial rule itself.¹³⁰

In sum, one can identify the following groups under pre-colonial and colonial dispensations: the kinship groups, associational groups and the communitarian (a hybrid of the first two). Together, these *communal* groups lay the foundation for understanding the nature of the high level of social pluralism that is characteristic of Africa.¹³¹ The associational and communitarian groups became the civil society that would graduate to the level of the *young men* associations in the anti-colonial struggle to dislodge the ruling group from the *dependence structure*.

Referring to Ross, while his first approach concentrates on ethnic identification, the second deals with how immigrants to cities use their experiences and skills as an effective means for political action.¹³² Relating this approach to the relationship between political participation in the anti-colonial mass movement and one's links with the rural areas, it is suggested by Ross that the relationship is negative.¹³³ This meant that political participation in the urban areas was based on *Gesselschaft*.¹³⁴

Political participation by these associations, both ethnic and non-ethnic, was based on the level of participation within them – their internal democratic practice. This important point is, however, not touched on by Ross in his work. Rather, Ross relies on the criteria of individual disposition and resources, in terms of, *inter alia*, the social status and the scale of

¹³⁰ *Ibid*, 90, 91.

¹³¹ *Ibid*, 79.

¹³² Ross, *supra* note 122.

¹³³ The correlation is in respect of social ties that can be politicised to help enhance an individual's ability to win political office. Hence it did not have to do with the ability of tribal/youth/improvement associations to link up with the rural areas and contribute to development. It also did not have to do with the maintenance and preservation of some traditional lifestyles as a stumbling block to the politicisation of the individual.

¹³⁴ A German expression in reference to association participation defined as "purposeful alignment on the basis of a perceived interest." See Ross *supra* note 122 at 105, 106. For detailed analysis on the concept of *Gesselschaft* and its opposite term, *Gemeinschaft* see, Leon Trakman, *Reasoning with the Charter* (Toronto: Butterworths, 1991) at 76ff.

social relations, lifestyle and ethnicity of the person.¹³⁵ This analysis is defective in examining the “capture” of whole groups and co-opting them into mass nationalist movements. The reason is that the focus of Ross’ analysis tends towards the creation of individual charismatic leaders who end up becoming career politicians.

Yet, the very point that I attempt to explain here is group-based motivation and mobilisation. Members of a deprived group may use a group approach to advance their lot or use the political process to reduce their level of deprivation. This involves the ability to create group awareness or consciousness of their peculiar socio-economic and political position in order to motivate them into action, cancel out their lower socio-economic status and lead them to higher levels of participation. In group-based mobilisation, therefore, activity level is determined by self-consciousness, not status. This analysis confirms Ross’ later finding that “social status will be negatively related to the independence style participation and positively related to the postindependence style.”¹³⁶

The level of participation within these groups was fairly democratic due to the antecedent experience that informed their formation. Group members were generally ready to co-operate with their group leadership since they were largely involved in participation from the decision-making stage to institutional formation. Evidence of effective participation is also discernible from the success attained in group-based mobilisation since the members of the group felt equal in their status in order to be motivated to act as a body against those in the upper echelon of the society. Defective or unequal participation was seen in the style of colonial administration but not the internal administration and organisation of traditional NGOs. A typical example was the issue of indirect rule which limited the participation of colonised peoples in national politics to implementation, and the chiefs to mobilisation only. This process constrained participation to include only the defective types.¹³⁷

¹³⁵ Ross *supra* note 122 Chapter 6. One can accommodate Ross’ reliance on these factors since in most instances he seemed to be concentrating on individual, but not group, participation which is the focus of this work.

¹³⁶ Ross, *supra* note 122 at 102.

¹³⁷ See details below.

Dissatisfied with the level of participation at the national level, it was little wonder that the nationalist leaders made political capital out of the presence of these "NGOs." By exploiting their lack of representation in national politics, the nationalist leaders were able to co-opt them into the mass organisations they formed to fight for independence from colonial rule. Most of these associations therefore became politicised, or had their resources channelled into the mass nationalist movements that came into being in the heat of the anti-colonial struggle.¹³⁸ Drawn together by dislike of colonial policies, and convinced that self-government would help resolve most issues, members of a wide variety of groups coalesced in congresses, often led by charismatic individuals.¹³⁹ Colonialism presented the African with a common opponent, forcing the African to overcome tribal, linguistic and regional divisions. It was therefore a wise political calculation by, eg., Kwame Nkrumah, the first president of Ghana, to rally into his socialist-oriented party the so-called "verandah boys" (commoners) or "standard-seven boys" (middle school graduates).

V: Traditional "Civil Society" as Tool for "Community Development"

It has already been mentioned that socio-economic groupings, informed in their goals by their traditional counterparts which acted as *communal* and *civil* groups in the pre-colonial political establishment, were formed to cushion the harsh effects of urban life and colonialism in general. The organisation of such groups confirms the fact that colonialism did not have in place a social welfare policy to help the colonised people overcome the shocks and harshness associated with the forced graduation to the *advanced political* stage. Apart from local initiatives, two other groups of foreign origin got involved in providing social work. These were the missionaries and voluntary agencies which appeared on the scene in the 1920s and 1930s and concerned themselves with problems of the blind, youth, women, prisoners, etc.¹⁴⁰ The voluntary organisations "were modelled almost completely

¹³⁸ Eg., AYA joined hands with the CPP in the Ashanti Region of Ghana and later the National Liberation Movement (NLM) that fought for Ashanti autonomy. *Juvento* is also on record as having played no mean role in the unification and independence of Togo, while *La Goumbe* acted as the local propaganda agency for the *Rassemblement Democratique Africain* (the leading party in Cote d'Ivoire founded by its first President Houphouet Boigny). See Hodgkin *supra* note 115 at 89.

¹³⁹ Claude Welch, Jr., *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organizations* (Philadelphia: University of Pennsylvania Press, 1995) at 42.

¹⁴⁰ Adelaide Hill, "The Administrative Structure for Social Welfare in West Africa," in St. Clair Drake and T. Peter Omari, *Social Work in West Africa* (Report of The Seminar on Social Work in West Africa) (Accra: Ghana Publishing, 1962), at 43.

after, and usually supported by, their Western counterparts”¹⁴¹ and were often started by the wives of government officials. But the problem with these organisations is that they had indirect and overtly personal motives for engaging in social work. While the missionary offered help with the goal of winning converts, the purpose of the elite ladies was to seek an escape route for their energies.

The more serious aspect is the paternalistic manner in which they looked on their beneficiaries as objects of benevolence deserving of aid.¹⁴² This attitude has contributed to configuring the case of the poor and needy into a state of dependency and helplessness. This factor is also responsible for laying the foundation for construing deprived and pre-developed peoples as “charity cases” although the discourse has now shifted to the use of more benign but equally insidious terminology such as “self-help,” “upliftment,” “empowerment,” etc.¹⁴³ Other voluntary organisations which existed around this time included the Young Men and Women’s Christian Associations (YWCA and YMCA), the Scouts, the Guides, the Boys’ Brigade and the Red Cross.¹⁴⁴

The reason for inaction on the part of the colonial authorities to promote social welfare is not hard to grasp. As rightly argued by Hill,

the political goals of any society influence the character of the social services sought or provided in that society. As colonies, West African countries did not receive full measure of social services – in the first instance, perhaps because of the cost involved, but also because of values held by the colonisers toward their colonies.¹⁴⁵

Changes were introduced for the first time in the 1940s through the concept of community development (mainly in the rural areas) and social service centres in the urban areas. In fact, it is understood that the community development concept was conceived in the 1920s, but its implementation was delayed until the 1940s when the British started exporting the model

¹⁴¹ This process has remained the model followed by international NGOs in their operations in Africa under the NGO revolution being experienced during the post-Cold War international order. See below.

¹⁴² See an analysis of the common law position on defining charity below.

¹⁴³ Deborah Mindry, *Feminizing Humanity: Philanthropic Modes of Power and Rhetorics of Difference in South Africa*. Ph.D dissertation, University of California, Irvine. Presented at Rockefeller African Development Dissertation Workshop, Westerbeke Ranch, California, Feb. 5-9, 1997. Copy on file with author, a participant at the Workshop. See details below.

¹⁴⁴ Hill, *supra* note 140 at 47.

¹⁴⁵ *Ibid*, 43,44.

for application in their African dependencies.¹⁴⁶ According to Hill, the changes were induced not by African nationalism but “by the issues and responsibilities stemming from the second World War.”¹⁴⁷ It is interesting to note that the emergence of social welfare in the colonies coincided with the coming into effect of the Keynesian welfare state in Western Europe and North America.¹⁴⁸ The rationale for the introduction of welfarism both home and abroad was in response to the *negative* contribution that the application of the *negative* rights-development relationship naturally spawned. To regain *active* and *passive* contributions to development, it was thought appropriate to re-introduce a *passive* relationship approach to rights and development through the concept of “community development” in the colonies and Keynesianism in the metropolis.

The introduction of indirect rule laid the foundation towards the introduction of the community development concept. The local conduits used to implement the concept were some traditional groups in civil society. In so doing, the traditional voluntary methods were exploited, as part of the mechanics of indirect rule, to impose the community development concept on the people. Osei-Hwedie recognises three basic aspects of indigenous voluntary methods¹⁴⁹: the concept of community self-reliance,¹⁵⁰ voluntary action based on kinship

¹⁴⁶ A. Manghezi, *Class, Elite, and Community in African Development* (Uppsala: Bohusläningens AB, Uddevalla 1976) at 40. The reason for its implementation around this time was due to “the new horizons [that were] opening up” which called for colonial governments to begin looking towards development and expansion. See Peter du Sautoy, *Community Development in Ghana* (Oxford: Oxford University Press, 1958), 22.

¹⁴⁷ Hill, *supra* note 140 at 44. It was in 1940 that the purposes of the *Colonial Development and Welfare Act* in the United Kingdom were broadened to enable colonial administrators to attach some seriousness to the issue of social welfare which was far overdue. But there was reluctance on the part of British to implement this Act. This attitude is reflected in the wholesale importation of the British model to its colonies without considering the differences in structure, traditions, intellectual values and concepts. Thus Hill argues that there was initially little experimentation or even determining of community preferences in the introduction of welfare services. The second factor was that they only wanted to implement policies on those social services which could be supported by revenue from the particular colony concerned. *Ibid*, 44,46.

¹⁴⁸ See a brief analysis of the Keynesian theory below.

¹⁴⁹ K. Osei-Hwedie, “Voluntary Agencies and the Promotion of Mental Health,” (1989) Vol. 4 No.2 *Journal of Social Development in Africa*, 49 at 51. See also: Yaw A. Badu and Andrew Parker, “The Role of Non-governmental Organisations in Rural Development: The Case of the Voluntary Workcamps Associations of Ghana,” (1994) Vol. 9 No. 1, *Journal of Social Development in Africa*, 27, at 30; Gerry Salole, *supra* note 124, who deals with indigenous NGO formation and development in Ethiopia; and O. Omoni, *supra* note 98.

¹⁵⁰ This involved community co-operation to solve problems, based on the internal strengths and resources of those in the community. The benefits went directly to the community, ie those involved in the action. *Ibid*.

obligations,¹⁵¹ and humanitarianism.¹⁵² He concludes that of these three the community co-operation aspect is the most important, "as societies favoured and promoted community self-reliance, co-operation and self-help."¹⁵³ Within the framework of the community co-operation concept can be situated the operations of the *Asafo* company.¹⁵⁴

Community development was described as having to do with

getting backward people in the right frame of mind for doing things. It also has to do with "social disequilibrium, sense of frustration, of inferiority and even of persecution" ... Politically, community development sets out to achieve a hopeful "climate" in which government and people may cooperate and human capacity be developed. In Cyprus, Fiji, Aden, East and Central Africa, the West Indies and Malaya, community development is concerned with hastening the processes of unifying the various communities within a plural society. This includes attempts to find motives within the various societies and to initiate processes therefrom that may prove strong enough to remove group fears.¹⁵⁵

Community development was also meant to put in place institutions that would survive colonialism and form part of the post-independence system.¹⁵⁶ It involved mass education, public administration, the provision of basic necessities of life, roads, community centres, markets, etc.,¹⁵⁷ acquisition of skills for house-building, carpentry, shoe-repairing, etc. "Development areas" were then demarcated and established, with schools to train recruits who would then go back to the villages or stay in the communities to impart their knowledge, "thus enabling "development" to take place."¹⁵⁸ It was believed that community development would contribute to "good order, progress, and stability" in

¹⁵¹ This falls into the category of membership organisations.

¹⁵² This called for helping somebody, or doing something on behalf of someone, without receiving any direct benefit, or even hoping to be paid back in kind. *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ A critique of Osei-Hwedie's analysis, however, is that membership organisations were not limited to kinship organisations only.

¹⁵⁵ S. Milburn, *UN Series on Community Organization and Community Development, No. 21: A Study Prepared for the UN* (New York, 1954-55).

¹⁵⁶ This is the most plausible conclusion one could come to after analysing Peter Hodge's perspective on the origin of the concept of community development. See Hodge, "The Future of Community Development," in A. Robson and B. Crick, eds., *The Future of the Social Services* (Harmondsworth, England: Penguin Books, 1970), at 66, 67. Examples of such institutions include the Department of Social Welfare and Community Development which still exists in Ghana today but is subsumed under the Ministry of Youth and Social Welfare.

¹⁵⁷ K. Amanor *et al.*, "Ghana: Country Overview," in Kate Wellard and James Copestake, eds., *Non-Governmental Organizations and the State in Africa: Rethinking roles in sustainable agricultural development* (New York: Routledge, 1993).

¹⁵⁸ Ernest Mulube, "The Role of Community Development in National Development," unpublished diploma thesis in Social Policy (Institute of Social Studies, The Hague, 1969). cf. Manghezi, *supra* note 146 at 41.

“developing [African] societies.”¹⁵⁹ It is important to observe that human rights was absent in the formulation of community development policies.

Community development also had another goal which is spelt out in the US government’s policy towards the concept’s application in the decolonised world:

[to] offer positive ways to implement the social, political, and economic aspects of United States foreign policy. The cost is relatively low considering the benefits and the future value to be derived from helping nations achieve that self reliance they all so ardently desire.¹⁶⁰

The future value and benefit the US had in mind was “to increase economic productivity and stability throughout the world including freer world trade which is considered to be necessary if the other three objectives are to be realized.”¹⁶¹ Economic stability was also to pave the way for investment of productive capital from within and without.¹⁶² Community development was therefore to lay the foundation for the expansion and consolidation of the level of economic globalisation already attained. The rural communities offered special attraction for the Western states since it was there that the mono-crops – cocoa, coffee, tea, palm oil, etc – were produced by the deprived rural majority.¹⁶³ These were the very groups Fanon was counting on for the African revolution, an idea which somehow sounds idealistic and utopian today. But looking at the history of attempts to regenerate *active* contribution from the underclass after their contribution turns *passive* and *negative*, and also to avoid a Marxian type of revolution, one would not be surprised to note that community development was sought to be promoted with these issues in mind.

¹⁵⁹ A. M. Phillips, “The Contribution of Community Development to Political Stability,” in (Oct. 1969) Vol. 4 No. 4 *Community Development Journal*, at 189.

¹⁶⁰ William Gibson *et al*, *Community Development Programs in India, Iran, Egypt and Gold Coast: Team III* (Washington, DC: International Cooperation Administration, 1955) at 1.

¹⁶¹ The three other objectives which are in line with US foreign policy are improving economic and social conditions in many areas of the world; extending and strengthening the democratic form of government and thereby promoting human freedom; and, promoting political stability. *Ibid*, 94.

¹⁶² *Ibid*, 95.

¹⁶³ Eg., *ibid*, 96, it is stated that “A second example of the importance of community development to the economy is evident in the Gold Coast. A very substantial pillar of the Gold Coast economy is the production and sale of cocoa in world markets. To insure continuing supply of the best possible grade of cocoa the Agriculture Department contracted with the Department of Social Welfare and Community Development to initiate an educational development campaign among the cocoa farmers on the care and cultivation of the cocoa tree.”

The concept of community development thrived on the theory of dualism, a branch of the modernisation theory,¹⁶⁴ both derived from the philosophico-anthropological tradition of seeing two types of societies, one savage, illogical and underdeveloped and the other civilised, rational and developed. The former was seen as a stumbling block to universal attainment of civilisation, development and free world trade which need to be pulled down to pave the way. Seen in this light, community development was instituted simply for the sake of perpetuating colonial policies and facilitating further exploitation while at the same time creating the impression that the interests of the colonised people were being catered for. According to Manghezi,

There is abundant evidence, however, which shows that in many cases these community development projects are actually intended to serve the political and ideological interests of the sponsors rather than those of the villagers.¹⁶⁵

Ghana was the “guinea pig” for the community development experiment. The ability of the colonial authorities to work the concept through the traditional NGOs made it a seeming “success.”¹⁶⁶ Kojo Amanor, *et al*, have this to say regarding the relationship between traditional NGOs and community development:

These [community] organizations have a long history, rooted in pre-colonial village and town associations which were charged with the upkeep of the social amenities of communities, including sanitation, roads and paths. During the colonial period communal labour formed an important part of local administration.¹⁶⁷

The form of participation that went with the development which was attained under the notion of community development involved the defective types: “ceremonial” or “support,”¹⁶⁸ the “pseudo,”¹⁶⁹ “the unreal”¹⁷⁰ or “partial” types.¹⁷¹ It involved the management of a community development project by administrators with business training and background and the people looked on as workers to be employed and disciplined into working hard to achieve the economic targets of the project. The

¹⁶⁴ Treated in detail below.

¹⁶⁵ Manghezi, *supra* note 146 at 53.

¹⁶⁶ *Ibid.*, 41. The success of the concept in Ghana is said to have influenced its immediate adoption in the Francophonie.

¹⁶⁷ Amanor *et al*, *supra* note 157 at 183.

¹⁶⁸ Where citizens “take part” by expressing support for the government marching in parades. Surrendra Vettivel, *Participation & Sustainable Development: Theory and Practice in Government and NGOs* (New Delhi: Vetri Publishers, 1993) at 15.

¹⁶⁹ The situation in which members are induced to agree to decisions already taken. *Ibid.*

¹⁷⁰ Where participation is a mere smokescreen due to the decisional outcome being structurally predetermined. *Ibid.*

¹⁷¹ The process by which the final power to decide rests with one party only. *Ibid.*

project director and personnel thus see their role as monitoring, helping the people to get inserted into the present structure and not changing the structure itself.¹⁷²

This assertion challenges the claim that community development offered the rural communities the opportunity to exercise and enjoy their rights, or that community development was to usher them into that state of rights exercise.¹⁷³ It is rather noticed that both *socio-economic* and the *political* civil rights were abused. As noted earlier, participation in *socio-economic* civil rights starts from the time of organisation and mobilisation of the people at the community level to protection of the gains that would result from development. That is, from the time of the first exercise of rights *to do*.¹⁷⁴ But it is observed that, rather, participation is considered to have taken place at the time that duties are to be performed.¹⁷⁵ That is why ceremonial, partial and other forms of unfree participation are the order of the day with the community development. Effective socio-economic participation is guaranteed by effective political participation. When political participation is not guaranteed community development projects are planned from outside the country or by the political elite at the national or local level and imposed on the community. The people cannot protest against this imposition on the grounds that they do not have the right to exercise their political freedoms. On the other hand, even if they are allowed to decide on and plan their own projects but their right to property is not guaranteed they will not be able to protect the gains that would accrue to them from abuse by the government or powerful non-state actors. In such cases full or real participation is not made possible. Yet, this is the nature of the community development that was practised under the colonial era and imported into the post-colonial. In all of the projects no mention was made of promoting, educating or protecting the rights of the local people. The emphasis was on "mass education" to

¹⁷² Desmond D'Abreo, *From Development Worker to Activist: A Case Study in Participatory Training* (Mangalore: DEEDS, 1983) at 164. See Appendix F.

¹⁷³ Pierre de Schlippe argues further that community development could act as an instrumental organ to ensure promotion of the re-instatement of the rights of deprived communities. Pierre de Schlippe, "The Theory of Community Development," in J.A. Ponsioen, ed., *Social Welfare and Policy: Contribution to Theory* (The Hague: Mouton & Co., 1962), 87.

¹⁷⁴ Appendix E.

¹⁷⁵ Appendix F.

remove “the supposed *psychological obstacles* (lack of initiative)¹⁷⁶ that were alleged to inhibit the societies of underdeveloped nations from embracing and assimilating the “positive” cultural values of Western capitalist societies;”¹⁷⁷ and to provide the communities with their “felt needs.” Community development, which was sought to be attained through traditional “civil society,” nearly killed the spirit of participation that permeated the Akan traditional “civil society.”

VI: A Comparative and Contextual Analysis of Akan and Western Notions of Rights and Civil Society

It is noted that the factors responsible for developing the Akan concept of human rights and which can be offered as being representative of the African context are cultural, historical-colonial and developmental. However, African scholarship on African notions of rights does not adequately deal with these three fundamental issues. I therefore present below a brief summary of the theory of community emancipation in the context of the three factors that inform the Akan notion of rights. This exercise helps to expose the differences that exist between the international/Western notion of rights and an African version of it. The cultural factor is located in Africa’s pre-colonial past,¹⁷⁸ the historico-colonial in Africa’s colonial past and the developmental in Africa’s post-colonial and contemporary times. The first two factors inform, or lay the foundation for making an argument for the third. The ability to establish this back-and-forth relationship is a vindication for the *holistic* school of African philosophy which combines the past and the contemporary African contexts in its articulation of African philosophy.

¹⁷⁶ The lack of initiative as an original state of the rural African is said to contribute to the creation of a cycle of poverty: lack of initiative goes with apathy and no desire to participate which leads to inability to discern or appreciate problems. As a result nothing gets done. This in turn does not lead to improvement in the living conditions of the people, spawning in its wake, poverty, misery and squalor. See Manghezi, *supra* note 146 at 57, fig. 2.

¹⁷⁷ *Ibid*, 50.

¹⁷⁸ This is not to say that I share a view that culture is not dynamic. Indeed it is. See El Obaid Ahmed El Obaid, *Human Rights and Cultural Diversity in Islamic Africa* (Unpublished DCL Dissertation, Institute of Comparative Law, McGill University, Montreal, 1994). But I seek to distinguish traditional African culture from modern African culture. The latter covers the effects of Africa’s colonial and post-colonial experience, that is its historical and developmental experiences.

A: Human Rights

1: The Cultural Element

Culturally speaking, it is generally acknowledged that the African notion of rights is different from the Western and international system of rights in certain key respects. One of the points of difference that is with regard to the origin of rights. Western notions of rights are said to have their origins in modern times and founded on a modernist notion of Western philosophy.¹⁷⁹ On the other hand, the Akan notion of rights is located in Africa's pre-colonial past prior to the arrival of "modernity."¹⁸⁰ Therefore, one can assume that the Akan, for that matter, African concepts of rights arrived with the organisation of socio-economic community life.

The second point of difference is in regard to the manner the international human rights regime is segmented into first (civil and political), second (economic, social and cultural) and third (right to development, peace, etc) generations. The theory of community emancipation establishes that civil and political rights did not come together. Rather, the first set of rights to emerge for exercise were *communal* rights -- renamed civil rights at the *political* stage. These rights cover mainly the *socio-economic* aspect of civil rights in addition to the rights which the international human rights regime recognises as economic, social and cultural rights. The second generation are those that emerged at the *political* stage and cover *political* civil rights and political rights proper. *Socio-economic* civil rights and *political* civil rights share the same core rights -- conscience, thought, expression, movement, etc. The difference between them, however, is that the former are identified as simply rights (without the qualification of freedom to/from/of) and are used to meet socio-economic needs. It is the political aspect, which evolved from the civil, that has the label "freedom to/of/from" to denote the fact that these rights have been subjected to abuse before and restrictions are now placed on government to prevent further abuse or excesses. Freedom lays stress on the opportunity given for the exercise of one's rights, powers, desires, and the like.

¹⁷⁹ Imre Szabo, "Historical Foundations of Rights and Subsequent Developments," in Karel Vasak, ed., *The International Dimensions of Human Rights* (Paris: UNESCO, 1982), 11.

¹⁸⁰ The analysis of the Akan notion of rights lends support to this argument. But refer generally to the discussion of African scholarship on human rights *supra*. Also, Ayittey, *supra* note 95.

Freedom is therefore not an independent concept, as it derives its force from rights exercise and vice versa. These “freedom rights” are the type of rights that were used by rights agitators and victims of rights abuse as the tools to counter the political barriers to development. They are therefore the specific rights that governments the world over fear most and seek to constrain.

The Akan concept of rights did not have so-called third generation rights.¹⁸¹ The theory of community emancipation posits that these so-called solidarity rights are redundant. The rights currently in usage and practice are able to cater for any human need possible through a process of revising appropriate existing rights. Thus, eg., the right to life has undergone a structural redefinition at each stage of community metamorphoses: from the right not to be killed,¹⁸² to the right to be free from torture, degrading and inhuman treatment, to the right to food or subsistence. The same can be done for the other rights. So the solution lies in the revisability of rights, not necessarily the creation of new rights which only end up creating a confusion in the discourse of human rights and making their practical implementation almost impossible, thereby letting abusive governments hide behind such new concepts to further abuse the rights of their peoples. A typical example is the right to development.¹⁸³ It is the contention of the theory of community emancipation, though, that with the arrival of the *advanced political* stage, deprived persons and peoples need to be provided with the means that will enable them to make up for the opportunity denied them to attain their development. Thus, at the *advanced political* stage, it is suggested that special provision (eg., in the form of affirmative action) be made to enable deprived people to gain access to facilities that will enable them to attain their full *being*.

¹⁸¹ Arguments presented in the African Charter which support the conventional generations of rights and seek to prioritise the second and third generations of rights over the first are exposed in Chapter 5 and critiqued as contrary to a true reflection of African notion of rights on all three grounds of culture, history and development.

¹⁸² Several Akan proverbs express this by laying emphasis on the sacredness attached to human life. Eg.: “It is man that counts ...” “If it affects your neighbour it is not the same as affecting a tree.” “The human person is composed of blood.”

¹⁸³ The controversy surrounding the right to development has to do with its sources: legal and moral. For a detailed and interesting discussion, see Jack Donnelly, “In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development,” (1985) Vol.15 *California Western International Law Journal*, 473. Also, Shivji, *supra* note 11 at, eg., 81. Part of the controversy also concerns its philosophical basis and also the definition of the right itself.

The fourth point of differentiation between the Western and Akan concepts of rights is with regard to the nomenclature attached to human rights, referring to civil and political rights as “negative” rights¹⁸⁴ and economic, social and cultural rights as “positive” rights.¹⁸⁵ The Akan concept of rights does not see political rights as negative. Rather, together with civil rights, they are positive. Civil and political rights are still seen as *foundational* or *enablement* rights since they involve action on the part of the one who exercises them to enable a person or group to meet their developmental needs. In fact, civil and political rights belong to the citizenry, not to the government. They actually impose on government a *duty not* to abuse them. Therefore, there is *no right* on the part of government here. Consequently, it is incorrect to tag these rights as “negative rights” notwithstanding that they impose limits on the exercise of governmental power.¹⁸⁶

The so-called “positive” rights that emerge for exercise at the *advanced political* stage are recognised as *corrective* rights and their exercise and their enjoyment is inextricably linked to the exercise of *positive* or *enablement* rights in three major ways. First, because their enjoyment was occasioned by the abuse of civil and political rights. Secondly, the attainment of the purpose for the enjoyment of *corrective* rights hangs on respect for the exercise of *positive* rights.

A fifth difference is that the Western system is individual-biased. The Akan concept, on its part, is individual-communal with each exerting an influence on the other but individual rights being exercised first. The Western liberal notion of rights is said to be individualistic on the basis that it is the individual who charts his or her own path to happiness and the acquisition of property and uses everything accruing from his or

¹⁸⁴ L. Trakman, *Reasoning with the Charter* (Toronto: Butterworths, 1991) at 8 and 10.

¹⁸⁵ Because their enjoyment calls for action by the government on behalf of the citizenry. This assertion alone exposes a lot of loopholes. There are some aspects of economic, social and cultural rights the enjoyment of which are dependent on the government *not* doing something for the deprived citizenry. It may also involve the government not doing something but acting to prevent a third party from appropriating the property of the citizenry. For an interesting and more detailed discussion on this see, eg., Henry Shue, *Basic Rights, Subsistence, Affluence, and US Foreign Policy* (Princeton: Princeton University Press, 1980).

¹⁸⁶ Refer to K. Appiagyei-Atua, *supra* note 71, esp. Chapter 1.

her efforts for him/herself.¹⁸⁷ All that the state is supposed to do in this circumstance is not to interfere.¹⁸⁸ However, Toope contends that Western values that inform human rights are not unremittingly individualist, making reference to the work of philosophers of the communitarian tradition who seek to establish the proper relationship between the individual and society.¹⁸⁹

In the same way, to say that African notions of rights, such as the Akan, is purely communalistic is false. This is depicted, eg., in the nature of the land tenure system of most traditional African communities¹⁹⁰ which recognises individual rights and interests in land and rewards individual creativity and enterprise.¹⁹¹ However, the difference with the Western context is that individual rights are exercised in a community context. This assertion establishes the relationship that exists between rights and duties in the African notion of rights. Here, rights are exercised when duties are performed for the rights-holder by all other persons in the community, as the case maybe, apart from the individual rights-holder himself. After the individual is enabled to exercise his rights, he pays back to the community by performing his duties for others in need of his knowledge, expertise, etc. Thus, the African notion of duties are two-fold and positive as well as negative, unlike the Western notion that is single and mainly negative.¹⁹² Also rights exercise and performance of duties take

¹⁸⁷ L. Trakman *supra* note 184 at 11. Also see Milne's definition of a right: "a right is supposed to entitle its holder to a presumptive benefit." Alan J.M Milne, *Human Rights and Human Diversity: An Essay in the Philosophy of Human Rights* (Albany: State University of New York Press, 1986).

¹⁸⁸ See eg., Madam Justice Wilson's comment in *Operation Dismantle Inc. v R.* [1985] 1 S.C.R. 441, at 516, that liberty amounts to a "right to pursue one's goals free from government restraint."

¹⁸⁹ References are also made to, *inter alia*, the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950, Eur. T.S. 5, 213 U.N.T.S. 221, art. 15) and the *Canadian Charter of Rights and Freedoms*. See S. Toope, "Cultural Diversity and Human Rights (F.R. Scott Lecture)," (1997) Vol. 42 *McGill Law Journal* 169 at 182.

¹⁹⁰ Gluckman argues that the hierarchical system of land administration which he describes for the Lozi of Zambia is the common pattern in African land tenure. M. Gluckman, "Property rights and status in African traditional law," in M. Gluckman ed., *Ideas and Procedures in African Customary law* (London: Oxford University Press, 1969) 255 at 253ff.

¹⁹¹ Eg., Ayittey describes the Oyo people of Nigeria as "especially individualistic and egalitarian, believing that each person is as good as the other, and deserving of a voice in local affairs." See G.B.N. Ayittey, *supra* note 98 at 258. The recognition accorded the individual person is also expressed in proverbs such as "The mosquito, however tiny, is a significant part of the animal kingdom."

¹⁹² The question of correlation between rights and duties in the African context is consequently different from the Western notion represented by Hohfeld. Hohfeld conceptualises four types of rights which he calls legal "advantages." These are "claims," "privileges" or "liberties," "powers," and "immunities." They are qualified by Milne as "claim rights," "liberty rights," "power rights," and "immunity rights,"

place simultaneously. In some other situations the former precedes the latter, not vice versa¹⁹³

The diverse and complex nature of the political systems of Africa¹⁹⁴ makes one appreciate the fact that the idea of a central government exercising undisputed authority, and determining the needs of the people for them, was a luxury most African communities could not afford. Thus, the Akan political system, for instance, had concepts of rights some of which (the *political* civil rights and political rights) were acquired through a struggle against the traditional elite.¹⁹⁵ In support, Ayithey succinctly puts it thus: "the right to such freedoms was customary in many tribes. This was one of the reasons some Africans bore 'tribal marks' to distinguish them from other tribes, not only for protective reasons but also for the enjoyment of certain customary rights and freedoms."¹⁹⁶ It is within this context that I posit the functioning of a "civil society" in the traditional Akan political system and the role of human rights in the shaping of the traditional political society. The rationale here is

respectively. Hohfeld ascribes the "opposites" and "correlates" of the four legal advantages. The opposite of a legal right is the legal "disadvantage" which a person who does not have the right is under while a correlate is the "disadvantage" imposed on another party as a result of the "advantage" conferred on one party. Thus, the opposite of a claim right is a "no right." Therefore, a person who has no claim right has no right. The opposite for the rest are, respectively, a duty, a disability and a liability. The correlates are, respectively, a duty, a no right, a liability and a disability. On that score, the correlate of one type of right becomes the opposite of another. See W. Hohfeld, *Fundamental Legal Conceptions* (New Haven, Yale University Press, 1923). However, this notion of duty is negative in that it only imposes an obligation not to do something to hurt the right-holder. This is what is enunciated in the "Neighbour principle" by Lord Atkin in *Donoghue v. Stephenson*: "You must take reasonable care to avoid acts or omissions which would injure your neighbour. Who then in law is my neighbour? The answer seems to be ... persons who are so closely affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions in questions." For a broad discussion of this, see John Cooke, *Law of Torts* (London: Pitman, 1991), Chapter 3. The Akan notion of duty, however, not only imposes a negative duty, but a positive one, the fulfillment of which results in the enjoyment of the rights *to be* of his neighbour.

¹⁹³ African socialism and the provisions of the African Charter on rights and duties have restructured and mixed up the order of priority, shifting the focus from the individual to the community, and from rights to duties. Regarding rights and duties, the African Charter devotes articles 27-29 to stipulation of duties, but to the individual only, not peoples. Again, no exemption clauses are applied to the exercise of duties as compared to the exercise of individual rights. Thus, the Charter places undue emphasis upon duty, either to the neglect of rights or placing duties before rights and seeing the latter as a reward for performance of one's duties, instead of seeing rights as a facilitator for the performance of duties. This issue is revisited in Chapter 5.

¹⁹⁴ See Potholm, *supra* note 83.

¹⁹⁵ Refer to the swearing-in oath that a chief-elect is made to commit himself to: K. Arhin, *supra* note 27 at 12.

¹⁹⁶ Ayithey, *supra* note 191.

that it is in the face of abuse that individuals come together to protect themselves and their proprietary interests, enhance their claim-making capacities, and find ways to chart their own path to freedom and development. It is also within this framework that I find useful Donnelly's analysis that human rights are derived from interaction between individual claims to rights, social conditions and political realities.¹⁹⁷

2: The Historical-Colonial Factor

Africa's historical past in reference to the colonisation of its territory and the plunder of its resources to promote European capitalism has had a major impact on its natural metamorphosis and development. This historical experience has caused some African writers, such as Inikori, to argue that but for European colonialism, Africa would have been a capitalist giant in today's world.¹⁹⁸ Inikori's in-depth account of the extent of damage done to the human potential and resources is largely accurate. Following in his trail, some Africans have also argued for compensation for the damage, loss and degradation of human dignity inflicted on Africa and Africans through the slave trade and colonialism.

But one practical approach to redress these past abuses is through a conceptualisation of an African notion of rights. Africa's post-independence leaders exploited Africa's bleeding past to champion the cause of economic, social and cultural rights at the UN in the 1960s and to call for the prioritisation of these rights over civil and political rights in order to enable African states to develop and "catch up" with the West. Africa's past experience justifies its claim for an African notion of rights but not in the manner put across by its self-serving leaders. Also, some of the views presented above, such as the community and romantic perspectives, do not serve a useful purpose for Africa's emancipation through the praxis of rights. The African notion of rights on historical grounds call for the recognition of, and respect for, economic, social and cultural rights

¹⁹⁷ J. Donnelly, *supra* note 16. Yet, quite strangely, Donnelly fails to attribute this interaction to traditional African communities since he allowed himself to be deluded by African socialists and the earlier schools on traditional African rights that traditional African societies were purely communalistic, homogenous and cooperative.

¹⁹⁸ J.E. Inikori, *The Chaining of a Continent: Export Demand for Captives and the History of Africa South of the Sahara, 1450-1870* (Kingston: Institute of Social and Economic Research, 1992).

which have become ripe for exercise at the *advanced political* stage. But their enjoyment should be preceded by the exercise of civil and political rights. As well, the gains to be attained should be protected through sustained enjoyment of civil and political rights.

3: The Development Argument

The Western notion of rights take human rights as a given which must be enjoyed in and of itself.¹⁹⁹ Another way of phrasing the point is that human rights exercise is to be enjoyed by human beings *qua* beings. It is also to be enjoyed so as to enable each individual to attain his or her individual needs only.²⁰⁰

The Industrial Revolution that took off in Europe was supposed to have thrived on respect for and enjoyment of human rights, science and technology. This is the context in which the link between human rights and development should have been established in Western Europe. However, because of the failure to emphasise rights for the ordinary worker, *positive* development could not be accomplished by and for the workers on a sustainable basis. This situation contributed to colonial adventurism and the slave trade. The inability of the working class to change the nature of rights exercise due to their corporatisation and co-option into civil society also occasioned the ossification of the concept of rights as “negative” and not development-oriented.

The same concept was imported into African territories and imbibed by African leaders, paradoxically, also in the name of development of their people. Thus, the exploitation of Africa continues under the guise of neo-colonialism and now under the “new international order.”

But an African notion of rights would rather see human rights as the key to unlocking the fetters to development. Put another way, the lower the level of development, the more human rights are needed for exercise to overcome the obstacles to development.

¹⁹⁹ R. Howard, “The Full-Belly Thesis: Should Economic Rights take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa,” (1983) Vol. 5 *Human Rights Quarterly* 467. Although she also argues that rights enjoyment is to enable the person to fulfill his or her needs.

²⁰⁰ Trakman, *supra* note 184. But Stephen Toope argues that what underlies the language of rights seems to be the goal of human freedom and the desire to promote physical, intellectual and spiritual

Human rights are expected to help the people to appreciate the internal and external factors they need to deal with in their bid to attain development. The internal concerns their inner abilities represented by their potentials, gifts, talents and capacities and how to liberate and make maximum utilisation of these untapped human resources. The external is linked to their relationships with the ruling entities (both local and external) who control the dependence structure: how to appreciate the obstacles they pose to the popular sector's development and how to confront power and demand change from this group.

B: Civil Society

The preceding chapter reveals that there are some differences between the concept of "civil society" as developed in Western Europe and the Akan political community. The Western philosophical conception of the process of rationalisation of the state posits the natural state (the pre-state or anti-state)²⁰¹ that is portrayed as negative and where the people could not enjoy their rights in the absence of a state structure. However, in the Akan context, there is a pre-state which is not anti-state, neither is it depicted as a negative moment. It can be posited as representing a "positive" moment in the sense that rights exercise did take place in the pre-state. And it was these rights that emerged at the *political* stage as civil rights.²⁰²

Another difference is that *communal* associations existed at the *communal* stage in traditional African communities. These took care of religious, social and economic issues in the community. They may correspond with Taylor's first type of civil society in the Western context. But Taylor's notion of such society seems mythical since he admits that civil society actually started beyond the state of nature. Also such a community cannot exist without the tutelage of state power.²⁰³ Traditional "civil

development, shared by Asian, African and Western peoples and governments. See S. Toope *supra* note 188 at 184.

²⁰¹ In the language of Hobbes and Rousseau. See Norberto Bobbio, "Gramsci and the Concept of Civil Society," in John Keane, *Civil Society and the State: New European Perspectives* (London: Verso, 1988), 73 at 74.

²⁰² Refer to the discussion in Chapter 1.

²⁰³ C. Taylor, "Modes of Civil Society," in (1990) Vol. 3 No. 1 *Political Culture*, 95 at 108, 109.

society” (*ekuo* – groups) constituted part of the development structure. The *oman* developed out of families and the various *ekuo* that emerged through the promotion of inter-familial relationships. Thus, in the Akan context, rights exercise originated in tandem with “civil society” but minus democracy until the arrival of the *political* stage.

VII: A Review of Development from the Western and Akan Perspectives

The major differences that have been discerned between the Akan and mainly Western notions of rights and civil society are significant in undertaking a critical analysis of development from the two perspectives, in the context of human rights.

The major viewpoints representing the Western position of development from a rights perspective finds reflection in the works of scholars such as Mancur Olson,²⁰⁴ and others.²⁰⁵ Their works analyse the linkage between democracy, freedoms and development and the conclusion they reach is that democracy does not inhibit economic development but rather promotes it. For example, Olson strongly contends:

But individuals need their property and their contract rights protected from violation not only by other individuals in the private sector but also by the entity that has the greatest power in the society, namely the government itself. An economy will be able to reap all potential gains from investment and from long-term transactions only if it has a government that is believed to be both strong enough to last and inhibited from violating individual rights to property and rights to contract enforcement.²⁰⁶

Economics, apart from moral and political factors, was responsible for the British, French and American revolutions that were unleashed in 1688, 1776 and 1789, respectively;²⁰⁷ though this fact seems to have been forgotten by the Americans, Britons and French.²⁰⁸ But economics was the principal motive. The revolution was about economic freedom and economic growth for the middle class who saw it prudent to couch their claims in the language of political rights and freedoms and founded them on moral grounds to gain widespread support and appeal. According to Quashigah, “the doctrine of natural rights” therefore “arose from the specific needs

²⁰⁴ M. Olson, “Dictatorship, Democracy, and Development,” (Sept. 1993) Vol. 87 No.3 *American Political Science Review*, 567.

²⁰⁵ Eg., *The Economist*, August 27, 1994 at 9.

²⁰⁶ Olson, *supra* note 204 at 572.

²⁰⁷ K. Quashigah, “The Philosophic Basis of Human Rights and its Relations to Africa: A Critique,” (1992) Vol.2 Nos 1&2 *Journal of Human Rights Law and Practice*, 22.

and ambitions of a group – the middle class.” It was a practical historical concept which did not force itself onto human exigencies of the period, but was rather fashioned out of the human exigencies of the times. In this doctrine of natural rights we saw bold steps being taken by legal and political philosophers to uplift those basic rights needed for the support of the then emerging production relations into a category of rights which were enforceable against the rulership.”²⁰⁹ Olson’s analysis, couched in a typical neo-Lockean fashion, affirms this assertion.²¹⁰

On the face of it, these conclusions are significant in making a claim for a *positive* relationship between human rights and development, and thereby to disclaim the contention that development can be traded away for rights.²¹¹ However, these analyses only aim to argue for the protection of the interest of the entrepreneurial middle class from governmental interference and abuse. They do not tell us about how, after the necessary protection has been secured for entrepreneurial take off by the middle class through the instrumentality of nominal democracy, the gains of the capitalists are achieved. Neither does it tell us whether or not the process of attaining economic growth is morally justified. The analyses fail to place into perspective the fact that extension of political rights and democracy to the poor was only granted after the Western elites were convinced that property rights, if protected by law and through other structural arrangements, would not pose a threat; and it would clothe the system with legitimacy. Thus, these analyses are devoid of a normative theory of exploitation of labour which is able to account for how property was acquired in the first place and how it is used for further exploitation. Also, the analyses do not consider the role and impact of the centre-periphery relationship that subjects the less industrialised states into a subordinate status and forces them to unfavourable trading relations with the industrialised states.

²⁰⁸ *The Economist*, *supra* note 205 at 9.

²⁰⁹ K. Quashigah, *supra* note 207 at 34.

²¹⁰ See details below.

²¹¹ In fact, that is the contention of the *Economist* who then uses Olson and Bhallat’s work to support its claim.

Based on Olson's analysis, it means that the rich nations are rich simply because they give room for the respect of economic freedoms (not economic, social and cultural rights) and civil and political rights.²¹² This view is representative of the Lockean/Neo-Lockean notion of property acquisition. According to Locke, property is obtained when an individual mixes his labour and thereby lays claim to a part of the world which is the common heritage of the humankind so long as he does not take more than what he needs and also leaves some for others to appropriate.²¹³ This appropriation of private property is to be attained in the context or environment of a civil society.²¹⁴

Robert Nozick,²¹⁵ Peter Bauer,²¹⁶ and others who build on this analysis claim that private property is justly acquired through voluntary exchange or by laying claim to something that does not belong to anybody else, but not simply taken from other people. Thus, according to Bauer, "incomes, including those of the relatively prosperous or the owners of property, are not taken from other people. Normally, they are produced by their recipients and the resources they own and are not misappropriated from others."²¹⁷ Such property, thus supposedly justly acquired cannot be taken away from the owner by any political authority, no matter the nature of its democratic composition.²¹⁸ It is also claimed that redistribution not only distorts the market signals but also abuses the rights and democracy of the people by taking what is justly acquired by someone and redistributing it to others. Thus, in the

²¹² Missing these important paradigms, one is not surprised to read the conclusion of *The Economist*, that there is a close correlation between political freedom and prosperity because "nearly all of the richest countries are free (meaning, among other things, democratic) and nearly all of the poorest countries are not." *Ibid*, 15.

²¹³ J. Locke, *supra* note 24; D. Schweickart, "A Democratic Theory of Economic Exploitation Dialectically Developed," in Roger Gottlieb, ed., *Radical Philosophy: Tradition, Counter-Tradition, Politics* (Philadelphia: Temple University Press, 1993), 101 at 104.

²¹⁴ Taylor, *supra* note 203.

²¹⁵ R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

²¹⁶ P. Bauer, *Equality, the Third World and Economic Delusion* (London: Weidenfield and Nicolson, 1981).

²¹⁷ *Ibid*, 12. These resources would include the capacities and motivations that the rich possess which they utilise to make economic strides. *Ibid*, 19ff.

²¹⁸ Nozick, *supra* note 215.

economies of the industrialised world the invisible free hand should be allowed to socially allocate resources and benefits.²¹⁹

The fundamental flaws with this claim include the fact that the theory of just acquisition is out of touch with real-world concerns. Either it does not take into account the years of exploitation through slavery, colonialism and neo-colonialism, or it justifies them. Monopoly power can be used to amass endless wealth no matter how wasteful and how far above cost the capitalists set their prices without being condemned.

Thus, by failing to draw the proper historical links with their theory²²⁰ they detached it from reality. This weakness exposes them to another criticism regarding the notion of just acquisition of property. As contended by David Schweickart in reaction to Nozick's theory of *Entitlement*:

Early capitalist accumulation derived from the theft of common land, the slave trade, the extermination of native peoples, and other assorted horrors. Just acquisition and voluntary exchange had little to do with it. (Nor have they to do with much of the subsequent capital accumulation, as countless financial scandals, our own savings and loan debacle among them, make evident.)²²¹

The undue emphasis on individualism and uninhibited concentration of wealth in the name of consolidated individual property rights by the Western states, and the twisting of Adam Smith's concept of the "invisible hand" have enabled a small number of people and firms to gain disproportionate control over the direction of the economy.²²² This, according to the Ungerian conception of empowered democracy, is anti-democratic.²²³ Secondly, the consolidated private property which accepts the

²¹⁹ Friedrich Hayek, *New Studies in Philosophy, Politics, Economics, and the History of Ideas* (London: Routledge and K. Paul, 1978).

²²⁰ Contrary to Nozick's claim.

²²¹ Schweickart, *supra* note 213 at 105.

²²² Robert Dahl expresses the view on behalf of scholarly students on political power that in America and other democracies "key political, economic and social decisions are made by 'tiny minorities.'" cf. Thomas Dye and L.H. Ziegler, *The Irony of Democracy: An Uncommon Introduction to American Politics*. 4th ed. (North Scituate: Duxbury Press, 1978) at 1.

²²³ See, eg., Robert M. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Social Democracy* (Cambridge: Cambridge University Press, 1987); and, *Knowledge and Politics* (New York: Free Press, 1975).

“task-definition”-“task execution” dichotomy²²⁴ is not only anti-democratic but also disempowering. It legitimises inequalities of wealth which in turn numbs the people’s ability to question acquisition of ill-gotten wealth which has relegated them to a condition of economic despondency, and consequently, a state of economic dependency on others. The question of exploitation here involves abuse of rights of those who are left at the mercy of the exploiter. It is realised that these analyses are left out of the Olsonian theory of democratic/rights-based development because their work seems to concentrate on protection of private property against the state, not protection of the popular sector against abuse by non-state actors. This is not seen as undemocratic since Olson’s conception of democracy is the nominal type; but not the developmental-oriented type that aims at developing human capacities through the active and full participation of citizens in controlling their own destinies.²²⁵

VIII: A Democratic Theory of Economic Exploitation

In presenting his democratic theory of exploitation, Schweickart argues that the fundamental dialectical innovation of the democratic theory is that it concerns itself with a concrete project that represents an alternative vision: “the specification of a model of an economically feasible, morally desirable alternative to capitalism.”²²⁶ The model is designed by drawing on theoretical, historical, and empirical research, all the while guided by the democratic heuristic. Schweickart’s feasible, desirable, fully democratic economy must be an appropriate synthesis of three elements: *workplace democracy, a free market for economic goods and services, and social control of investment.*²²⁷

But the central concept is *economic or workplace democracy*. The question that fostered this concept of democracy is: why do workers not elect their bosses? “[I]f

²²⁴ This, according to Unger, involves the making of decisions by directors and managers of corporations and leaving their execution to the workers without involving them in the process of decision-making. See R.M. Unger, *Social Theory: Its Situation and its Task* (Cambridge: Cambridge University Press, 1987). This analysis confirms the point being expressed in the theory of community emancipation about the absence of exercise of *socio-economic* civil rights.

²²⁵ Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Clarendon Press, 1981).

²²⁶ Schweickart, *supra* note 213 at 116.

ordinary citizens in Western democracies are competent enough to elect their mayors, governors, presidents, and a host of other political officials, are they not competent enough to elect their own workplace managers?"²²⁸ If the right of the ordinary citizens to define and determine for themselves how they should chart their destinies is taken away from them and vested in their political leader only, they will not do better in choosing the right political leader during periodic elections. Their ability to think for themselves is lost.

Schweickart's concept of *workplace* democracy is in line with the theory of community emancipation's generationalisation of rights into civil rights first and political rights second; and also its postulation of civil rights as having emerged at the *communal* level (or *communal* rights) as *socio-economic* civil rights and those that developed at the *political* stage as *political* civil rights. In this rights analysis from the Akan perspective, rights exercise takes place at two levels, the micro and the macro. Each is supposed to influence the other. Respect for *political* civil and political rights are supposed to insulate, protect and facilitate the exercise of *socio-economic* civil rights. *Socio-economic* civil rights are also supposed to lay the foundation for their holders to be more politically conscious and to influence politics at the macro level. But, unfortunately, in most instances *political* civil and political rights are hijacked at the macro-level which then disrupts the unfettered exercise of *socio-economic* rights. This is the result of the exercise of rights from the Western perspective to attain development. The nature of development attained in this fashion is lopsided. Development enures to the rich few who benefit from the political-economic arrangements. It is then supposed to "trickle down" to the underclass. But this type of development is not *holistic* since it is measured in terms of economic growth only without consideration of the spiritual, moral, emotional and other aspects of development of the community. It is also not *holistic* because of its lopsidedness. Neither is it sustainable.

²²⁷ *Ibid.*

²²⁸ *Ibid.*, 117.

Thus, referring to several examples on the efficiency of workplace democracy, Schweickart comes to this crucial conclusion that “democracy, it turns out, has positive economic as well as political and moral significance.”²²⁹ It is observed here that Schweickart and Olson come to the same conclusion. The fundamental difference between them, however, is that while Olson emphasises democracy at the macro-level (through exercise of *political* civil rights and political rights only) Schweickart does so at the micro-level (through *socio-economic* civil rights). Therefore the conclusion is that nominal or electoral democracy²³⁰ alone does not account for the economic development of the industrialised democracies. In the industrialised democracies, freedom for the popular sectors is not respected. In other words, nominal democracies and liberal rights exercise can serve as tools of oppression against the weak and pre-developed members of the community by creating space to protect the interest of those who have access to consolidated private property. In support of this conclusion, one can refer to Dahl’s claim that: “capitalism is persistently at odds with values of equity, fairness, political equality among all citizens, and democracy.”²³¹

The introduction of democracy and capitalism in Africa during the era of globalisation has involved an application of the same concepts of nominal democracy and the institutionalisation of democracy to protect the property, commercial and political interests of the ruling group on the dependence structures of African states. The adoption and incorporation of this approach to development in Africa does not hold much hope for the majority of ordinary Africans, the marginalised entities on the dependence structure. It is therefore my contention that the key developmental issue in Africa does not lie so much with macro-level democracy but, first, with micro-level democracy. The macro only acts as a smokescreen to protect and justify the misdeeds that take place at the micro-level by non-state actors, in the economic sphere, often the big multinational or “global” corporations.²³² It is important to note

²²⁹ Schweickart, *supra* note 213 at 117.

²³⁰ See David Gillies and Gerald Schmitz, *The Challenges of Democratic Development: Sustaining Democratization in Developing Countries* (Ottawa: North-South Institute, 1992). For detailed exploratory analysis of the various brands of democracy see the same.

²³¹ R. Dahl, “Social Realities and ‘Free Markets,’” (Spring) *Dissent*, 224 at 226. cf. *ibid*, 23.

²³² David Korten, *When Corporations Rule the World* (West Hartford: Kumarian Press, 1995).

that it was not until quite recently that non-state actors were recognised as perpetrators of rights abuse.²³³ Even there it was the political abuse perpetrated by armed insurrection groups that led to this development.²³⁴ Thus, Olson's assertion that democracy provides security of property and guarantees for long-term economic development is only true where one sees the role of the state as acting as the economic police agent for capitalism and the middle and upper classes. It is governments that issue the charters of incorporation that allow corporations to come into being. The same governments bestow privileges and authority on corporations, such as tax breaks and "a favourable investment climate."

Among the Akans, development was measured not just in economic terms, but also in religious and socio-political terms. In fact, the Akan concept of development was *holistic* in focus. Economic status alone was not enough for a person to gain recognition and respect in the community. The norm was to grant each individual a space to develop on the land, either to farm, to hunt, or to learn a trade which were all connected to the land. Hence, the proverb: *Asare ye duru*: "All power is derived from the land." However, the Akan economic structure did not remain at the subsistence level for long. It became monetized through the use of gold dust as a form of currency. Social stratification then set in, which was intensified after the introduction of cocoa as a cash crop. However, the norm did not change and people still frowned on the emerging social classes. Hence, the proverbs on cocoa, the UAC, etc.²³⁵

The next chapter outlines how through the self-serving ideology of African socialism, Africans saw traditional rights concepts suppressed, practically and theoretically, thereby disabling the people from using such concepts to attain *sustainable holistic* development. The rest of the work examines the ways in which development plans for

²³³ See, eg. D. Matas, *No More: The Battle Against Human Rights Violations* (Toronto: Dundurn Press Limited, 1994) on the difficulties Amnesty International has faced in seeking to extend their mandate to cover human rights violations of non-state actors. Also, Michael Stohl *et al* make us aware of the importance of assessing rights abuse by non-state actors in order to give a holistic assessment of the human rights in a country. See M. Stohl *et al*, "State Violations of Human Rights: Issues and Problems of Measurement," (1993) Vol.15 *Human Rights Quarterly*, 592; and Chapter 5 in general.

²³⁴ Matas, *supra* note 233.

²³⁵ See Chapter 1.

Africa after the Cold War have been formulated and implemented by Western economic interests with the collaboration of African leaders and how that situation is repeating itself, theoretically through the instrumentality of the so-called “modern” concept of civil society, and practically through the vehicle of development and, to a lesser extent, some human rights NGOs.

CHAPTER 3

AFRICAN DEVELOPMENT 1960-90: THE IMPACT OF WESTERN POLICIES AND AFRICAN SOCIALISM ON HUMAN RIGHTS

For by definition, the neo-colonial state has tended, for its own reproduction, to usurp and obliterate the autonomy of civil society and therefore the very foundation of democracy. It is within this formation that rights struggles, like other democratic struggles, have to be waged.
– Issa Shivji.¹

Introduction

The previous chapter dealt with a practical application of the theory of community emancipation and Akan philosophy in analysing the relationship between human rights, civil society and development from the Akan and Western perspectives. It also touched on the various perspectives of African notions of human rights posited mainly by African scholars.

This analysis was undertaken in the context of three principal factors which I have identified as being responsible for shaping human rights from the African perspective. The cultural, historico-colonial and the developmental factors are used to differentiate between the Akan notion of rights and the Western perspective which has largely shaped the international regime of human rights. The differences extrapolated point to the fact that Africa has distinct notions of rights which need to be accepted and accommodated as such into the international human rights regime which remains dominated by Western perspectives. More importantly, the differential analysis exposes some major defects and loopholes in the Western-international system which offer room for manipulation and abuse by those who tread the corridors of political and economic power. The conclusion reached was that although, on the face of it, the Western notion of rights establishes a *positive* relationship between human rights and development, in reality and in practice, it fails to do so. The reason is that the Western notion of rights, together with its accompanying democratic arrangement, is not comprehensive enough to cover and

¹ Issa Shivji, *The Concept of Human Rights in Africa* (London: CODESRIA, 1989) at 5.

recognise, *inter alia*, socio-economic civil rights whose exercise would enable ordinary members of the community to take part in meeting their socio-economic development. Socio-economic civil rights also act as the key to claim for, and for the exercise of, political civil rights and political rights proper. The cumulative result of the exercise of these rights is the attainment of a balanced, *holistic* and *sustainable* notion of development.

This chapter is devoted to using the analysis on rights, civil society, democracy and development to conduct a practical assessment of the post-colonial development agenda that Western governments have formulated for implementation in Africa from the post-independence era to the post-Cold War era.

In discussing Western development policies in the context of human rights, it is important to note that each development programme is linked to an agenda of globalisation. Four distinct policy eras are identified. The first was the Slave trade which led to the establishment of the Trans-Atlantic trade route.² The second was colonialism³ which resulted in the incorporation of Africa into the world economy as a mere periphery to the colonial centre.⁴ The third is the neo-colonial era which started after the attainment of political independence in the late 1950s and early 1960s. The fourth is the post-Cold War era which is often referred to as the era of globalisation. It is the most massive and comprehensive globalisation attempt.

² J.D. Anderson, *West and East Africa in the Nineteenth Century* (London: Heinemann, 1972); Walter Rodney, *How Europe Underdeveloped Africa* (London: Bogle-L'Ouverture Publications, 1978). See the arguments of the colonial apologists who argued that colonialism was for the good of Africa and the results too were positive, eg., L.H. Gann and P. Duignan, *Burden of Empire: An Appraisal of Western Colonialism in African South of the Sahara* (London: Pall Mall, 1968); and, David K. Fieldhouse, "The Economic Exploitation of Africa: Some British and French Comparisons," in P. Gifford and W. Lewis, eds., *France and Britain in Africa: Imperial Rivalry and Colonial Rule* (New Haven, Conn.: Yale University Press, 1971) 593.

³ Semankula Kiwanuka, *From Colonialism to Independence: A Reappraisal of Colonialist Policies and African Reactions; 1870-1960* (Nairobi: East African Literature Bureau, 1973).

⁴ A periphery state occupies a subservient position on the world economic structure as producer of raw materials and purchaser of manufactured goods from the centre or metropolis. The latter buys the raw materials and manufactures them for sale to the periphery. This analysis represents a key component of the Dependency school's economic theory of exploitation. See eg., Andre Gunder Frank, *Dependent Accumulation and Underdevelopment* (New York: Monthly Review Press, 1979).

I: An Analysis of the Colonial/Post-Colonial Western Development Agenda

The general assessment of scholars on the implementation of the development agenda of Western states in Africa is that it has been a total failure.⁵ Yet, one writer has put forward a radically different assessment of the situation, that is Claude Ake. In his *Democracy and Development in Africa*, Ake argues that "the problem is not so much that development has failed as that it was never really on the agenda in the first place."⁶ According to Ake, the following issues became the principal preoccupations of African leaders at the dawn of political independence: the struggle over which of the nationalist groups that had joined forces to negotiate an end to colonialism should take over the colossal power structure left by the colonial power;⁷ increased competition and conflict among elements of "civil society" and nationalities and ethnic groups at independence;

⁵ Fantu Cheru, *The Silent Revolution in Africa: Debt, Development and Democracy* (London: Zed Books Ltd., 1989); E.A. Brett, "State Power and Inefficiency: Explaining Political Failure in Africa," (1986) Vol. 17 No. 1 *IDS Bulletin* 22; Richard Sandbrook, *The Politics of Africa's Economic Stagnation* (London: CUP, 1985); Rosenblum and Williamson, *The Squandering of Eden: Africa at the Edge* (New York: Harcourt Brace Jovanovich, 1981); James S. Wunsch and Dele Olowu, eds., *The Failure of the Centralized State: Institutions and Self-Governance in Africa* (Boulder: Westview Press, Inc., 1990); Ozay Mehmet, *Westernizing the Third World: The Eurocentricity of Economic Development Theories* (London: Routledge, 1995. World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (Washington: The World Bank, 1989); and Chazan *et al*, *Politics and Society in Contemporary Africa* (Boulder: Lynne Rienner, 1988). Eg., Chazan *et al* argue at p. 15 that if application of the modernisation theory in African failed then the shortcomings could be attributed "either to poor judgment, to mistaken ideologies, to the conflict between competing goals, or to an inability to overcome cultural impediments deeply rooted in African societies."

⁶ C. Ake, *Democracy and Development in Africa* (Washington, DC: The Brookings Institution, 1996) at 1. The "agenda" refers to the one African leaders set for their various countries at the time of independence. But not that of the former colonialists for their former colonies.

⁷ Which struggle resulted in mutual alienation of the anti-colonialist coalition partners. In this regard, it is pertinent to refer to Dunduzu K. Chisiza: "The main explanation for the friction [between the ruling party and the opposition] hinges on the sharing of gratitude and prestige. Before independence, foreign rulers occupy the topmost rungs of the social ladder. With the coming of independence, however, they step down and leaders of the parties which have triumphed at the polls step up to fill the vacant rungs, thereby becoming the recipients of gratitude and admiration from their fellow-countrymen for having liberated their countries. Leaders of opposition parties, who may have fought for independence just as valiantly as anyone else, find themselves the recipients of practically nothing. Herein lies the rub. It is only human for these people to feel that they have been given a raw deal. Once they begin to feel that way, they are often certain to despise and to denounce their opponents as 'selfish, ambitious, vain ...'. Their opponents will regard this as mischievous little men and may retort by calling them, 'jealous, visionless, little men with small minds'. And so the stage is set for full-scale mudslinging which sometimes culminates in the governing party clamping down on their opponents with the force of law." D. Chisiza, *Africa - What Lies Ahead* (Indian Council for Africa, 1961) at 1. cf. J. Ayodele Langley, *Ideologies of Liberation in Black Africa 1856-1970: Documents on Modern African Political Thought from Colonial Times to the Present* (London: Rex Collings, 1979) 572 at 572, 573.

the tendency to use state power for accumulation of profit by individuals and groups; and, alienation of leaders from followers in the post-colonial era.⁸ As a result:

Besieged by a multitude of hostile forces that their authoritarianism and exploitative practices had engendered, those in power were so involved in the struggle for survival that they could not address the problem of development. Nor could they abandon it. For one thing, development was an attractive idea for forging a sense of common cause and for bringing some coherence to the fragmented political system. More important, it could not be abandoned because it was the ideology by which the political elite hoped to survive and to reproduce its domination. Since development was the justification for rallying behind the current leadership, for criminalizing political dissent, and for institutionalizing the single-party structure, to abandon it would undermine the power strategy of the elite.⁹

Faced with this dilemma, African leaders responded by making perfunctory attempts to promote development. But, in fact, they sought to pass that responsibility on to foreign patrons. "Thus while African leaders talked about the frailty of political independence and the need to buttress it by self-reliant development, they eagerly embraced economic dependence."¹⁰ This analysis represents a usefully radical assessment of the development environment that African peoples confronted. Ake's work is important in two major respects. First, he makes us aware that in the absence of a development agenda, one cannot talk about development having commenced. Secondly, of all the numerous factors that have been identified as being responsible for Africa's problems -- poor management, unfavourable terms of trade, lack of entrepreneurial skills, etc¹¹ -- Ake isolates the political as the key factor.

However, I offer a critique of Ake's analysis in the context of the theory of community emancipation and a colonial/post-colonial analysis of the Gramscian notion of civil and political societies.¹² The theory of community emancipation postulates, *inter alia*, that at the *advanced political* stage of community metamorphosis it is the ruling group that determines the needs of the community. It happens that most often they are the only entity that remain on the community development-turned-dependence structure. In the

⁸ *Ibid*, 4-6.

⁹ *Ibid*, 7.

¹⁰ *Ibid*, 7,8.

¹¹ Ake, *supra* note 6 at 1.

¹² According to Gramsci, civil society is represented by the captive intellectual elite who formulate policies for governments in order to help the latter maintain its hegemonic influences. Political society, on the other hand, is the coercive arm of the government whose role is to complement that of the

case of African nation-states, political independence did not result in the total replacement of one ruling group by another but a sharing of the dependence structure with the foreign counterpart still holding dominant power. The subordinate position of the local ruling group is attributed to the fact that it was relatively weak and dependent, financially. Also the economy over which it has been asked to preside has equally been placed in such a weakened position. Thus, African leaders thought it expedient to ally themselves with the foreign ruling group on the dependence structure.

One can place this analysis in the context of internationalising Gramsci's concept of civil and political societies in order to establish the missing link between colonialism and neo-colonialism, something that is not well-established in Ake's work. In the assessment of the goal of colonialism and how it came to establish itself, two forces are identified: the intellectual community, especially from the philosophical, economic and anthropological traditions. The main role of this intellectual class is "to provide authority with their labor while gaining great profit."¹³ These intellectuals helped lay the foundation, and provided the justification, for colonial adventurism. In the post-independence era their role shifted to formulating development policies for Africa. Their role therefore corresponds with Gramsci's civil society.¹⁴ The other force is the political society, which during colonialism was represented by the arbitrary and absolute colonial political machinery run by the Colonial Administrators, Governors-General, the Provincial Commissioners, the District Commissioners, etc.

But it is not only African leaders who failed to create a development agenda for Africa. Western states were equally disinclined to formulate a development agenda for Africa.

intellectuals. See Antonio Gramsci, (Quintin Hoare, ed., and Geoffrey Smith, trans.,) *Selections from the Prison Notebooks of Antonio Gramsci* (London: Lawrence and Wishart, 1971).

¹³ Thus, "the problem for the intellectual is ... the insiders, experts, coteries, professionals who ... mold public opinion, make it conformist, encourage a reliance on a superior little band of all-knowing men in power." Edward Said, *Representations of the Intellectuals* (New York: Pantheon Books, 1994) at xv and xiii.

¹⁴ Incidentally, this includes Hegel himself from whom Gramsci borrowed his concept of civil society. But by turning Hegel's notion of civil society on its head, Gramsci's civil society in the context of colonial theory of civil society places Hegel in the category of those who use their intellectual influence to foment and justify hegemony. See Hegel, *Philosophy of Right* (Oxford: Clarendon Press, 1957); A. Gramsci, *supra* note 12.

In fact, the phrase "Western development agenda" is in reference to an agenda for the development of the West itself, not Africa. In this regard, it is not that development failed for Africa. Rather, it is the case that the West did not, and still does not, have a development agenda for Africa, but for itself alone. This assertion is supported by the fact that the economic/political policy advisers and scholars on Africa did not see the need to change their stance in the face of glaring "failures" of their approaches.¹⁵ In fact, there has been nothing new under the sun¹⁶ with regard to the Western development agenda for Africa from the time of implementation of the first "globalisation" effort, the Slave trade, to date. Therefore we need not talk of "failure" of the development agenda but rather its "success," for the results attained from the various development programmes are what were actually being pursued, development for the West. Any development that was attained for Africa was only incidental or facilitative. In other words, it was not planned but only a means to promote development for Western capitalist states.

Another critique on Ake is that his work seems to limit itself more to economic development. My contention is that respect for human rights and democracy is also part of development and, in fact, the foundation to development. So the real question

¹⁵ Mehmet argues that he does not suspect conspiracy on the part of the theorists. In other words, they do not belong to Gramsci's civil society. Among others, he cites Kaldor and Rosenstein-Rodan who realised the inadequacies in their theories and "confessed" and abandoned their earlier stances. There were also those who dissented. But the mainstream stuck to its guns and prevailed. Mehmet continues: "Accordingly, no amount of good intent can hide the failure of Western theories...When these idealized (i.e. stylized) theories failed in the Third World, the typical reaction of the mainstream economist was to simply rearrange the underlying assumptions of the theory, always preserving its Western rationalist roots, never conceiving the possibility of culture-specific conceptions of rationality." See Mehmet, *supra* note 5 at 3. With this conclusion reached, I find it difficult that Mehmet should still cling to the "good intent" theory. Those who "repented" and dissented had the good intent but those who stuck to their stance are the "organic intellectuals whom Gramsci saw as directly connected to classes or enterprises that used intellectuals to organize interests, gain more power, get more control." (Said, *supra* note 13 at 4). Compare eg., Samuel Huntington, *Political Order in Changing Societies* (Yale: Yale University Press, 1968) with Samuel Huntington, "Democracy for the Long Haul," (1996) Vol. 7 No. 2 *Journal of Democracy* 3. This class of intellectuals composes the international civil society of capitalism.

¹⁶ This is in fulfilment of the saying of the wise King Solomon, the Preacher: "What has been is what will be, and what has been done is what will be done; and there is nothing new under the sun. Is there a thing of which it is said, 'See, this is new? It has been already, in the ages before us.'" Ecclesiastes 1.9-10 (RSV). See also, Peter Uvin and Isabelle Biagiotti, "Global Governance and the 'New' Political Conditionality," (Sept-Dec.1996) Vol. 2 No. 3 *Global Governance* 377.

is whether or not *sustainable holistic* development ever started in Africa. I suggest that it is yet to begin. If human rights were given the maximum respect it deserve, it would address the woes of mismanagement, expose and reduce corruption, and provide people with skills to enable them to attain their rights *to be*, etc. Political conditions and human rights should also be considered in the context of civil and political societies. They are the key in promoting, popularising and defending rights exercise.

Colonialism ushered Africa into the *advanced political* stage at a time when most of the traditional African political communities were at the *communal* and *political* stages of their metamorphosis. Thus there was a forced graduation, the consequences and shocks of which are still felt in the lives of the people on the continent today. This negative impact includes the fact that the bringing of "modern" science and technology to Africa disabled Africans from fully realising their potential in overcoming their environmental and other stumbling blocks to development.

The labour of colonised peoples was exploited for gain as "human capital" and as a "natural" resource that was there to be assayed and quantified. They were depicted as part of the "production" process who did not deserve to enjoy rights in and of themselves but only those limited rights that would enable them to continue to contribute *actively* to development for the ruling group, no matter how short and unsustainable that contribution would be. This analysis supports the theory that decolonialisation was negotiated as colonialism was becoming an expensive economic enterprise for the post-war needs of imperialism.¹⁷ Thus, according to Babu, it was thought expedient to grant independence to the colonies and pass on the financial burdens the colonial powers would have incurred to the newly independent colonies in the form of loans.¹⁸

¹⁷ The same reason accounts for the abolition of the Slave trade. See Adam Smith's ethnocentric perspective in support of the slave trade in A. Smith, *Lectures on Jurisprudence* (Oxford: Clarendon Press, 1978).

¹⁸ A.M. Babu, *African Socialism or Socialist Africa?* (Dar es Salaam: Tanzania Publishing House, 1981) at 48. In support of this claim one can refer to the delay in the introduction of social welfarism by British colonial powers in West Africa and the reluctance displayed in implementing them with

According to Gramsci, civil society is expected to take advantage of this carefully expanded set of parameters, utilise it to take over political society (the coercive arm of the state) and thereby create a stateless society where civil society would reign.¹⁹ It is my contention that the idea of the withering of the state was utopian in its application to internal national politics.²⁰ But Gramsci's concept was applicable to both the colonial and post-colonial context in Africa. It was up to post-independence African leaders to cause the "withering away" of the old colonial state and its appendages by breaking up the colossal colonial political apparatus which the departing colonialists expected the new African leaders to use to set up new political societies.

Post-independence African governments were supposed to utilise the space granted under decolonisation to transform themselves, share power with the elements of "civil society"²¹ to flourish and thereby automatically destroy the colonial political apparatus. However, they preferred to fight among themselves in order to capture total political power, and rather share this power with the foreign ruling class.²²

British funds but rather money belonging to the colony. See Adelaide Hill, "The Administrative Structure for Social Welfare in West Africa," in St. Clair Drake and T. Peter Omari, *Social Work in West Africa* (Report of The Seminar on Social Work in West Africa) (Accra: Ghana Publishing, 1962). See details below.

¹⁹ A. Gramsci, *supra* note 14; also, Norberto Bobbio, "Gramsci and the Concept of Civil Society," in John Keane, *Civil Society and the State: New European Perspectives* (London: Verso, 1988), 73.

²⁰ Or when it is "successful" at all, such as in the case of Poland when the Solidarity Movement seized power, it brings chaos. See K. Kumar, "Civil Society: an inquiry into the usefulness of an historical term," (Sept 1993) Vol. 44 No. 3 *British Journal of Sociology* 375 at 386.

²¹ As existed in the traditional political systems and which were co-opted into the nationalist struggle.

²² Thus, except in a few instances, colonialism was not attained through the mustering of "all legitimate and constitutional means" as Nkrumah suggested (See K. Nkrumah, *Ghana: The Autobiography of Kwame Nkrumah* (London: Thomas Nelson, 1957) at 112), but through a negotiation and handing over of the reins of government to Africans who could be trusted "to share their values and be attentive to their interests." Thus, in the case of Ghana, Nkrumah had to agree to limit the human rights provisions that he initially intended to introduce into Ghana's independence constitution. See Geoffrey Bing, *Reap the Whirlwind: An Account of Kwame Nkrumah's Ghana from 1950 to 1966* (London: Macgibbon & Kee Ltd, 1968). It is also significant to note the acceptance speech made by the new President of Congo (Kinshasa) on the attainment of independence from Belgium where, after praising the Belgian administrators, and promising future co-operation, he added that Belgium had given "an example unprecedented in the history of peaceful decolonization - leading our people directly, without transition, from foreign rule to independence under full national sovereignty." G.B.N. Ayittey, *Africa Betrayed* (New York: St. Martin's Press, 1992) at 98. Contrast the President's speech with the fiery one delivered by the then Premier, Patrice Lumumba also quoted in Ayittey above. Nkrumah also could not hide his admiration and positive overtures towards capitalist states in his *Autobiography*. In this regard, Ake argues that "On the whole, political independence in Africa was rarely the heroic

So African nationalist leaders fell to the bait of fighting to capture political power for themselves. In the end, they had to share power with Western and Western-trained intellectuals. This is the intellectual group which formulated economic policies for African governments, under the guidance of the broad principles of the modernisation theory and Keynesianism. Meanwhile, African governments busied themselves consolidating political power. African leaders also took part in formulating the concept of African socialism which they used to camouflage the Euro-Yanqui-centric²³ approach to development as something African.

African socialism was one of the principal post-colonial ideologies developed by African leaders. Although it was short-lived, the impact it had on the human rights situation in Africa cannot be overlooked. The anti-human rights principles and strategies formulated under African socialism were used to legitimise and excuse rights repression; and to facilitate the implementation of the neo-colonialist development policies carved in the name of Keynesianism and the modernisation theory. These Western concepts could only thrive in Africa under a coercive, state-centred, dictatorial government. Thus, neo-colonialism presented the means to shift the rights-development relationship from a *negative* to a *passive* one till the right atmosphere was generated to occasion a return to the *negative* relationship approach.

It has already been observed that colonialism had the goal of attaining development principally for the colonial power.²⁴ Thus, in the context of the theory of community emancipation, it was the appendages of the colonial power who determined what needs and wants had to be met for the colonialists. These included the production and acquisition of commodities such as cocoa,²⁵ gold, diamond, etc which were deemed essential for the industries of the industrial North. Duties that were imposed on the colonial peoples to meet these needs were at times in the form of forced labour. No

achievement it was made out to be; it was often a convenience of deradicalization by accommodation, a mere racial integration of the political elite." Ake, *supra* note 6 at 4.

²³ Term borrowed from Richard Devlin, "On the Road to Radical Reform: A Critical Review of Unger's Politics," (1990) Vol. 28 No. 3 *Osgoode Hall Law Journal* 641 at 645.

²⁴ W. Rodney, *supra* note 2.

conducive environment was created to enable the colonised peoples to perform their duties. The enjoyment and exercise of rights was therefore at its lowest ebb. In fact, human rights was considered to be too "luxurious" and "foreign" for African peoples to enjoy. Thus, Africans were denied the opportunity to exercise their rights *to be, to do* and *to have*. As a result, they lost their very sense of *being* and Africanness.²⁶ To ensure total compliance with the duties inflicted on African peoples in the absence of rights, duties could only be performed in the Austinian way, as the command of the sovereign.²⁷ Thus, Ake argues that since the colonial state was for its subjects only an absolutist and arbitrary power, it could not engender legitimacy (in the language of natural law) though "it made rules and laws profusely and propagated values."²⁸

Due to the suppression of the rights of the colonised people and the continued accumulation of unfulfilled needs, tension began to rise which sparked the nationalist flame and agitation for independence. The traditional institutions that formed the "civil society" in the African traditional political systems were caught in the draconian and inhuman colonial policies of the time. They were also the institutions that were rallied by the nationalist leaders to fight for an end to colonialism.²⁹

II: Anti-Colonialism in the Context of Rights Struggle

With the support and co-operation of the mass anti-colonial coalition force behind them, African nationalist leaders adopted different strategies in their fight for independence. The strategies were embodied in the concepts of African nationalism and Pan-Africanism.³⁰ The former is identified as representing the political revolt

²⁵ Eg., the colonial government decided to promote the production of cocoa in Ghana and thereby made Ghana a monocultural cocoa economy. Ake *supra* note 6 at 2.

²⁶ Frantz Fanon, *Wretched of the Earth* (New York: Grove Press, Inc., 1963); W. Rodney *supra* note 2.

²⁷ R. W. M. Dias, *Jurisprudence* (London: Butterworths, 1985); and, H.L.A. Hart, *Definition and Theory of Jurisprudence* (London: Oxford University Press, 1953).

²⁸ Ake, *supra* note 6 at 3.

²⁹ Refer to Chapter 2.

³⁰ For detailed analysis on this dual concept see Ndanbaningi Sithole, *African Nationalism* (London: Oxford University Press, 1968); Julius Nyerere, *Freedom and Socialism: Uhuru na Ujamaa* (London: Oxford Press, 1968), chapter 5; Dorothy Nelkin, "Socialist Sources of Pan-African Ideology," in W. H. Friedland and C. Rosberg, *African Socialism* (Stanford: Stanford University Press, 1964), 63; Nnamdi Azikiwe, "The Future of Pan-Africanism," in *Présence Africaine*, No. 40, Eng. ed. Vol. 12., 1962, at 7-29; K.A. Busia, *The Challenge of Africa* (New York: Praeger, 1962).

against colonialism and the latter, the aspiration for continental solidarity and African equality.³¹ Concerning the practical aspects of the nationalist struggle, Nkrumah summed most of them up when he declared:

I described Positive Action as the adoption of all legitimate and constitutional means by which we could attack the forces of imperialism in this country. The weapons were legitimate political agitation, newspaper and educational campaigns and, as a last resort, the constitutional application of strikes, boycotts, noncooperation based on the principle of absolute nonviolence, as used by Gandhi in India.³²

One realises that embedded in these approaches was an appeal to the colonial authorities and the international community to respect the rights of colonised peoples. It was also to tell the colonised peoples that they, as human beings like anyone else, were endowed with rights which should be respected. At their Pan-African Congress held in Manchester in 1945, for instance, part of the Declaration of the Pan-Africanists³³ read as follows:

We are determined to be free. We want education. We want the right to earn a decent living; the right to express our thoughts and emotions, to adopt and create forms of beauty. We will fight in every way we can for freedom, democracy, and social betterment.³⁴

Thus, both under nationalism and Pan-Africanism, African nationalists used the rights debate as an important basis of their struggle for independence. They harped on civil and political rights abuses, such as the denial of representation in the colonial legislative assemblies, brutal suppression of resistance, the introduction of preventive detention, the killing of the development of a buoyant "civil society" within most political systems, etc.³⁵ Rights abuses in the economic sphere were also high on the agenda. These included forced labour, suppression of trade unionist activities, the eviction of African peasants from their land and prohibition from engaging in profitable cash production, particularly in East Africa.³⁶ In all of these arguments,

³¹ See Margaret Roberts, "A Socialist Looks at African Socialism," in Friedland and Rosberg, *supra* note 30, 80 at 80, 81 and 85.

³² K. Nkrumah, *supra* note 21 at 122. For detailed analysis of the nationalist struggle see Sithole, *Roots of a Revolution: Scenes from Zimbabwe's Struggle* (Oxford: Oxford University Press, 1977).

³³ This is used to refer to both African nationalist leaders and militant African-American leaders interested in forging and maintaining links with their African roots.

³⁴ Ayttey, *supra* note 21 at 99.

³⁵ *Ibid.* For an account of French repression see Kéba M'baye and Birame Ndiaye, "The Organisation of African Unity (OAU)," in Karel Vasak, general ed., *The International Dimensions of Human Rights* Vol. 2 (Westport: Greenwood Press, 1982), 583.

³⁶ R. Howard, *Colonialism and Underdevelopment* (London: Croom Helm, 1978) at 9,10.

African nationalists, though not involved in its formulation, appealed to the Universal Declaration of Human Rights³⁷ to support their claims for an end to colonial rule and the rights abuse that went with it.

III: Western Development Policies and their Influence on African Socialism

A: Application of Keynesianism and Modernisation Theory

Keynesianism has had a strong relationship with the modernisation theory, *inter alia*, in the context of both concepts following the negative relationship approach between human rights and development in Africa. Keynesianism is first and foremost an economic concept, though its proponent, John Maynard Keynes, is also considered a political activist.³⁸ John Keynes formulated the concept in the heat of the Depression.³⁹ It is important to note that it was meant for application in the capitalist world only to redress the crisis that plagued capitalism at the time,⁴⁰ principally unemployment and the endemic social ills of capitalism such as rising inequality, individualism, etc. Keynes' contention was that the crisis in capitalism, which he called one of the "greatest economic evils of our time" were attributed to "the fruits of risk, uncertainty and ignorance:"

It is because particular individuals, fortunate in situation or in abilities, are able to take advantage of uncertainty and ignorance, and also because for the same reason big business is often a lottery, that great inequalities of wealth come about; and these same factors are also the cause of unemployment or labour, or the disappointment of reasonable business expectations, and of the impairment of efficiency and production.⁴¹

³⁷ Hereinafter, Universal Declaration.

³⁸ He was a member of the Liberal party of his time though his political views which one comes across in his writings have socialist trappings which deviated from the classical liberal stance. See Hyman Minsky, *John Maynard Keynes* (New York: Columbia University Press, 1975), 146ff. See also Keynes, "Am I a Liberal?" in Keynes, *Essays in Persuasion* (Vol. 9 of *The Collected Writings of John Maynard Keynes*) (New York: Norton, 1963), 295ff.

³⁹ Though he started his writings in the pre-Depression period. The views he expressed, eg. in *The End of Laissez-faire* (London: Hogarth Press, 1926) were those that were re-echoed in later works.

⁴⁰ Claus Offe argues: "the KWS [Keynesian Welfare State] has been adopted as the basic conception of the state and state practice in almost all Western countries." John Keane, ed., *Contradictions of the Welfare State* (Cambridge, Mass.: MIT Press, 1984) at 193; Mehmet also argues that Keynesianism was directed, "as with other Western theories, to solving Western problems." Mehmet, *supra* note 5 at 59.

⁴¹ Keynes, *Laissez-faire and Communism* (New York: New Republic, Inc., 1926), 68.

Keynes grounded his thesis on economic reforms of capitalism on three concepts: economic efficiency, social justice and individual liberty.⁴² He repudiated the notion of the “invisible hand” and endogenous market forces and blamed them for the ills of capitalism. In their place he advocated state intervention in the economy to co-ordinate a kind of collective planning that would involve active government spending. The idea was to spawn artificial demand which would in turn help create jobs and end the vicious cycle of unemployment.⁴³ Western governments were also to engage in the provision of social services to mitigate the harsh effect of unemployment.⁴⁴ Keynes’ goal was to create a more benign, equitable and egalitarian capitalism. The state’s role in this regard was to help tap and harness the potential inherent in capitalism and direct it towards the attainment of more appropriate social welfare goals.⁴⁵

Situating the Keynesian theory in the context of civil society, one realises that it repudiates the Lockean idea which was responsible for engendering the neo-classical economy of the invisible hand. It rather supports the Montesqueiean model.⁴⁶ But more significantly, Keynesianism is a reflection of the Hegelian notion of civil society. The difference between them seems to be that Hegel concentrates his work on social reform leading to political and economic reforms,⁴⁷ while Keynes centres on economic reform as the foundation. Thus, for example, Keynes admitted that state interventionist measures would infringe on some personal freedoms that are deemed

⁴² Keynes, *General Theory of Employment, Interest and Money* (16th ed.) (London: Macmillan Press, 1977), especially Chapter 24.

⁴³ Allan Meltzer, *Keynes’s Monetary Theory: A Different Interpretation* (Cambridge: Cambridge University Press, 1988) at 252-253.

⁴⁴ However, Keynes was cautious about the negative impact of social spending on the poor. According to him, it would increase consumption and reduce savings.

⁴⁵ J. Keane, “Introduction,” in Claus Offe, *supra* note 40 at 15. He argues: “The Keynesian welfare state is to “positively subordinate” itself to the capitalist economy. It is required to both *intervene* in this subsystem and create, through non-market or *decommodified* means, the pre-conditions of its successful functioning.” The influence of Keynesianism is probably reflected in the various social charters that is found in the constitutions of Western European states, including the European Social Charter.

⁴⁶ See Taylor, Charles, “Modes of Civil Society,” in (1990) Vol. 3 No. 1 *Political Culture*, 95.

⁴⁷ Hegel *supra* note 14.

"untouchable."⁴⁸ Also the state-organised process of decommodification was to have a dramatic reduction effect on the nature of civil society which had been structured by the market.⁴⁹ Keynes might, or ought, to have anticipated this as well. Yet, he did not offer a re-theorising of the concept of rights in a "positive" context commensurate with the "positive" role he assigned the state. He only offered an economic prosperity solution: the benefits accruing from state planning would compensate for any abuse of power by the state.⁵⁰

Another solution Keynes suggested, which perhaps displays the extent of his "political naivety," or lack of concern for the political aspect of his theory, was the fact that he could rely on altruistic "judges" (elected officials), public opinion and the ballot box to check abuses of the state.⁵¹ He therefore did not see the need for political reform to allow his economic concept to work.⁵² In terms of similarity, however, both Hegel and Keynes advocated for the rights of workers or the underclass generally.⁵³ This was an attempt to resolve looming class conflicts, not through a revolutionary control of the means of production, but through the volume of distribution and growth and greater access to political power through the trades union and its corporatisation into the state apparatus. Bowles describes the compromise reached between capital and labour as follows:

⁴⁸ Keynes, *supra* note 42 at 380. He contends: "Whilst, therefore, the enlargement of the functions of government, involved in the task of adjusting to one another the propensity to consume and the inducement to invest, would seem to a nineteenth century publicist or to a contemporary American financier to be a terrific encroachment on individualism, I defend it, on the contrary, both as the only practicable means of avoiding the destruction of existing economic forms in their entirety and as the condition of the successful functioning of individual initiative."

⁴⁹ Keane, ed., *Civil Society and the State: New European Perspectives* (London: Verso, 1988) at 7.

⁵⁰ Meltzer, *supra* note 41.

⁵¹ *Ibid.*

⁵² See Claus Offe who argues that the continued compatibility of capitalism and democracy was deemed inconceivable and unworkable in the eyes of both classical liberalists and classical Marxists. But the ability of Keynesianism (which he describes as a mediating principle) to survive was due to the development of "a specific version of democracy, one with political equality and mass participation that is compatible with the capitalist market economy. He therefore refers to Keynesianism and the mass political participation as two mediating principles that ensured compatibility between the two forces. See Offe *supra* note 40 182ff. See also Keane on "negative and positive subordination" of the state to capitalism: Keane, *supra* note 45 at 14,15.

⁵³ Although these are feeble attempts to rectify the task-definition/task-execution model of capitalism that Roberto Unger repudiates. See, R. Unger, *Social Theory: Its Situation and its Task* (Cambridge: Cambridge University Press, 1987) at 3.

[The accord] represented, on the part of labour, the acceptance of the logic of profitability and markets as the guiding principles of resource allocation, international exchange, technological change, product development, and industrial location, in return for an assurance that minimal living standards, trade union rights, and liberal democratic rights would be protected, massive unemployment avoided, and real incomes would rise approximately in line with labour productivity, all through the intervention of the state, if necessary.⁵⁴

There is no denying the fact that the adoption of Keynesianism did accrue to the benefit of capitalism. Offe writes that "most observers agree that its effect has been, first, an unprecedented and extended economic boom (at least until the 1980s) favouring all advanced capitalist economies."⁵⁵ But Offe fails to analyse the international political effects of the creation of this profit margin for capitalism.⁵⁶

One can draw a link between the practice of the concept of Keynesianism and the introduction of the modernisation theory by reference to two factors. First, the urge to provide full employment which led the United States to develop a large military-industrial complex that employed millions of workers. The production and sale of armaments for the US government (and other Western allies) reaped a huge profit for the Western economies that in turn created a fiscal crisis in the form of inflation.⁵⁷ Babu maintains that America was able to transfer its inflation to Europe which could not absorb the excess liquidity thereby creating "the unwanted Eurodollars."⁵⁸ This in turn spawned the Euromarket which has become one of the largest international markets for short-term funds⁵⁹ for "needy" economies such as Africa's. In addition,

⁵⁴ S. Bowles, "The Keynesian Welfare State and the Post-Keynesian Political Containment of the Working Class," unpublished manuscript (Paris, 1981) at 12. cf. C. Offe, *supra* note 40 at 193.

⁵⁵ Offe, *supra* note 40 at 193.

⁵⁶ Keane critiques Offe's lack of international perspective in his analysis of the influence of transnational migration of industrial production to the peripheral capitalist countries and the fiscal crisis facing capitalism in relation to the growth of armament production. He relates the second factor to Offe's "general failure to analyse the external ordering of welfare states within the global-system of nation-state power and conflict." Keane's criticism, however, still does not go far enough since he did not specifically mention the role of the peripheral states in contributing largely to the success of Keynesianism. See Keane, *supra* note 45 at 17 and 19. A critical analysis of the failures of Keynesianism which gave way to the emergence of neo-classical economics and the "new international order" is discussed below.

⁵⁷ Babu, *supra* note 18 at 85. In fact, one major failure of Keynesianism which has prompted unabashed criticism is inflation. See C. Offe at 149, 150, 199; also, Frederick von Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Chicago: University of Chicago Press, 1985).

⁵⁸ Babu, *supra* note 18 at 86.

⁵⁹ F. Cheru, *supra* note 5.

the proliferation of the arms race led to what Keane describes as “the external ordering of welfare states within the global system of nation-state power and conflict.”⁶⁰ An effect of this external ordering on African development is the proliferation of arms which was used, among others, as a means to promote compliance with Western foreign policy by African states. Another was that the proliferation of arms and the fear of centrifugal forces overcoming the absolutism of state power led to African governments channelling large portions of their budget into the purchase of arms to suppress dissent. This policy has had a negative effect on African economies in two respects: first, the money which should have been used to meet the socio-economic needs of the people was used to stock-pile arms. Secondly, the arms were most often used as a tool to suppress the people’s exercise of their “freedom rights” in order to cow them into further submission. The increase in suppression of rights consequently led to increased *negative* and *passive* contribution to development.

Yet another form of external ordering was the effect Keynesianism has had on the imposition of the modernisation theory, as an independence model of development, on Africa. The relationship lies in the fact that the post-colonial economic agenda for African states was – in the name of the modernisation theory – to be attained through a restructuring of the socio-economic framework inherited from colonialism, but not the political. This is related to Keynes’ lack of emphasis on re-theorising the political and human rights frameworks of capitalist states. The emphasis was on the end (prosperity) to justify the means (reliance on the inherited colonial political structure). This way, Keynesianism became the shadow of the “trickle down” concept inherent in modernisation theory. This latter concept optimistically assumed that increased economic capacity would “trickle down” to the masses and thereby alleviate poverty and improve the material conditions of the poor in the less industrialised world. The modernisation theory had both economic and political aspects to it, each expected to function together in a parallel fashion.⁶¹ In general, it borrowed not only

⁶⁰ Keane, *supra* note 45 at 19.

⁶¹ Mehmet, *supra* note 5 at 58.

from Keynesianism but also the deterministic, social darwinistic framework or path to modernity and civility. The unilinear "march to progress" was to result in the non-industrialised world evolving to become industrialised states.⁶² Modernisation therefore came to mean "westernisation," "industrialisation,"⁶³ and later "development."⁶⁴

The modernisation theory is summarised by a UNDP discussion paper as follows:

The conventional perspective on development is linear. It assumes that there is a single track that all countries follow. The challenge of those who are behind on this track is to "catch up" with other others. It follows that the most expedient approach to development is to imitate those that are further ahead. Transfers of technology are the means to achieve that goal. Because all eyes are on the experience of others, developing countries are encouraged to abandon their tradition. The latter is a hurdle to overcome. Finally, it is investment in physical capital that is basic to progress. The structures that such capital investments give rise to produce development. The human factor is generally relegated to a peripheral position; the perspective on change is typically short-term.⁶⁵

The emphasis on physical capital, in the form of aid and loans and technology transfer, explains the lack of attention to the human factor and the consequent unconcern for human rights which emerges in the form of human or social capital. Thus, instead of investing in people by creating conditions for pre-developed African peoples to exercise their rights *to be*, *to do* and *to have*, the popular sectors were only expected to work for the new ruling group. They have worked with their bare hands to the extent of becoming "so exploited and mystified that they make themselves active accomplices of their executioners."⁶⁶ The means to attain this goal was the centralisation of power in the state. Thus, Mehmet maintains that

Rostow's *Non-Communist Manifesto* was not *laissez-faire* capitalism with reliance on the invisible hand of the market. In fact the Rostowian prescription favoured state capitalism. By strategic decisions affecting resource allocation designed to stimulate investment in leading sectors, a society (i.e. government) could engineer economic growth and accelerate the growth rate. Thus, quite paradoxically, Rostow, the prophet of capitalism, far from advocating

⁶² W.W. Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge: Cambridge University Press, 1960); also, Rostow, *Politics and the Stages of Economic Growth* (Cambridge: Cambridge University Press, 1971).

⁶³ Ake, *supra* note 6 at 11; Mehmet, *supra* note 5.

⁶⁴ Gustavo Esteva, "Development," in Wolfgang Sachs, ed., *The Development Dictionary: A Guide to Knowledge as Power* (London: Zed Books Ltd., 1992).

⁶⁵ UNDP, *Sustainable Human Development. From Concept to Operation: A Guide for the Practitioner*. A UNDP Discussion Paper, August, 1994.

⁶⁶ P. Hountondji, *African Philosophy: Myth and Reality* (Bloomington: Indiana University Press, 1996) 2nd ed., at 170.

reliance on market forces ended in legitimizing state intervention in Third World development, based on planning and foreign intervention.⁶⁷

The elaboration and implementation of the economic centralisation aspect of modernisation theory found expression in its political counterpart. Political modernisation was propounded by American political scientists in the 1950s to facilitate attempts by the US government to promote America's emerging influence in world politics.⁶⁸ Thus, exponents of the concept, including Samuel Huntington,⁶⁹ David Apter,⁷⁰ A. Organski,⁷¹ and others, can be placed in the category of Gramsci's civil society whose goal is to promote international hegemony for capitalism. In their view, economic modernisation could not be striven for simultaneously with a democratic form of government. Economic development should therefore take precedence over political development for "in the long run, social and economic modernization [would] produce broadened participation."⁷² This stance is related to the intellectual foundation African governments built to contend that the exercise of civil and political rights was a luxury that had to wait till economic development was attained.⁷³ The task of politics was to create the conditions for economic growth by ensuring social peace and political stability.

This view is vividly represented by Huntington and Nelson's analysis of the two phases in the evolution of overall levels of political participation. In the first phase, two models were represented and referred to as the "bourgeois" and "autocratic." In

⁶⁷ Mehmet, *supra* note 5 at 69.

⁶⁸ Vicky Randal and Robin Theobald, *Political Change and Underdevelopment: A Critical Introduction to Third World Politics* (London: Macmillan, 1985) at 12, ff. In support of this contention, one can refer to the preface to Huntington and Nelson, *No Easy Choice: Political Participation in Developing Countries* (Cambridge: Harvard University Press, 1976) where it is stated, *inter alia*, that "this study grows out of a research program conducted from 1969 to 1973 at the Centre for International Affairs of Harvard University...The present essay was originally a substantive report to the Agency for International Development, which provided the bulk of the funding for the research program." Huntington and Nelson, above at 1,2.

⁶⁹ S. Huntington, *supra* note 15. Also *ibid*.

⁷⁰ David Apter, "Some Economic Factors in the Political Development of the Gold Coast," in (1954) *The Journal of Economic History*; Apter, *The Politics of Modernization* (Chicago: University of Chicago Press, 1965).

⁷¹ A. Organski, *The Stages of Political Development* (New York: Alfred A. Knopf, 1965);

⁷² Huntington and Nelson, *supra* note 68 at 1.

⁷³ See details below.

phase II, the models are the technocratic and the populist.⁷⁴ It is my contention that the phases are historically irrelevant. The technocratic model usually takes place at the first phase and, in fact, it is what the modernisation theory is all about: "low levels of participation, high levels of investment (particularly foreign investment) and economic growth, and increasing income inequalities."⁷⁵ On the other hand, in the populist model of development at phase II the reverse was true. That is, "high and increasing levels of political participation go with expanding governmental benefits and welfare policies, increasing economic equality, and if necessary, relatively low rates of economic growth. The logic of this pattern of evolution leads toward increasing social conflict and the polarization of society, as more groups become more participant and attempt to share in a stagnant, or only slowly growing, economic pie."⁷⁶ Of the two, Huntington and Nelson seem to favour the technocratic model as the lesser evil since they believed that the populist model would lead to a total breakdown of society through civil war or cause a "participation implosion" occasioned by a military take-over.⁷⁷ While they claimed that these models were not perfect in themselves, their overall analysis lent support to the principal ideas enunciated in the models presented above. And in reality, it is the technocratic model that has been implemented in Africa.

Against this background, the contention that African leaders were abusive by nature, or that the African culture did not have space for rights exercise⁷⁸ (which is why attempts to introduce human rights failed)⁷⁹ is wrong. In reality, it would not have been possible to implement the modernisation and Keynesian theories (which had been packaged and waiting for execution in post-colonial Africa)⁸⁰ in an ambience of effective human rights exercise and political participation, as formulated according to the tenets of the theory of community emancipation. Thus, the conditions for rights

⁷⁴ Huntington and Nelson, *supra* note 68 22ff.

⁷⁵ *Ibid* 23.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*, 24.

⁷⁸ Eg., R. Howard, *Human Rights in Commonwealth Africa* (Totowa: Rowman and Littlefield, 1987).

⁷⁹ Eg., S. Huntington, "Will more countries become democratic?," (1984) Vol. 99 No.2 *Political Science Quarterly* 193.

⁸⁰ Mehmet, *supra* note 5 at 60.

abuse were laid open for African leaders to exploit. This is where we have to locate the source of rights abuse in Africa.

B: African Socialism

At independence, the human rights rhetoric of African nationalist leaders was translated into constitutional provisions for their various countries. Some democratic structures were also put in place and guaranteed in the constitutions to promote rule of law, democracy and human rights. S.K.B. Asante has outlined three factors that contributed to creating a flourishing ambience for human rights. These are the Charter of the UN which consigns six articles "encouraging" or "promoting" respect for human rights; the adoption of the Universal Declaration which he describes as providing "a powerful source of inspiration for the founding pattern of African nations;" and the influence of the European Convention of Human Rights as having played a role in shaping the human rights provisions in the constitutions of some African states such as Nigeria and Sierra Leone.⁸¹

However true Asante's analysis is, he overlooks one very important factor that was responsible for the incorporation of human rights provisions into the constitutions of African state: that these rights provisions were inserted by way of negotiation with the departing colonial authorities. The principal goal was to protect the property interests of the settler minorities and foreign companies against possible nationalisation by African nationalists due to their socialist inclinations.⁸² Western states were interested in letting African states attain some level of development in the area of human rights and democracy in order to enable their corporate interests to be protected "during their absence" from the continent. This is in the face of the uncertainty attending the question of expropriation of industries and commercial interests belonging to foreign nationals.⁸³ Under the UN General Assembly resolution

⁸¹ S.K.B. Asante, "Nation Building and Human Rights in Emergent African Nations," in (1969) Vol. 2 *Cornell International Law Journal*, 72, at 72. Yet, one important tool African nationalists used which was missing in the Universal Declaration was the right to self-determination.

⁸² *Ibid*, 73, 74. Also Issa Shivji, *supra* note 1 at 19; Brendalyn Ambrose, *Democratization and the Protection of Human Rights in Africa: Problems and Prospects* (Westport: Praeger, 1995) at 87.

⁸³ See, eg., J.G. Starke, *Introduction to International Law* (London: Butterworths, 1984), 402ff.

on the Rights and Duties of States⁸⁴ and the International Covenant on Economic, Social and Cultural Rights,⁸⁵ international law gave less industrialised states the leeway to nationalise foreign corporations and pay compensation.⁸⁶ This compensation was supposed to be determined by the nationalising state even though international law arguably provided, on the other hand, that such compensation be "just, adequate and effective."⁸⁷ Therefore, incorporating provisions in local laws was seen as an attempt to by-pass the rules of international law.⁸⁸

Another factor that induced the incorporation of human rights into the constitutions of independent African states was that the use of the human rights platform in nationalist and Pan-Africanist campaigns, coupled with the promise of improvement in general welfare under indigenous rule, created in the African populace an expectation of firm human rights guarantees with the arrival of nationhood. This hope in the ordinary citizen was reinforced by the continued promises of respect for rights at the dawn of independence.⁸⁹ Thus, African leaders had no choice but to meet, at least superficially, a key condition they promised their "comrades-in-arms."

⁸⁴ The Charter was adopted at the 2315th plenary session of the General Assembly of the UN on December 12, 1974. It passed by a vote of 120 to 6 with 10 abstentions as GA Res.3281 (XXIX): 29 GAOR, Supp. 30, UD Doc. A/9030, at 50.

⁸⁵ Adopted and opened for signature, ratification and accession by GA Res 2200 A (1966), UN GAOR, Supp. No. 16, at 49.

⁸⁶ The sovereign rights of states over natural resources is also the subject of GA Res. 1515 (XV) of 15 December, 1960 and 1803(XVII) of 14 December 1962, etc. It is also important to note that before GA Res. 523 (VI) and 626 (VII) were passed in connection with the Iranian nationalisation of British oil interests in 1951, Western states had to concede to the principle of the sovereign right of every state to dispose of its wealth and its natural resources, a principle which all states have to respect. This paved the way for the Resolutions to have the effect that states have an international obligation to respect concession agreements. See T.O. Elias, *New Horizons in International Law* (2nd revised ed. by Francis Ssekandi) (Dordrecht: Martinus Nijhoff Publishers, 1992), 203 note 11.

⁸⁷ J.G. Starke, *supra* note 87 at 402-403.

⁸⁸ This approach is still in effect under the post-Cold War Order. For example, in Ghana, as in other African countries, the obsession to attract foreign investment has led to the enactment of loose provisions in its investment code that allow multinational corporations to have an advantage over national governments.

⁸⁹ For example, Ayittey quotes Nyerere as having said: "Democratic reforms are naturally well-suited to African conditions. For me the characteristics of democracy are: freedom of the individual, including freedom to criticize the government, and the opportunity to change it without worrying about being murdered." Ayittey, *supra* note 21 at 100.

But the promise could not be kept for long as African leaders did not have only their citizens to satisfy. More importantly for them, they had two important camps to satisfy: their socialist counterparts who supported them morally and materially to overthrow colonialism, as well as their capitalist counterparts who negotiated with them to end colonialism. Both camps resented the granting of rights to citizens but for different reasons.⁹⁰ On the part of the Soviet Union, rights exercise was perceived as a reward after one has performed duties to let socialism thrive.⁹¹ Thus, for Africa, the continent was in the stage of promoting dictatorship of the proletariat which did not call for recognition of, respect for the rights of the people.⁹² On the part of the Western states, the reason was to encourage the implementation of the modernisation theory.

But in the end, it was the West that won, based primarily on its larger economic resources for aid and technical assistance as reward for compliance or as a stick to punish non-compliance. Also, the centre-periphery relationship which the West sought to develop through colonialism had been firmly established. It is for this reason that Mehmet contends that "post-independence leadership elites in the South played a generally submissive and accommodating role in economic development, facilitating the diffusion of Western planning techniques."⁹³ But as well, the socialist experiment collapsed. The type of one-partyism that emerged was implemented with the active collaboration of Western states. Fanon asserts:

As regards internal affairs and in the sphere of institutions, the national bourgeoisie will give equal proof of its incapacity. In a certain number of underdeveloped countries the parliamentary game is faked from the beginning. Powerless economically, unable to bring about the existence of coherent social relations, and standing on the principle of its domination as a class, the bourgeoisie chooses the solution that seems to it the easiest, that of the single party. It does not yet have the quiet conscience and the calm that economic power and the control of the state machine alone can give. It does not create a state that reassures the

⁹⁰ Offe, *supra* note 40 at 179.

⁹¹ See eg., *The Declaration of the Rights of the People of Russia* of November 15, 1917. Also article 50 of the Russian Constitution of 1936 states that civil and political rights are to be granted "in accordance with the people's interests and for the purpose of strengthening and developing the socialist system." cf. Donnelly, at 310.

⁹² Barry Munslow, ed., *Africa: Problems in the Transition to Socialism* (London: Zed Books Ltd., 1986).

⁹³ Mehmet, *supra* note at 58.

ordinary citizen, but rather one that rouses his anxiety ... The single party is the modern form of the dictatorship of the bourgeoisie, unmasked, unpainted, unscrupulous, and cynical.⁹⁴

Thus, African leaders soon began to divorce human rights from their ruling style, both in practice and in the constitutional texts. In the speeches and writings which gave birth to African socialism, human rights was notably absent.

The term "African socialism" is said to have been coined by Leopold Senghor in the 1940s. The adjective "African" indicates that it was a concept supposedly firmly rooted in Africa. Thus African socialism was defined, under African Democratic Socialism, as "democratic socialism as conceived by Africans in Africa, evolving from the African way of life and formulated in particular terms as the result of a continuing examination of African society."⁹⁵ The *African-ness* embedded in the concept is also stressed in the Kenyan Government's Sessional Paper on African socialism. It states that "African" in African socialism has been offered as a way of expressing "the African roots of a system that is itself African in its characteristics."⁹⁶

Unlike other movements of socialism which are often the brain child of one thinker, African socialism is not distinctively associated with a single leader. Thomas R. Kanza enumerates the various brands of African socialism thus:

There is the lyrical, existentialist and *négritude* socialism of Leopold Sedar Senghor ...; the positive socialism of Kwame Nkrumah ...; the African socialism of Kenyatta and Mboya ...; the co-operative and democratic socialism of Gamal Abdel Nasser ...; the theoretical and pragmatic socialism of Julius Nyerere ...; the dynamic socialism of Sékou Touré ...; the realistic socialism of Modibo Keita ...; the revolutionary socialism of Massamba-Débat ... Others speak of socialism on the Yugoslav or the Israeli pattern.⁹⁷

I may not agree with all the labellings of Kanza but a critique of that is beyond the scope of this work. What is significant here is the confirmation of the variety of faces of socialism that post-independence African leaders professed and practised. As a

⁹⁴ Fanon, *Wretched of the Earth* (New York: Grove Press, Inc., 1963) at 164, 165.

⁹⁵ This is the definition which emerged at a conference on "Democratic African Socialism and its Challenges" organised by the East African Institute of Social and Cultural Affairs in Nairobi, 1-6 February 1964. Friedland and Rosberg, Jr., "Anatomy of African Socialism," Introduction to Friedland and Rosberg, *supra* note 30 at 1.

⁹⁶ Referred to in *ibid*, 31. Indeed, African socialists agree on the view that African socialism is *African*, in origin and form. Malagasy's first leader Jacques Rabemananjara's remark, that "community life, this form of socialism, we knew it before Karl Marx was born," is a reflection of the view of African socialists. *Ibid*, 31.

⁹⁷ Kanza, *Evolution and Revolution in Africa* (London: Rex Collings, 1971) at 101.

result of the different strands inherent in African socialism, Busia refers to it as "African concepts of socialism" and describes its various strands as "complex compounds."⁹⁸ It needs be noted though that not all African leaders subscribed to African socialism at the attainment of independence. One can single out, for example, Houphouet-Boigny of Côte d'Ivoire, President Tubman of Liberia, Seretse Khama of Botswana and M'ba of Gabon. However, perhaps apart from Botswana, all those states, though avoiding the nomenclature "socialist," had a lot in common with African socialism.

African socialism represented an attempt by post-independence African leaders to continue their conformist and simplistic analysis of what constitutes Africa's political past and how this past could be reconstructed to help solve Africa's contemporary problems. For example, in his assessment of Kwame Nkrumah's theory of philosophical consciencism (Nkrumah's brand of African socialism),⁹⁹ Hountondji argues that Nkrumah's work aimed at developing the argument that Africa had a single ideology, "the original humanist principles underlying African societies"¹⁰⁰ which represents "the collective philosophy of Africans, the African philosophy."¹⁰¹ In other words, in the traditional African communities there were no ideological conflicts. In the view of Nkrumah, this single ideology has been "enlarged by Islamic and Euro-Christian influences."¹⁰² But, instead of accepting these cultures as having come to constitute part of Africa's contemporary culture,¹⁰³ Nkrumah rather argued for a synthesis or contraction of the two rival ideologies that "co-exist uneasily" with that of the African humanist ideology that had precipitated "the crisis of the African conscience."¹⁰⁴ This contraction or harmonisation exercise "will allow the combined presence of traditional Africa, Islamic Africa and Euro-Christian Africa, so that this

⁹⁸ Busia, *Africa in Search of Democracy* (London: Routledge and Kegan Paul, 1967) at 73ff.

⁹⁹ And therefore is a reflection of what other African socialists wrote on the subject. In fact, Nkrumah had other names for it. In some cases it is referred to as "Nkrumahism" or Scientific Socialism.

¹⁰⁰ Nkrumah, *Consciencism. Philosophy and Ideology for Decolonization and Development with Particular Reference to the African Revolution* (New York: Monthly Review Press, 1965) at 70.

¹⁰¹ Hountondji, *supra* note 66 at 149.

¹⁰² Nkrumah, *supra* note 100 at 70.

¹⁰³ El Obaid Ahmed El Obaid, *Human Rights and Cultural Diversity in Islamic Africa* (DCL Dissertation, McGill University, Montreal, 1996).

presence is in tune with the original humanist principles underlying African society.”¹⁰⁵

Like other African socialists, what Nkrumah failed to accept was the pluralism and diversity of not only African culture, but of the Euro-Christian and Islamic cultures, and the fact that there are some significant points of cultural convergence between the three. These convergence points include the position of the individual and the use of technology, although that is a question of degree.¹⁰⁶ Thus, it would have been appropriate for Nkrumah to have first considered what united the three cultures and use that as a bridge to argue for accommodation of the two foreign cultures which had come to stay, with the traditional African system acting as the foundation. But that foundation was never placed in Africa's pre-colonial cultural past. Thus, contrary to the bold assertion that African socialism was to rectify the negative effects of colonialism, cater to the needs and interests of the African and prevent further abuse, it rather became a tool to further such influences and to create a very favourable environment for neo-colonialism to thrive.

The urge to create a common ideology in the name of African socialism was a means to muzzle free expression. Thus, one major negative psycho-sociological impact of African socialism is that it put constraints on free-thinking and therefore on academic freedom, the freedoms of religion, conscience and expression, and consequently, the freedom of association.¹⁰⁷ The single parties that emerged as an adjunct of African socialism were to act as the conscience of the state and to think for it, under the guidance of the executive leader. For instance, Sékou Touré described his party as constituting

¹⁰⁴ Nkrumah, *supra* note 100 at 70.

¹⁰⁵ *Ibid.* 70.

¹⁰⁶ In this regard, one need to refer to the influence of Islamic and African cultures on the European, that of Islamic and African on one another, and that of the European on the Islamic and African. See, eg., Cheikh Anta Diop, *Civilization or Barbarism: An Authentic Anthropology* (New York: Lawrence Hill Books, 1981).

¹⁰⁷ G.B.N. Ayittey, “Human Rights and Economic Development: The Case of Africa,” in Irving Brecher, *Human Rights, Development and Foreign Policy: Canadian Perspectives* (Halifax: Institute for Research on Public Policy, 1989) 241 at 252.

the thought of the people of Guinea at its highest level and in its most complete form. The thought of the Party indicates the orientation of our actions; the thought of the Party specifies the principles which ought to direct our behaviour, our collective and individual attitude.¹⁰⁸

The effect of suppression of freedom of expression on development is highlighted in the theory of community emancipation which suggests, *inter alia*, that freedom of expression is the hub around which all the other freedoms revolve. It is freedom of expression that links and buttresses the freedoms of opinion, religion and conscience (the *ingredient* freedoms) with the freedoms of movement, association and assembly (the *vehicular* freedoms).¹⁰⁹ It is in this regard that I share Hountondji's stance that denouncing the "unanimist illusion" in Consciencism will enable us to achieve two types of liberation of debate, the political and the philosophical. This way, the value of pluralism – that is to say, of the free exploration and confrontation of ideas as a precondition of a real African philosophy, would be reaffirmed.¹¹⁰ A third form of liberation which would have followed as a matter of course is economic liberation. For societies that advance are those that take cognizance of changing circumstance, adapt their policies, and permit the free exchange of ideas and a free debate for viable solutions to be found to economic problems.¹¹¹

Post-independence African leaders resorted to centralisation of not only thought and knowledge, but every aspect of the government machinery as well. These included the distribution of authority, responsibility and resources available to central versus local governments, the banning of multi-party political activity, control of the judiciary and the legislature, etc.¹¹² The results are vividly portrayed as follows:

frequency of severe errors in development policy; the emergence of autocratic and corrupt governments; the exploitation of the rural masses by minuscule urban elites; and the wastage of vast amounts of resources on poorly planned development projects. Other dysfunctions include the difficulty of administering effectively from the center when problems are poorly

¹⁰⁸ See S. Touré, *La Guinée et l'émancipation africaine*, at 233. cf. Charles F. Andrain, "Guinea and Senegal: Contrasting Types of African Socialism," in Friedland and Rosberg, Jr., eds., *supra* note 30, 160 at 173. In some instances, ideological centres like the Kwame Nkrumah Ideological Institute, were set up to educate cadres on the leader's concept of African socialism. Kaunda also called for the setting up of a Human Relations Department at the University of Zambia to teach his principles of Humanism.

¹⁰⁹ Refer to Chapter 1.

¹¹⁰ Hountondji, *supra* note 66 at 155.

¹¹¹ G. Ayittey, *supra* note 107 at 253.

¹¹² James S. Wunsch, "The Failure of the Centralized State" in J.S. Wunsch and D. Olowu, *supra* note 5, 1 at 4,5.

understood, resources are short, and management systems are inappropriate; the effective withdrawal in self-defense of the rural masses from the market economy; the erosive effects such policies have had on the entire economy; and the use, in a few cases of brutal tyrannies to how power.¹¹³

In sum, though African socialism is argued to be a new trend in the political philosophy of African leaders after independence,¹¹⁴ in reality, it was not a true philosophical reflection of traditional African political systems. Neither was it an Afrocentric paradigm for the resolution of Africa's socio-economic and political problems inherited from colonialism. It was rather, a Euro-Yanquicentric¹¹⁵ one camouflaged with an "Africanness" to deceive the politically untutored masses.

IV: The Idea of Human Rights in African Socialism

Directly and indirectly, in theory and in practice, African nationalist leaders portrayed in African socialism that Africa had no concept of rights. One way of doing this was to avoid an articulation of rights discourse in African traditional political systems. Another approach was to twist the meaning of practices that make inference to rights exercise. Thus, eg., the practice of achieving decisions by consensus was misinterpreted to mean that there was no expression of dissent. Therefore, political pluralism or right to freedoms of association and assembly and expression were deemed uncalled for.¹¹⁶

Though they did not consciously set out to develop a theory of rights under African socialism, one can still discern an African socialist conception of rights from three principal sources. By analysing the practical implementation of African socialism;¹¹⁷ the position of the Organisation of African Unity¹¹⁸ on human rights; and what Cassese refers to as the "Third World "doctrine" of human rights."¹¹⁹

¹¹³ *Ibid*, 6,7.

¹¹⁴ A. Langlely, "Introduction," *supra* note 7.

¹¹⁵ It is significant to note that the *contemporarists*, in their critique of African political ethnophilosophy, did not tackle the issue of what post-independent African philosophy in the name of African socialism actually represent. My view is that they could not do so because that would have exposed them and the African socialists as carrying on the same agenda: pandering to the interests of Euro-Yanquism.

¹¹⁶ Julius Nyerere, *supra* note 30.

¹¹⁷ As has been treated above.

¹¹⁸ Hereinafter, the OAU. The OAU was founded in Addis Ababa, Ethiopia, in 1963. For detailed analysis of the history of the OAU see e.g., C.O.C. Amate, *Inside the OAU: Pan-Africanism in*

One body which was used to promote and foster the ideological aspect of African socialism is the OAU. Though not all African states subscribed to African socialism, at least by name, one can observe a reflection of the core ideas of African socialism in the Purposes and Principles of the Organisation of African Unity.¹²⁰ One can trace this link to the fact that the idea for the formation of the OAU was mooted through the activities of socialist-oriented African-Americans such as Henry Sylvester, W.E.B. Dubois, George Padmore and others.¹²¹ Another fact is that pan-Africanism thrived on these three key principles: African unity, black nationalism and socialism¹²² which called for "the government of Africans, by Africans, for Africans."¹²³

The Purposes of the OAU Charter refer to a comprehensive list of the objectives to be achieved by African states under the auspices of the OAU, and the areas of co-operation to be covered while working towards the achievement of these objectives.¹²⁴ The Principles detail the basis for the co-operation of African states.¹²⁵

Practice (London: Macmillan Publishers, 1986); and Amadu Sesay, *The OAU After Twenty Years* (Boulder: Westview Press, 1984).

¹¹⁹ Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986) at 309 and 119-121. But the terminology "less industrialised states" is preferred. According to Cassese, this "doctrine" of the LIS dominated the UN human rights agenda around the 1960s and mid-70s. The other two "doctrines" are the Western doctrine (between 1945 and the late 1950s) and second, the Socialist "doctrine" (between 1960 to the mid-1970s). See Cassese above at 209ff.

¹²⁰ OAU Charter, 479 UNTS 39, entered into force September 13, 1963.

¹²¹ Indeed, according to Amate, the term "pan-Africanism" was first used by Sylvester who was also the first to organise a pan-African congress until DuBois took over after the former's death. Amate, *supra* note 119, Chapter 1.

¹²² Dorothy Nelkin *supra* note 30 at 63.

¹²³ See George Padmore, *Pan-Africanism or Communism?* (London: Dobson, 1956) at 21-22. Padmore confirms the link thus: "Economically and socially, Pan-Africanism subscribes to the fundamental objectives of democratic socialism, with state control of the basic means of production and distribution. It stands for the liberty of the subject within the law and endorses the Fundamental Declaration of Human Rights, with emphasis upon the Four Freedoms ... Pan-Africanism sets out to fulfill the socioeconomic mission of communism under a strong brotherhood of Negro blood throughout the world." Nelkin also quotes Padmore to the effect that African leaders had "the opportunity to [build] upon the pioneering work of DuBois [to] formulate a program of dynamic nationalism which combined African traditional forms of organization with Western political party methods." *Ibid*

¹²⁴ See article II of the Charter. The objectives include the promotion of unity and solidarity, achievement of a better life for the peoples of Africa, defence of their sovereignty, territorial integrity and independence, eradication of all forms of colonialism from Africa and the promotion of international co-operation. The areas of co-operation cover political and diplomatic, economic and social, educational and cultural, health, sanitation and nutritional, scientific and technical, and defence and security. These fit in with the elements of African socialism described above.

These Purposes and Principles therefore talk about co-operating to achieve the economic development that would make life worth living for the peoples of Africa.

On the attitude of the OAU towards human rights, a cursory look at the Charter indicates that the organisation was not keen on giving human rights a prominent place among its concerns. For example, Article XX of the OAU Charter recommended the setting up of 5 specialised Commissions. None of them was devoted to the issue of human rights.¹²⁶ This is attributed to the fact that at the time of its formation the OAU was pre-occupied with "more pressing" issues, three of which were identified as unity, non-interference and liberation.¹²⁷

The OAU attitude has received a mixed reaction from African writers and jurists. A leading advocate of the suppression of rights in the name of development is Keba M'baye. He contends:

Thus, African governments appear clearly to have sacrificed rights and freedoms for the sake of development and political stability. This situation can be explained and even justified. In mobilizing the masses in order to secure economic and social development, everyone's attention is directed exclusively towards the prospect of improved standards of living. Inaction or idleness thus came to be regarded as an infraction and the exercise of certain freedoms, even in the absence of any abuse, an attack on public order.¹²⁸

Others have also argued that the OAU did not attach any importance to rights. But, unlike M'baye, they have condemned, instead of lauding, the OAU for adopting such

¹²⁵ See article III of the Charter. These cover respect sovereign equality, non-interference, respect for sovereignty and territorial integrity of each state, and peaceful settlement of disputes through negotiation, mediation, reconciliation or arbitration, etc.

¹²⁶ The Commissions were the Economic and Social, Educational and Cultural; Health, Sanitation and Nutrition; Defence; and Scientific, Technical and Research. Two more Commissions, Transport and Communications and the Commission of Jurists were added at the first ordinary session of the OAU in 1964. One might argue that the Commission of Jurists was to play the role of human rights promotion but it is interesting to note, reading M'baye, *supra* note 35 at 593, that this Commission was only set up as an instrument for legal research. Anyhow, the Commission was cut down after only one year in existence while some others merged to create in the end 3 rather than 7 Commissions.

¹²⁷ This was spelt out by Haile Selassie, then Head of State of Ethiopia, at the Conference of Addis Ababa on May 22, 1963, and confirmed in the OAU Charter. See the Preamble, and specifically articles II.1.c and III which talk about guaranteeing the national sovereignty and territorial integrity of the member states; and article III.6 stipulating an absolute commitment to the total emancipation of African territories not yet independent. Of course, one need place these "pressing issues" in the context of development.

¹²⁸ M'baye, *supra* note 35 at 599.

a stance on human rights.¹²⁹ Still, others like, E.V.O. Dankwa, argue against both of these positions. Dankwa's assertion is that apart from the Defence Commission, all the other Commissions "deal directly with human rights." His conclusion was that the issue of human rights in the OAU Charter has been glossed over by most writers but that there are express and implied references to human rights in the Preamble.¹³⁰ What Dankwa fails to notice, however, is the fact that these few references to human rights were phrased in such general and non-obligatory terms as to be rendered powerless. They were further diluted by undue emphasise on such concepts as state sovereignty. Secondly, and more importantly, these so-called inferences to rights are couched in terms of peoples' or state rights. For instance, the first, second and third paragraphs, respectively, of the Preamble to the Charter talk about "the inalienable right of *all people* to control their own destiny;" that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the *African peoples*;" and the "responsibility [of Member States] to harness the natural and human resources" of the continent "for the total advancement of *our peoples* in spheres of human endeavour."¹³¹ The attachment of the OAU to human rights remained vague, imprecisely conceived, and group-centred. At best, the Charter contained mere paper commitments.

V: The Influence of African Socialist Ideas on the African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights entered into force in June 1981, after its adoption by the Assembly of Heads of State and Government, the highest organ of the OAU. After a series of attempts, mostly by the UN through workshops, seminars, etc to have established an African regional human rights convention, in July 1979 the OAU Assembly of Heads of State and Government finally called on the OAU Secretary-General to organise a meeting of experts to prepare a preliminary

¹²⁹ These include Birame Ndiaye, "The Place of Human Rights in the Charter of the OAU," in K. Vasak *supra* note 35 at 601.

¹³⁰ E.V.O. Dankwa, "The African Charter on Human and Peoples' Rights: Hopes and Fears," (Unpublished. Copy on file with author) at 3.

¹³¹ [Emphasis added]. As argued in Chapter 1, these references to group rights are an alien concept to the African notions of rights. They are also impracticable in implementation.

draft for an "African Charter on Human and Peoples' Rights."¹³² In September of the same year, a special "seminar on the establishment of regional commissions with special reference to Africa" was organised by the UN in Monrovia, Liberia.

At the meeting it was concluded that the role of regional human rights institutions should include standard-setting, promotion and protection. The standard-setting role was "not to replace the United Nations standards, but to supplement them and perhaps, where appropriate, to mould them to regional conditions."¹³³ Its role was also to identify areas in which further human rights standards might be needed to deal with specifically regional issues and to prepare declarations, model rules and draft conventions for governments to sign and adopt.¹³⁴ The proposal also included the adoption of a "grassroots approach" to any rights strategy for Africa. This involved an approach "which seeks to call upon the creativity, the energy and the activity of the peoples themselves to work for the defence of their rights and to adopt the measures best suited to their respective needs,"¹³⁵ by working through national and local institutions and groups, NGOs, churches, trade unions, bar associations and town and village organisations.¹³⁶ While the need to draw up a Charter that takes Africa's conditions and realities into consideration was recognised¹³⁷ the concern was also expressed that:

Great care should be taken in the extrapolation of concepts from the African customs and mores for inclusion in the Charter, so that interpretation of the Charter is not influenced by political or social considerations of a limited rather than universal character and that law is not confused with political or social expediency.¹³⁸

However, the draft which was prepared by "highly qualified experts"¹³⁹ and devoid of the "grassroots approach" was a far-cry from the guidelines established in the

¹³² AHG/Dec 115 (XVI) reproduced in UN doc A/34/552 (1979) Annex II. A draft of the Charter is reprinted in the Bulletin of Peace Proposals, Oslo, Vol. II, No. 4, 1980. cf *Ibid*.

¹³³ Conclusions reached at seminar, titled: "The Role of Regional Institutions in the Field of Human Rights and a Review of the Structure and Functions of Existing Regional Commissions with particular Reference to the Council of Europe, OAS and the League of Arab States." Para. 18.

¹³⁴ *Ibid*.

¹³⁵ Expressed by Theo van Boven in his presentation.

¹³⁶ *Ibid*, para 30.

¹³⁷ *Ibid*, para 22.

¹³⁸ T.O. Elias, *supra* note 86 at 115.

¹³⁹ AHG/Dec 115 (XVI).

Monrovia Proposals. Emphasis was rather placed on the guidelines submitted to the OAU by the Committee of Experts that the Charter "should reflect the African conception of human rights [and] should take as a pattern the African philosophy of law and meet the needs of Africa."¹⁴⁰

Like African socialism, the African Charter does not reflect African civilisation and historical practice. Thus, African peoples lost another chance to have a concept of rights that speaks to their experiences and would offer them the space to attain their full realisation, and make maximum utilisation of their talents and potentials. Part of the blame can be placed on the door steps of some African intellectuals whose formulation of the so-called African notions of rights was only an echo of the elitist view on human rights in Africa but all the same played an influential role in shaping the contents of the African Charter.

The legal significance regarding the incorporation of these unique elements in the African Charter is that most of them run contrary to the purpose behind the decision to set up regional mechanisms to promote human rights, and for that matter article 52(1) of the UN Charter itself. Instead of supplementing the human rights standards set up by the UN and its specialised agencies, the OAU rather sought to detract from some of the standards so far attained. One can mention, *inter alia*, the majority of the provisions on civil and political rights¹⁴¹ which contain the infamous claw-back clauses. They include articles 6,¹⁴² 8,¹⁴³ 9,¹⁴⁴ 10,¹⁴⁵ 13.¹⁴⁶ These references are vague and made subject to the interpretation of each state. And judging by the authoritarian

¹⁴⁰ Based on these guidelines, the OAU member states are said to have taken into account "the values of African civilisation which should inspire and characterise the reflection on the concept of human and peoples' rights" in drawing the Charter. See Paragraph 4 of the Preamble to the African Charter.

¹⁴¹ Civil and political rights cover articles 1-14 of the Charter.

¹⁴² This is on right to liberty which is made subject to "reasons and conditions previously laid down by law."

¹⁴³ On freedom of conscience and religion, made subject to "law and order."

¹⁴⁴ Freedom of information, expression and opinion subject to "within the law."

¹⁴⁵ Freedom of association subject to abiding "by the law." There is also an inference to a further restriction: that one may be forced to join an association without his or her free will. Clause (2) states that "Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association."

¹⁴⁶ Political freedoms to be enjoyed "in accordance with the provisions of the law."

nature of African regimes and the continued presence of repressive legal systems, including colonial preventive detention laws, references to “law” and “order” do not give enough assurable predictability to rights protection.¹⁴⁷ This is bound to, and has indeed, created a chilling effect on rights exercise in Africa since it does not make one feel safe and free in exercising and enjoying civil and political rights. The reaction of Amnesty International to these clauses is worthy of note:

It is important ... that [the] limitation clauses [...] are not interpreted in a way that would allow governments to enact arbitrary or abusive laws which unnecessarily restrict fundamental rights and render meaningless these guarantees of the African Charter.¹⁴⁸

It has even been suggested that the absence of derogation clauses in the African Charter is informed by the notorious presence of the limitation clauses.¹⁴⁹ The negative reaction to the claw-back clauses could have been avoided had the reference to “law” and “order” been qualified with phrases such as “those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.”¹⁵⁰ It is therefore recommended here that these limitation clauses be substantially revised.

VI: The Tension Between Development and Human Rights

A: Aid, Human Rights and the UN Development Decades

In dealing with the effect of aid on human rights, one can look at the issue from two perspectives. First, analysing the mission statements on aid to see if human rights is mentioned as a conditionality for development; and the proportion of aid packages devoted to human rights. The second basis for analysis is the extent to which the rights of the aid recipients were respected and incorporated into the decision-making process regarding the aid package, in the execution of the aid project, as well in the sharing and protection of the gains of the project..

Another way to observe the role of aid in human rights is inverse: whether aid can promote abuse of rights by failing to build enforceable human rights protections into

¹⁴⁷ One can recall the libel laws in Ghana which were enacted during the dictatorial era of Kwame Nkrumah and which still remain in the statute books. See Chapter 4.

¹⁴⁸ AI, “The Organisation of African Unity and Human Rights,” *AI Index: IOR 03/04/87*, at 11.

¹⁴⁹ See D’sa, “Human and peoples’ rights: Distinctive features of the African Charter,” in 29 *Journal of African Law*, 75). Also, as noted earlier, in the Preamble, preference is expressed for economic, social and cultural rights. cf. *Ibid*.

all stages of “risk-prone” development projects such as the construction of dams and resettlement schemes; the failure to promote awareness and exercise of human rights in all stages of poverty-oriented projects.¹⁵¹ One can mention the probability of using aid to prop up “friendly” dictatorial regimes who use aid, directly and indirectly, to promote further abuse.¹⁵²

Foreign development aid was contrived as a Western development policy to boost the economic, political and self-interested ambitions of the Western donor community.¹⁵³ During the first UN Development Decade (1960-1970) the object of granting aid was primarily to help facilitate the implementation of Keynesianism and the modernisation theory. Indeed, the declaration of the Decades was a reflection of Western foreign aid/development policies. It was only sponsored through the UN to gain some form of legitimacy. The steps to development adopted here remained the *negative* relationship approach between rights and development. As noted above, the contention remained that human rights would naturally evolve when development was attained. And since, as part of the package, civil society had been largely suppressed and made non-existent in African countries, aid delivery was mostly channelled through governments. This arrangement offered African governments the opportunity to use aid to achieve their own political and financial ends. The exploitation of this situation by African governments created tension between them and the Western donor community. The reaction of African leaders in this scenario was to develop the concept of “neo-colonialism” to describe the “selfish and insensitive” stance of their foreign counterparts towards their peculiar class interests. Yet, this concept was couched as a way of protesting against plunder and abuse of the

¹⁵⁰ As is found in article 11 of the African Charter and is a borrowing from the International Covenants.

¹⁵¹ James C.N. Paul, “International Development Agencies, Human Rights and Humane Development Projects,” in I. Bretcher, *supra* note 107, 275 at 291.

¹⁵² Eg., Canada’s complicity regarding the use of aid to Indonesia to suppress the right of the people to East Timor for self-determination: David Gillies, *Between Principle and Practice: Human Rights in North-South Relations* (Montreal: McGill-Queen’s University Press, 1996).

¹⁵³ John Hendra, “Only Fit to be Tied”: A Comparison of the Canadian Tied Aid Policy with the Tied Aid Policies of Sweden, Norway and Denmark.” (1987) Vol. 8 *Canadian Journal of Development Studies*, 261. See also, Graham Hancock, *Lords of Poverty: The Power, Prestige, and Corruption of the International Aid Business* (New York: Atlantic Monthly Press, 1992); and, Teresa Hayter, *Aid as Imperialism* (Hammondsworth: Penguin, 1971).

African nation-states as a whole. African leaders refused to realise that neo-colonialism started the very day political independence was won and they were partners to it.

The other agents involved in implementing the first Development Decade agenda were development NGOs which operated on a minor scale compared to their proliferation under the current wave of globalisation.¹⁵⁴ They were mainly foreign and were involved in the “community development” approach to development.

An assessment of the effect of aid on the development of recipient states indicates that the nature of the development that took place during the first Development Decade in both the centre and periphery was lop-sided in two respects: first, between the recipient and the donor it weighed in favour of the latter; and, secondly, between the elements of the Gramscian civil society¹⁵⁵ and the popular sectors, it weighed in favour of the former. The type of development that was attained was not sustainable and had to be intermittently and perpetually propped up by aid or some other means.¹⁵⁶ The implication is that the development that was attained was not realised through the full exercise of the rights of majority of members of the community, who constitute the deprived or the *pre-developed* members of the community.

It is for this reason that during the second Development Decade (1970-1980), aid was introduced to rejuvenate the sagging morale and energy of the people, the producers of primary goods for export. This approach is expressed in the adoption of the “basic needs” approach to development. A principal advocate of this concept was Robert McNamara, then President of the World Bank. He is quoted as saying that “a key failure of the First Development Decade was caused by the mistaken belief that maximizing economic growth rates can alleviate poverty through the “trickling

¹⁵⁴ See details below.

¹⁵⁵ The intellectuals who formulate and endorse development economic theories, the politicians in both the industrialised and less industrialised communities, the capitalists and landowners.

¹⁵⁶ See, eg., ODI Briefing Paper which describes the evolution of the UN in development. It estimates that \$5 billion a year is provided by all UN funds, programmes and specialists agencies combined: “UN’s Role in Grant-Financed Development,” (May (1997) (Vol. 2).

down” of benefits to the poor.”¹⁵⁷ Yet the “basic needs” approach was not allowed to take its full course. It was cut mid-stream to be replaced by a combination of the growth-oriented approach¹⁵⁸ and the first (negative) political conditionality regime.¹⁵⁹

The third Development Decade covered the period 1980-1990. It involved the application of the classical Structural Adjustment Programme (SAPs) during the first half and the reformed or neo-SAPs during the other half. The practical application of the classical SAPs under the direction of the World Bank and the International Monetary Fund (IMF)¹⁶⁰ prompted serious abuses of human rights – civil and political as well as economic, social and cultural¹⁶¹ in Africa in order to pave the way for the reforms to be implemented. The rights abuse and corruption that attended the implementation of the classical SAPs led to the introduction of the neo-SAP. The neo-SAP was to open the way for the institutionalisation of the “new international order” or the Post-Cold War Order.

B: The Post-Cold War Order, Civil Society and Human Rights

The post-Cold War Order¹⁶² seeks to thrive on the concepts of “civil society” (within which is located human rights and development NGOs) and “good governance” The

¹⁵⁷ CIDA, *Strategy for International Development Corporation 1975-1980* (Hull: CIDA, 1975).

¹⁵⁸ R. Riddell, *Foreign Aid Reconsidered* (London: James Currey, 1987).

¹⁵⁹ See a comparative analysis between the negative and positive conditionality regimes in Demetrios Marantis, “Human Rights, Democracy, and Development: The European Community Model,” (1994) Vol.7 *Harvard Human Rights Journal*, 1.

¹⁶⁰ Amy Steele, “The Past and Future of the World Bank and the International Monetary Fund,” (Fall 1995) Vol. 11 No.3 *International Insight*, 27 at 30. In an economic diagnosis of the ills of the economies of the less industrialised world, the Fund came to the realisation in the late 1970s, that the less industrialised states were not in a position to remedy their balance of payment problems through short term loans. It therefore recognised that the continued ability to engage in the alleviation of debt-servicing problems would call for accepting the responsibility to provide more lasting and permanent loans to the less industrialised world. The achievement of this goal hinged on developing coordination efforts between the Bank and the Fund to devise conditionality clauses in loan granting which culminated in the spawning of SAPs in the economies of African states, since traditionally, long-term development loans had remained the preserve of the World Bank.

¹⁶¹ Through cuts in social spending to education, health, medical care, sports, etc.

¹⁶² A more popular terminology seems to be the “New International Order,” See, eg., Kiaras Gharabaghi, “Introduction: The “New World Order Discourse” in Perspective,” in (Summer 1995) Vol. 11, No. 2 *International Insight*, 1. Also P. Uvin and Biagiotti, *supra* note 16 at 377. Yet, I prefer the “post-cold war order” due to my contention that this order is not new but the pursuance of an existing order in new clothes. See K. Appiagyei-Atua, “International Human Rights and Development

former is to free away and pluralise space for some measure of citizen participation in the affairs of the state; and the latter, to ensure accountable government and efficient administration.¹⁶³

In support of the *passive* relationship approach behind the post-Cold War Order, it is observed that the reforms were introduced to protect the gains attained in the implementation of the classical and neo-SAPs and Western capitalist interests in general. These interests were perceived to be under threat. Eg., Larry Diamond argues:

In principle, Americans continue to support international engagement as much as ever, but they increasingly fail to see a larger purpose beyond protecting narrow security and economic interests... In this period of drift and doubt, it is important for Americans, and their allies among the industrialized democracies, to ask hard questions. What are the threats to our national security and economic well-being in the coming years? What must we do – and spend – globally in the coming years to defend our interests? How do those interests relate to our values as a people and society?”¹⁶⁴

In Africa, unlike the situation in Eastern Europe,¹⁶⁵ the post-Cold War globalisation process followed a two-track approach. First, the introduction and implementation of “controlled democratisation” in the name of political liberalisation. Here, a limited role was carved for human rights and pro-democracy organisations to play to pave the way for economic reforms.¹⁶⁶ The second stage of the civil society mandate was to use another arm of civil society, development NGOs, to act as the “deliverers of

NGOs in Africa: In Pursuit of a Global Order or Global Governance?” A paper delivered at the annual ACUNS (Academic Council on the United Nations Systems) summer workshop held in Providence, RI, USA, in July-August, 1996.

¹⁶³ See World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth: A Long-Term Perspective Study* (Washington, DC: World Bank, 1989).

¹⁶⁴ L. Diamond, *Promoting Democracy in the 1990s: Actors and Instruments, Issues and Imperatives* (New York, December, 1995) (A Report to the Carnegie Commission on Preventing Deadly Conflict) at 2. Other Western writers have expressed similar sentiments. Also, eg., Huntington contends: “The United States is the world’s premier democratic country, and the greater the extent to which democracy prevails elsewhere in the world, the more congenial the world environment will be to American interests generally and the future of democracy in the United States in particular.” See, Huntington, *supra* note 79 at 194.

¹⁶⁵ The role of civil society in pursuing the democratisation goal was particularly strong in Eastern Europe. In that part of the world civil society became an embodiment of intellectual opposition to communism in the 1970s and 1980s.

¹⁶⁶ See details on Ghana in Chapter 5.

development”¹⁶⁷ in the name of implementing the positive political conditionality approach.¹⁶⁸

Ball and Dunn define NGOs as organisations in civil society which are formed to assist the needy or disadvantaged; or to pursue a common interest in and/or to take action on a particular subject or issue which causes disadvantage or is detrimental to the well-being of people or society as a whole. They limit the types of NGOs to two: the care and welfare, and the change and development types. The former is supposed to perform the following functions: service and delivery, mobilising resources, research and innovation, and human resource development. The latter takes care of public information, education and advocacy. Apart from the characteristics of NGOs mentioned, there are two other features that Ball and Dunn mention. These are first, because they share the concern that governments have with the disadvantaged, and with broader matters affecting people’s well-being, NGOs often relate closely to governments. Development NGOs engage in, *inter alia*, the following forms of relationships with governments: negotiate contractual relationships to deliver services on behalf of governments; mobilise resources in support of government policies and programmes; undertake research or establish innovative programmes and want to inform governments of their results, and advocate appropriate governmental responses; bring to government’s attention the ways in which public or private sector policies affect NGO operations, the disadvantaged or society as a whole. Also, NGOs take action, directly as well as indirectly, to deal with the needs, problems and issues with which they are concerned, for example, seeking to raise the awareness of the public generally about particular matters, or advocate changes in public policies.¹⁶⁹

There are in general significant problems with the development NGO concept as imported from the Western world into Africa. For example, one of the problems that

¹⁶⁷ L. Swatuk, “Foreign Aid and Civil Society: An Introduction,” in L. Swatuk and David Black, *Canada and South Africa after Apartheid: Foreign Aid and Civil Society* (Halifax: Centre for Foreign Policy Studies, Dalhousie University, 1996), 1.

¹⁶⁸ For a discussion on the new political conditionality regime, see D. Marantis, *supra* note 159 and Uvin and Biagotti, *supra* note 16.

these organisations face in their home countries is with regard to their registration as charities in order to qualify for tax exemptions as an organisation and also for its donors.¹⁷⁰ For example, under the Canadian Income Tax Act, charitable organisations are supposed to devote all of their resources to charitable activities.¹⁷¹ Charitable foundations must also be operated exclusively for charitable purposes.¹⁷² However, like the situation in Britain and the United States, what constitutes “charitable objects” and “charitable activities” is not defined. Their interpretation has been shaped by a legal regime (the common law) that has sought to make charities a purely non-political entity.¹⁷³

The attempt to distinguish between what is “altruistic” and what is “political” regarding the activities of charities, now mostly referred to as development NGOs, has tended to limit their engagement in advocacy activities that will aim at improving public policy and institutional behaviour. This attitude has shaped the activities of such NGOs in their operations in African states. What is interesting is that they are supposed to carry out government policies abroad, which is not considered political. However, to advocate for change in its government’s policies abroad or to engage in an activist role abroad is deemed political. This stance was further entrenched by the UN position concerning the granting of consultative status to NGOs to participate in activities of the Economic and Social Council (ECOSOC) of the UN. Article 71 (under Chapter X) of the UN Charter, states that consultative status shall be accorded to NGOs on matters falling within the competence of ECOSOC. And to acquire consultative status with ECOSOC, an NGO had to fall into one of three categories. Among some of the qualifications were that the NGO should be international in

¹⁶⁹ See Collin Ball and Leith Dunn, *Non-Governmental Organisations: Guidelines for good policy and practice* (Internet version: http://www.oneworld.org/com_fnd/guidelines/index.htm), Chapter 1 at 8.

¹⁷⁰ Donors are issued receipts for donations given which would allow them to claim deductions for tax purposes. See, eg., *Canadian Income Tax Act*, S.C. 1970-71-72, c. 63, As amended, subparagraph 110(1)(a)(i).

¹⁷¹ *Ibid*, subparagraph 149.1(1)(b).

¹⁷² *Ibid*, subparagraph 149.1(1)(a).

¹⁷³ Henry Intven, “Political Activity and Charitable Organizations,” (Winter 1982-83) *The Philanthropist/Le Philantrophe*, 35.

character.¹⁷⁴ Article 9 also states that “national organizations shall normally present their views through international non-governmental organizations to which they belong.”¹⁷⁵ International and local NGOs refer to NGOs from the industrialised and less industrialised states, respectively. The ECOSOC arrangement therefore meant that local NGOs in African states had to harmonise their mandates and policies to suit those of their international counterparts whose mandates are already shaped by the criteria which discourage political action. Thus, while the charity regulation laws have moderated any large-scale advocacy role of international development NGOs in African states, the ECOSOC arrangements also contributed to influencing and limiting any structuralist stance that local African development NGOs could have developed.¹⁷⁶

Though the ECOSOC arrangements have now been largely modified to enable NGOs from developing NGOs to stand on their own,¹⁷⁷ this has not ended the problem that local development NGOs face to be independent and pursue their own agendas. First, they are still dependent on international development NGOs for financial support. Other sources of funding sources are from international development agencies which are representatives of their home governments, and private sources.¹⁷⁸

¹⁷⁴ Article 4 of Part I of Res. 1269 (XLIV)).

¹⁷⁵ 44 UN ESCOR. Supp. (No.1) *Arrangements for Consultation with Non-Governmental Organizations* (May 23, 1968)) at 21 UN Doc. E/4568 (1968).

¹⁷⁶ See similar analysis in Chapter 5 on human rights NGOs.

¹⁷⁷ Eg., according to Resolution 1996/31 which was passed on July 25, 1996 to update the arrangements set out in Resolution 1296 (XLIV), “Consultative relationships may be established with international, regional, sub-regional or national organizations, in conformity with the Charter of the United Nations and the principles and criteria established under the present resolution. The Committee, in considering applications for consultative status, should ensure, to the extent possible, participation of non-governmental organizations from all regions, and particularly from developing countries, in order to help achieve a just, balanced, effective and genuine involvement of non-governmental organizations from all regions and areas of the world. The Committee shall also pay particular attention to non-governmental organizations that have special expertise or experience upon which the Council may wish to draw.” See Part I (5) of Resolution 1996/31. See also, Chapter 5.

¹⁷⁸ Private sources are also bound by the same charity laws. See also R. Tallontire, “International Trend and New Approaches in Fundraising. Where can we go from here?” A paper presented at the 2nd West African Fund Raising Workshop organised between April 8-12, 1996 in Accra, Ghana by the International FundRaising Group (IFG) Inc., UK. (Copy on file with author). He argues, in this paper, that most donating members of the public determine what their monies are to be used for so it would be wise for NGOs to tailor their proposals to suit such needs.

One would not have had cause to worry about the independence of local development NGOs but for the fact that Western governments which provide the bulk, if not all, the aid to the less industrialised world have a particular agenda to meet under the post-Cold War globalisation process. This agenda is to carve more power and space for multinational corporations over governments in order to be able to reap the maximum benefits from foreign investments. The process involves the transfer of a critical range of activities – economic, social and political – to the global scale.¹⁷⁹

The globalisation process suggests a minimalist role for government which should be outside the realm of the market place:

States are, by and large, reduced to the role of adjusting national economies to the dynamics of an unregulated global market ... The new capitalism is conceived in this historical context. Its basic instinct is to free itself from any form of state control or intervention. Its thrust is deregulation, privatization, and the dismantling of state protection for the vulnerable elements of society. It preaches that the unregulated global market is good for everybody, although some may reap its benefits earlier than others.¹⁸⁰

In this arrangement, the state retains a function as enforcer of contracts and as instrument of political leverage to secure access to resources and markets world-wide. But, by and large, the state is conceived as subordinate to the economy. It is to act as the economic police agent for capitalism by seeking to quell dissent, trade union rights, and agitation for social welfare reforms.¹⁸¹ This role of the state identifies with Gramsci's concept of political society, the coercive arm of the state that is supposed to help maintain the hegemony of the ruling economic class. The minimalist role of the government in the neo-classical economic agenda is a reflection of responsibilities assigned a liberal government in seeking to promote negative civil and political rights.¹⁸² It reflects a rigid application and reintroduction of the Lockean

¹⁷⁹ D. Copeland, "Marginal Utility: Globalization, Enterprise and Governance," at 2. Paper presented at Workshop on Human Security and Sustainable Global Development, Dalhousie University, Halifax, 15-17 August, 1996. (Copy on file with author).

¹⁸⁰ R. W. Cox, "Globalization, Multilateralism and Democracy" (1992-3) *ACUNS Reports and Papers* at 7.

¹⁸¹ Copeland writes that: "As an increasing number of citizens find themselves economically and politically disenfranchised and distressed, the central requirement will be to keep the lid on [– that is to forestall the negative contribution to development by the deprived and pre-developed]. So on the home front, look not for national day care but for the continued expansion of the criminal justice system, proliferating correctional facilities, and more heavily armed security forces." Copeland, *supra* note 179 at 8. For an analysis of the situation in Africa see Chapter 4 on Ghana.

¹⁸² Trakman argues: "As a self-willed being, the individual is entitled to exploit her own human resources, indeed to satisfy her dream of unending wealth. The well-being of others is a by-product of

notion of civil society where the economic dimension of civil society operates outside the realm of politics.¹⁸³

In this globalisation arrangement, the role of development NGOs is to supplement the limited role assigned the state, in the provision of aid and services in the rural communities. This calls for a tripartite relationship among government, development NGOs and the international development agencies. In Ghana, for instance, this arrangement is reflected in the aims, objectives and operations of the Ghana Association of Private Voluntary Organisations in Development (GAPVOD). The main aim of this umbrella body is to enhance the development of NGOs and the private development sector in which they operate.¹⁸⁴ A critical examination of the policies of GAPVOD portrays it as a pawn in the hands of international development agencies, the government and the private sector. It has denied itself the initiative to set its own development agenda that will cater to the needs of the local people and rather acts as a rubber stamp for the policies of the government and international donor bodies.

her happiness, not its determinant. Governmental checks upon her is to be kept to a minimum. The she manages her assets unwisely is her own problem. Ignorance, impecuniosity or bad luck is a private and personal affair. The supposition, a mirage, is that she has only herself to blame for the depleted worth of those assets. Like the corporate shareholder, she advances the value of her own personhood only through her own capacity to trade in it wisely and freely. She lives by that capacity, far more than according to social norms that others impose upon her. Her liberty is the foundation of what she is and ultimately can become: it exists above and beyond her social experiences. Thus, the State is responsible to effectuate her interests equally with the interests of all other people in a free and democratic society. In benefiting her, it supposedly benefits civil society as well." L. Trakman, *Reasoning with the Charter* (Toronto: Butterworths, 1991) at 11.

¹⁸³ See Chapter 1.

¹⁸⁴ Its objectives include facilitating the development potential of its constituent members by assisting them to achieve their individual objectives through the provision of training, evaluation and other consultancy services. It also seeks to collect, share and disseminate information relevant to the development process and practice in Ghana, including information on current government policies and programmes as they relate to urban and rural areas. Third, it seeks to co-ordinate the activities of member organisations and liaise between them, the government and the business sectors. Fourth, it seeks funding from both local and international organisations and act as a clearinghouse for international NGOs wishing to work with Ghanaian NGOs.

One also has to note that GAPVOD is under the sponsorship of the UNDP¹⁸⁵ whose policies favour the implementation of government economic policies for two reasons. First, is the fact that the UNDP, as a subsidiary body of an intergovernmental organisation, must carry out its assistance upon request by governments through governments under the Basic Co-operation Agreement (BCA). UNDP assistance, in principle, is requested by governments and institutionalised in the BCA. This indicates that UNDP cannot offer sponsorship to GAPVOD without the government's approval, knowledge, consent or, at least, its acquiescence. Secondly, UNDP development policies have tended to shy away from human rights.¹⁸⁶ Throughout its development decades, though it realised that the lack of emphasis on human rights was a factor in the failure in the implementation of such decades, the UNDP never included human rights *per se*, but such terminologies as "basic needs,"¹⁸⁷ "social justice,"¹⁸⁸ and in its 1996 Human Development Report "human security."¹⁸⁹ It is no wonder then that GAPVOD does not have a committee on human rights.¹⁹⁰

The role and activities of GAPVOD outlined above raise to the fore the issue of whose interests development NGOs really seek to serve. Alan Fowler observes that:

[Each source of aid] has a distinctive quality, that is a set of conditions or expectations that influence what the NGO can do developmentally and how ... While other factors, such as

¹⁸⁵ During an interview with Mr Ahadzie, the then Executive-Secretary of GAPVOD, I was informed that funding from UNDP was cut off for some years after some mismanagement of funds had been detected. But UNDP was about to resume funding as of March 1996. (Notes on file with author).

¹⁸⁶ Joe Oloka-Onyango, "Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa," (1995) Vol.26 No.1 *California Western International Law Journal*, 1.

¹⁸⁷ Francis Stewart, *Basic Needs in Developing Countries* (Baltimore: Johns Hopkins University Press, 1985).

¹⁸⁸ *International Development Strategy for the Third World Nations Development Decade*, G.A. Res. 35/56 (1980), UN. GAOR, Supp. No. 48, at 106.

¹⁸⁹ UNDP, *UNDP Human Development Report 1996* (New York: Oxford University Press, 1996).

¹⁹⁰ GAPVOD has nine sector committees which meet once a month to deliberate on issues affecting the sector and to co-ordinate the activities of NGOs operating in that sector. The committees are Women in Development, Water and Sanitation, Agriculture and Food Security, Environment and Disaster Relief, Health and Population, Child Survival and Development, Non-Formal Education/Training, Small-Scale Enterprise Development and Youth and Culture. As expected, missing from the committees' list is the human rights committee. Apart from the reason given above, one can also mention the factor of the old time "rivalry" between development and human rights NGOs. However, the Executive Secretary of GAPVOD, Mr Ahadzie, said that they intended to set up a Citizens Group to embrace the media and human rights. That is yet to be done. Supposing that that is done one wonders if human rights would be interested in joining and if so whether that will lead to a re-formulation of the objectives of the group and even its name so as not to reflect only "private voluntary organisations in development."

ideology and history, contribute to NGO functioning, the proportions of funds used from these diverse sources significantly shape and steer what a NGO is, how it operates and what it achieves.¹⁹¹

The needs of the people are defined by the donor community and how to implement the package is hijacked and shaped by the development NGOs who work mainly at the micro-level as “deliverers of development.” The so-called democratic environment is also not conducive to popular participation because it is located at the top and there is no effectively functioning civil society at the grassroots, under the control and direction of the local people, the so-called beneficiaries of the aid package. The human rights NGOs that are supposed to pluralise their space for participation have malfunctioned,¹⁹² and development NGOs, on their part, end up abusing the rights of the rural people by not letting them exercise their *socio-economic* civil rights.

Local development NGOs do not appropriate a human rights discourse and incorporate it into their operations, though they claim to be fighting for socio-economic rights. In the Ghanaian context, almost all of the NGOs would allude to fighting for the economic, social and cultural rights of the people, and also the right to development. Yet, they are not in a position to properly appreciate and articulate these concepts and to relate them to their work. This situation has been occasioned by the urge to meet the conditions of sponsors in order to obtain aid. One therefore gets the impression that the concepts are only an after-insertion into the principles and policies of organisations without letting these concepts to actually drive their operations.¹⁹³ This confusion has been generated by the way and manner human

¹⁹¹ A. Fowler, “NGOs and the Globalisation of Social Welfare: Perspectives for East Africa,” in Joseph Semboja and Ole Therkildsen, *Service Provision under Stress in East Africa* (Copenhagen: Centre for Development Research, 1995), 9 at 11.

¹⁹² See Chapter 5.

¹⁹³ For instance, they believed that the provision of food is a satisfaction of the economic, social and cultural rights of the recipients. Yet they would not appreciate the fact that economic, social and cultural rights have a “positive” aspect to it as well that invokes the government not to only to stop itself from taking away the people’s resources illegally but also preventing others to do the same, for at least if you cannot provide you can protect. Another issue they overlook is the fact that one cannot call economic, social and cultural rights as *rights* if they are cut off from civil and political rights. This issue was raised because it was noticed that most of the development NGOs see economic, social and

rights have been watered down to cover anything that relates to the mere provision of needs. The critical connection between the provision of needs and the role of civil and political rights, which determines whether this NGO process of development can qualify as rights exercise, is totally absent. The question of “charitable objects and activities” is played back here to suggest that reference to civil and political rights means entering into the realm of politics. For the local staff of development NGOs, this stance suits them since they do not want to antagonise the government and have their licences withdrawn.¹⁹⁴ Also most of them are in the development NGO business as a career so the urge to agitate for, and engage in, an activist role is not there. For that matter, they see those agitating for civil and political rights as a “bunch of rabble-rousers” who are only there to create confusion for political gain.¹⁹⁵

Thus, it is realised that the laws that regulate charities in their “donor” countries serve the interests of their governments in the pursuit of the globalisation agenda. It helps Western governments to stick to the *negative-passive* relationship approach to rights and development and at the same time limits the activities of development NGOs to the same approach. Apart from the charity laws, the criteria set up by Western development agencies that provide the bulk of funding for international development NGOs, also limit the ability of development NGOs to venture into rights promotion as a priority area.¹⁹⁶

cultural rights as an end in itself, instead of only as a means to let the disadvantaged lay the foundation whereby they will be enabled to exercise their civil and political rights and thereby attain development.

¹⁹⁴ J. Asiedu, executive member of African Centre for Human Development (ACHD), a development NGO based in Accra, Ghana.

¹⁹⁵ But after discussing with NGO leaders that the essence of civil and political rights exercise is embodied in participation from decision-making to sharing the benefits of development and protecting it, that is looking at the socio-economic aspect of civil rights, the idea was accepted, though in principle only. Interview with J. Asiedu, ACHD in May 1996. (Notes on file with author). Judith Thompson, the Executive Director of ProNet, for instance, has this reaction: that the staff of development NGOs should have human rights briefing sessions by human rights NGOs before engaging in their operations with the people. She also suggests the setting of a joint publication by both types of NGOs. Interview held in May 1996. (Copy on file with author).

¹⁹⁶ The DAC Orientations on Participatory Development and Good Governance (OECD/GD (93) 191, Paris 1993) also present comprehensive but contradictory signals over the acceptance and pursuit of *passive* or *positive* relationship between human rights, democracy and development. The Report reads, *inter alia*, that “Development administrators are not always convinced about the relevance and implications of encouraging participatory approaches. ‘Getting things done’ and funds disbursed often outweigh other considerations, and work against participatory development. *Participation is no*

While the mission statements of some countries at the bilateral level seem quite pro-human rights, when it comes to taking part in OECD programmes at the multilateral level, stumbling blocks to effective rights exercise will remain. More significantly, limiting the discussion to the bilateral level, the full application of the human rights components of development NGOs will still remain ineffective in securing the attainment of *sustainable holistic* development due to the defects that are associated with the Western-liberal notion of rights.

First is the fact that in the Akan notion of rights, for instance, there is no clear-cut distinction between civil and political rights and economic, social and cultural rights. Therefore, if traditional development NGOs, such as those identified as the *Asafo* and *Nnobia* groups,¹⁹⁷ were to operate they would have more likely given proportionate attention to civil and political, as well as economic, social and cultural rights. However, development NGO activities, influenced by the Western notion of rights and the constraining charity laws, have sought to cut civil and political rights from their activities, claiming to be engaging themselves only in economic, social and cultural rights promotion. Even here, they limit themselves to promotion, rather than protection of these rights.

Secondly, apart from indirectly failing to promote and protect *political* civil rights, development NGOs also do not respect the *socio-economic* civil rights of the people they are supposed to help. As a result, the notion of participation that is pursued by development NGOs takes place only at the level of performance of duties.¹⁹⁸ The third difficulty is related to the lack of a coherent analysis in the Western notion of rights on the *positive* relationship between rights and development, or the lack of

panacea and intended beneficiaries do not always participate in the way that development agencies would like them to. Reasons include the "opportunity cost" of participation, especially for the poor and women, and the perceived risk that social conflicts which are latent in many communities may come out in the open." [Emphasis mine]. DAC Report at 10, paragraph 17. Also, the only reference to human rights NGOs in the Report is that their importance is expressed in being "a source of information on human rights situations and a constituency for human rights vis-a-vis governments and public opinion." See paragraph 68 at page 22 of the Report.

¹⁹⁷ See Chapter 2.

¹⁹⁸ Appendix F.

recognition thereof, and the over-emphasis on a *negative-passive* rights-development relationship. This stance has influenced development NGOs to overlook the significance of rights exercise in the development that they seek to attain in the "distress" communities. But African concepts of rights see rights exercise as the tool, the foundation towards the attainment of development.

In conclusion, it can be said that the priority is not on helping African peoples need to enjoy and exercise their rights after being deprived of them for so long. It is rather to satisfy the interests of Western states. When the equation is set in this fashion rights exercise becomes subject to the control of the donor community, offering them the right to determine how much of rights, like aid, to dish out at a given time, for the "recipient." Just as aid worked that way to promote development for Western states in a disproportionate manner, so too, rights.

And indeed, which rights to enjoy and exercise has been defined by the nature of the political liberalisation process. Full exercise of *political* civil and political rights has been restricted by limiting the parameters within which elements of civil society, especially local human rights NGOs can function. The fear is that unfettered exercise of rights would lead to the unleashing of "centrifugal forces" that would violently disrupt economic reforms.¹⁹⁹ *Socio-economic* civil rights have also been restricted so that grassroots democracy, which would foster the promotion of an alternative development agenda, will be discouraged. The exercise of *socio-economic* civil rights involves participation at the micro-level or grassroots level to attain development through participation in organisation and mobilisation of the people; decision-making to assess the needs of community, to determine what to do to meet these needs, assess capacities of the people; planning how to execute the projects to meet the needs; implementing the project together; evaluating the project together; reaping, sharing and protecting the benefit together.²⁰⁰ Yet, development NGOs do not recognise these rights and end up suppressing them by engaging in relief/welfare and

¹⁹⁹ It is to be recalled that Western governments opposed the use of this argument to dispute the claim of less industrialised states towards the establishment of what Cassese refers to as the "Third World doctrine of rights." Yet, hypocritically, this same concept is now being employed by Western states and scholars to defend controlled exercise of rights.

“community development” approaches,²⁰¹ not the structural type of development which involves combining *political* civil and political rights promotion and protection with respect for *socio-economic* civil rights. Economic, social and cultural rights have also been cut and controlled so as not to fully rehabilitate the deprived and pre-developed members of the community to enable them to demand exercise of their civil and political rights. But it is these rights that are needed to form an *ensemble* whose total exercise will lead to the effective self-development of the individual and motivate him to actively contribute to community development.

In the light of the foregoing it is indisputable that Western development policies in Africa have systematically, and in diverse contexts, downplayed the relevance and effectiveness of rights exercise to African development. Thus, in seeking to formulate their development policies for Africa, rights abuse was perpetrated by Western governments and NGOs through a denial of the people’s ability to decide what is appropriate for them. Secondly, in attempting to implement the policies, further abuses were generated in order to facilitate their execution.²⁰² This situation confirms the fact that African notions of rights are important to plug the loopholes in the international regime of human rights.

²⁰⁰ Appendix E.

²⁰¹ Appendix F.

²⁰² Typical example is the case where villagers are maltreated and forced out of their communities to make room for the building of dams, establishment of large-scale mechanised farming projects, etc. Added to this abuse is the payment of no or inadequate compensation for compulsory acquisition of land. See, eg., James C.N. Paul, *supra* note 151.

CHAPTER 4

THE PLACE OF HUMAN RIGHTS IN THE POST-COLD WAR DEMOCRATIC DISPENSATION IN AFRICA: THE CASE OF GHANA

Human rights belong to individuals, not governments. Unless they are asserted by individuals worldwide, they will mean little. How can we mobilize humanity to assert human rights? Do we stick to a few clear, simple, isolated rights, a few flagrant and egregious wrongs, to marshal the greatest possible concern? Or do we move beyond that to defend against other attacks on human dignity, that are inextricably linked to the wrongs we have chosen to oppose?

-- David Matas¹

Introduction

The previous chapter set out to examine the human rights implications of the various development policies that Western governments have sought to implement in Africa. This analysis was done in the context of the *negative*, *passive* and *positive* relationships between rights and development. It was observed that Western development policies have always hovered between the *negative* and the *passive* relationship, but not the *positive*. This situation has largely been dictated by the nature of the democracy that the Western liberal system subscribes to, which is the nominal or "formal" type of democracy. Nominal democracy goes hand in hand with the negative approach to rights exercise which seeks to limit rights exercise solely as a preventive mechanism against governmental interference in the affairs of the people. This in turn implies that rights become only a political tool, thereby seeing civil rights in their *political* context only and failing to recognise their *socio-economic* component.

The practical application of this concept of rights and democracy has always privileged the interests of the well-to-do over the pre-developed and deprived

¹ D. Matas, *No More. The Battle Against Human Rights Violations* (Toronto: Durdun Press, 1994) at 197.

members of the community because the exercise of *socio-economic* rights facilitates, and is the foundation for, the exercise and enjoyment of all other rights. Against this background, the importation and application of the Western liberal notion of rights and democracy in the context of Western development policies have not helped promote *sustainable holistic* development for Africa. The reason is that not all people have been given equal opportunity to exercise their rights *to be* and *to do* in order to exercise and enjoy their rights *to have*.

Thus, it was observed that the various UN Development Decades have not contributed to arresting the development decline in African states. On the contrary, the situation worsens. The latest model of Western development policy is the globalisation process. It has introduced major policy shifts in the mission statements of development agencies, resulting in a change from the negative conditionality to the positive conditionality regime for aid disbursement. Some have contended that this attempt represents a final convergence of the paths of human rights and development, that is an adoption of the *positive* relationship approach to rights and development. However, it is noted that the reforms remain superficial due to other underlying factors that is actually driving the conception the globalisation process, reasons that are not related *per se* to the promotion of human rights. Their *de facto* denial therefore privileges well-to-do capitalists over the under-class when it comes to making maximum utilisation of rights for the sake of attaining development. This is pointed out as the major defect affecting the political liberalisation process and thus undermining the contention that the process hinges on a *positive* relationship between rights and development.

The process of globalisation is responsible for the emergence or the re-emergence of the concepts of civil society, and political and economic conditionality regimes defining the direction for political and economic liberalisation for the globalisation process. My contention is that the solution to the problems of “failed” development lies not in change in terminology, but in the unfettered exercise of rights, and rights broadly conceived.

This chapter seeks to examine the place of human rights in the process of *controlled* democratisation and introduction of market reforms that have been applied in Africa under the globalisation programme. The globalisation process covers the *advanced political* stage of community metamorphosis. In this part of the dissertation I focus attention upon the case of Ghana.

Ghana was the first African country to become independent from colonial rule on March 6, 1957.² Dr. Kwame Nkrumah and his Convention People's Party (CCP) won the majority of seats in the elections organised to usher the country into self-rule. He consequently became the first Prime Minister of Ghana and three years later, the first President when the country became a republic. Nkrumah ruled for 9 years during which period he converted the state into a socialist, one-party state and made himself the Life-President. Egregious human rights abuses took place under his regime and this was cited as one of the reasons for his overthrow in February 1966. After Nkrumah, Ghana has seen two attempts to return the country to constitutional rule thwarted by a spate of military coups d'état that have plagued the country's political history. In all, Ghana has been ruled by five different military regimes. The last successful military putsch was orchestrated by Jerry Rawlings in 1981, who ruled for eleven years as a military dictator before "handing over power to himself" as a civilian president in 1992. Jerry Rawlings was re-elected in 1996. The elections marked the first time in the history of Ghana that a civilian regime has been able to run its full term in office. In this part of the dissertation, I intend to examine the human rights provisions in the Ghanaian Constitution, 1992 which remains in force; the enforcement mechanisms put in place to ensure the promotion and protection of these rights; and the extent to which government practices support or deviate from the protection and promotion of these rights. An analysis of the role of the international donor community in the democratisation agenda also becomes important due to the influence it exerts on how the democratisation process should run in order to promote market reforms.

² It was named the Gold Coast while under British rule.

I: Civil Society in the Pre-Transition Era to Globalisation

In Africa, “civil society,” though suppressed through nationalism and the ideology of African socialism, was to undergo a resurgence from the late 1980s. After the overthrow of the proponents of African socialism and the death of the ideology itself, the marginalised politicians and civil servants who had a high stake in the political-economic fortunes of the African state tried to re-organise through human rights-related and democracy-oriented groups.

In Ghana, the proliferation of coups d'état by the military in African politics from the early 1970s to 1980s led to the replacement of the civilian ruling group by the military on the dependence structure. The displaced and disgruntled politicians then began to find solace in, and use as a smokescreen, one of the marginalised entities³ to further their political objectives.⁴ For example, during the National Redemption Council (NRC)/Supreme Military Council (SMC) era of General Acheampong (1972-1978), groups such as the Front for the Prevention of Dictatorship (FPD) were formed.⁵ There was also the Peoples' Movement for Freedom and Justice (PMFJ).⁶ Others found a place in such bodies as the Christian Council of Ghana (CCG), the Catholic Bishops Conference, the Association of Recognised Professional Bodies (ARPB), the Ghana Bar Association (GBA), etc to indirectly and clandestinely promote their political goals. The few human rights NGOs then in operation included membership organisations such as the Human Rights Committee of the GBA⁷ and the Ghana Journalists Association (GJA).

³ Which formerly constituted an essential component of the development-turned dependence structure but now belongs to the category of non-ruling group. See Appendix D.

⁴ Stephen N. Ndegwa, *The Two Faces of Civil Society: NGOs and Politics in Africa* (West Hartford: Kumarian Press, 1996). Meanwhile, the under-class sought refuge in their local associations. R. Fatton, *Predatory Rule: State and Civil Society in Africa* (Boulder: Lynne Rienner, 1992).

⁵ FPD was formed by a renowned politician, Dr. Kwame Safo-Adu who was a Minister under the Progress Party (PP) administration of Dr. K.A. Busia. F.K. Drah, “Civil Society and the Transition to Pluralist Democracy,” in Kwame Ninsin and F.K. Drah, eds., *Political Parties and Democracy in Ghana's Fourth Republic* (Accra: Woeli Publishing Services, 1993), 72.

⁶ Among its leaders were K.A. Gbedemah and General Afrifa. This group was later to resurrect as the Movement for Freedom and Justice under Afrifa and Adu-Boahen.

⁷ In reality, the GBA and other law societies throughout Africa remained the only more or less visible human rights NGOs working around this time. See details in Chapter 5.

The return to constitutional rule in 1979 saw an attempt by the civilian administration of the Peoples' National Party (PNP)⁸ to incorporate the non-ruling group into the development structure it sought to create. But the groups that emerged from this attempt to form the Ghanaian civil society of the time were to face the worst form of repression following the coup d'état of the PNDC on December 31, 1981. The then-existing groups had a pro-liberal composition, made up of the professional bodies, the middle classes, the officer corps of the military, members of the liberal professions, those located in the distributive sectors of the economy, academia, the upper layers of the state bureaucracy, and the chiefly classes.⁹ This composition made the coup-makers, who had a Marxist ideological leaning, develop a negative relationship with them.

The call for a "revolution" and the mistrust the PNDC government had for liberal-minded organisations occasioned their dissolution and replacement with so-called revolutionary organs: the Peoples' Defence Committees (PDCs) and Workers' Defence Committees (WDCs), and later Committees for the Defence of the Revolution (CDRs) and Civil Defence Organisations (CDOs), etc. These organs were supposed to make direct linkage with the "masses." Apart from them, the government encouraged the flourishing of left-wing groups most of whom were offsprings of the June 4 era¹⁰: the June Fourth Movement (JFM), the New Democratic Movement (NDM), the Kwame Nkrumah Revolutionary Guards (KNRG), the Peoples Revolutionary League of Ghana (PRLG), the African Youth Command (AYC), and the Pan-African Youth Movement (PANYMO).¹¹ One can also mention the 31st December Women's Movement (DWM) which was co-sponsored with state funds and has as of the time of writing virtually replaced and overshadowed the National

⁸ The PNP administration came into power by way of the ballot box in September 1979. It was led by Dr. Hilla Limann.

⁹ Emmanuel Hansen, "The State and Popular Struggles in Ghana," in P. Anyang' Nyong'o, *Popular Struggles for Democracy in Africa* (Atlantic Highlands: Zed Books, 1987), 170; and Baffour Agyeman-Duah, "Global Transformation and Democratic Reforms in Ghana," in Eileen McCarthy-Arnolds et al, eds., *Africa, Human Rights, and the Global System: The Political Economy of Human Rights in a Changing World* (Westport, CT: Greenwood Press, 1994), 193.

¹⁰ June 4 1979 marks the day Rawlings organised his military putsch which led to the overthrow of the Supreme Military Council regime led by Gen. F.W.K. Akuffo.

¹¹ Agyeman-Duah, *supra* note 9. Also, F.K. Drah, *supra* note 5.

Council for Women and Development (NCWD).¹² Such groups became the embodiment of “civil society” under the PNDC regime. But one cannot ascribe to them the status of groups that the theory of community emancipation defines. Such groups are supposed to be composed out of the free will of the people in exercise of their rights and freedoms and not to be allied to the government as its puppets. These so-called revolutionary organs would therefore fail to qualify as non-governmental organisations (NGOs) as well. At best, they were government-organised NGOs (GONGOs), for they were in reality only government machineries behaving as NGOs.

The PNDC administration pursued the strategy of co-optation and control through coerced marginalisation and controlled inclusion, adopting the following methods of repression. First, de-registration or proscription of groups who were variously branded as “reactionary forces,” “*agents provocateurs*,” or “enemies of the revolution.”¹³ Secondly, the removal of leaders or withdrawal of resources and privileges.¹⁴ The third repressive tactic involved the reconstitution of groups into new organisations by governmental fiat.¹⁵ Yet another strategy was co-option by the state.¹⁶ The PNDC adopted two more sinister tactics: “brutalisation” and silencing of groups. The former involved the vandalism of premises of target bodies and harassment of their officials, including kidnapping, torture and in certain cases, murder.¹⁷ The latter strategy included a less violent but equally insidious form of brutalisation, such as the denial of access to the media, attempts to discredit the

¹² The DWM monopolised the distribution of goods, industrial inputs, market stalls, etc. and both overtly and covertly demanded that all women join its ranks to obtain benefits from the state. See Mike Oquaye, “Human Rights and the Transition to Democracy Under the PNDC in Ghana,” (1995) Vol. 17 No.3 *Human Rights Quarterly*, 556 at 567.

¹³ A typical example is the Trades Union Congress (TUC) and its replacement by Workers’ Defence Committees (WDCs) and later the Association of Local Unions (ALU). *Ibid.*

¹⁴ The then acting secretary-general of the TUC and General-Secretary of the Industrial Commercial Workers’ Union (ICWU), Lawrence Ocloo, was forced into exile after the press was employed to publish accounts of alleged “malpractice” about him. *Ibid.*

¹⁵ One can mention the formation of the Ghana Federation of Agricultural Co-operatives (GAFACOOPS) in 1982 as an attempt by the PNDC to penetrate the farmers organisation. This attempt eventually led to the collapse of the original farmer’s association.

¹⁶ Victims of such strategy include the National Council on Women and Development (NCWD) and the Ghana Private Road Transport Union of the Trade Union Congress.

reputation of organisations by framing stories against them and using the public media to publish them as headline news. Editorial commentaries in the newspapers and in the news were also devoted to smear campaigns.¹⁸

In the face of repression, target organisations usually adopt three principal reactions: first, overt opposition to the regime with the support of the non-ruling group; second, forced withdrawal of contact with the state to avoid antagonism, and; third, direct co-operation with the government.¹⁹ In the case of Ghana, due to the perpetration of relentless suppressive tactics by the PNDC, most of these bodies had to adopt the second approach. Others went dormant or died out completely, rather than co-operate with the state.

As a result of the suppressive attitude towards human rights NGOs and other politically-active marginalised groups by most African governments, human rights and democracy NGOs were not actively present during the transitional period to democracy.

II: The Transitional Process to Democracy in Ghana

In spite of the pre-transition picture painted above, full-scale democratisation in Africa was not encouraged or deemed necessary by the external ruling group, the international donor community, which manipulated the return-to-democratisation agenda in co-ordination with local elements.²⁰ Thus, for example, after the national

¹⁷ Examples include attacks on university campuses and National Union of Ghanaian Students (NUGS) offices.

¹⁸ Organisations that suffered under the approach include the Ghana National Association of Teachers (GNAT), the Ghana Engineers Association (GEA), the Ghana Manufacturers Association (GMA). As would be expected, the PNDC government's disregard for civil and political rights was justified in the age-old African socialist agenda emphasising social, economic and cultural rights to the neglect of civil and political rights. Indeed, there are strong correlations or borrowings by African military leaders from African socialism to justify their coups d'état. One is the false reliance on Africa's traditional political practices to justify militarism in contemporary African politics: that, *inter alia*, the military formed an important element of promoting constitutionalism in the African political systems (citing the work of Asafo companies); and, that military take over was in consonance with destooling corrupt chiefs or kings. See George Ayittey, *Africa Betrayed* (New York: St. Martin's Press, 1992) at 65ff.

¹⁹ See Oquaye, *supra* note 12.

²⁰ Brendalyn Ambrose, *Democratization and the Protection of Human Rights in Africa: Problems and Prospects* (Westport: Praeger, 1995), at 25ff.

conference mode of transition²¹ was successfully implemented in Benin but was seen as "going too far," that sounded the death knell for future national conferences.²² In other francophone countries,²³ the process was virtually derailed or diluted, when it moved from a process compelled by social forces and beyond the control of the state to the government-sponsored or regulated type.²⁴

The strategy of *controlled* democratisation or political liberalisation involved constitutional revision and multiparty elections "in an authoritarian single party environment."²⁵ Another type of transition typical of military regimes that ruled without a formal constitution, the type in which Ghana's transition falls, is the drawing up of a new constitution and its subjection to approval through doctored referenda and multiparty elections.²⁶

Unlike the situation in Latin America, for instance, where NGOs took an important role in the overthrow of dictatorship and the restoration of democracy,²⁷ the situation was marked by NGO irrelevance in Africa, South Africa being a conspicuous exception. As part of the "instant capitalism, instant democracy" agenda, the transitions to democracy were hurriedly and haphazardly organised without the peoples' input which might have ensured the construction and establishment of

²¹ According to Drah, the underlying doctrine of the national conference mode of transition is derived from J.J. Rousseau's idea of the "general will" which, to Rousseau, is the source of all power in a state and hence sovereign. The national conference was therefore seen as a sovereign assembly whose "overall purpose is to set in motion a process which will compel the incumbent dictatorship to bow to the people's will, and drastically review the existing constitution or replace it with a new one under which multiparty elections will be held." F.K. Drah, *supra* note 5 at 70.

²² In Benin, the conference stripped the incumbent Marxist-Socialist Kerekou of all his powers, dissolved the then ruling party, set up a transitional government and conducted multiparty election in which Kerekou lost.

²³ Such as Togo, Cote d'Ivoire and Gabon.

²⁴ Ocquaye categorises the transition process into two types: the government-sponsored transitions and transitions under the control of social forces. I disagree with his view that the former is more likely to succeed on the grounds that the other type lacked direction. M. Ocquaye, *supra* note 12 at 565.

²⁵ Drah, *supra* note 5 at 71. Examples of this took place in Zambia which led to the overthrow of the incumbent, Kenneth Kaunda, the last relic of African socialism, and also Kenya. See also B. Ambrose, *supra* note 20 for analysis of the transition to democracy in Africa.

²⁶ Drah, *supra* note 5 at 72.

²⁷ Aryeh Neier and Hugo Fruhling. Two of the panelists on "Transitions in the midst of Crisis: the role of the Non-Governmental Organization," (1990) Vol 5 *American University Journal of International Law and Policy*, at 971 and 979, respectively.

participatory grassroots democracy that is founded on cultural and historical experiences. It is for this reason that Ambrose laments that the democratic exercise was in peril because "it was externally imposed and elite-driven, while the majority remains silent."²⁸

In Ghana, "political activities"²⁹ were revived by the old time politicians and civil servants. They attempted to step back onto the dependence structure and thereby return it to its original status as a development structure. They sought to do so by adopting the old strategy of forming pro-democracy groups to "test the pulse" of the PNDC military dictatorship. For example, it was Prof. Adu Boahen who revived the Popular Movement for Freedom and Justice (PMFJ) as the Movement for Freedom and Justice (MFJ)³⁰ and, together with some civil rights activists, former PNDC members who had fallen out with the government and other old politicians, used the MFJ to openly campaign against the PNDC regime.³¹ They were met with arrests, imprisonment without bail or trial, assassination attempts, disruption of meetings, death threats, etc.

During such challenging, uncertain pre-transition times in which the pro-democracy forces were working within the limited confines of freedom acceded to them by the PNDC through pressure from the international community, not much, if anything, was heard about human rights NGOs. The pro-democracy forces were geared towards political party formation but not the creation of human rights NGOs. The

²⁸ Ambrose, *supra* note 25 at 25.

²⁹ One of the usual announcements made by successful coup plotters is to "ban all political activities." This was meant to put a break to the functioning of party political activity and the exercise of the principles of democracy. Yet it was couched as a freeze on political activity even though what the coup makers engage in while in office is also part of political activity.

³⁰ The MFJ was more or less an umbrella group which comprised politicians from the two main political camps or traditions in Ghana, the liberals and the socialists who later formed the Danquah-Busia Club and the Nkrumah Heritage Club, respectively. Out of the former developed the New Patriotic Party (the leading opposition party in Ghana) and the latter which split into three parties to contest the 1991 elections.

³¹ Adu-Boahen later campaigned on the ticket of the NPP and became the party's presidential candidate during the 1991 elections that ushered the country back into constitutional rule, and into the Fourth Republic. Adu-Boahen had before then delivered the annual Ghana Academy of Arts and Sciences lectures in which he used the opportunity to denounce the military dictatorship of Rawlings. On the

nurturing of a strong human rights NGO community would have helped fight for the expunging of key human rights abusing laws. But a more favourable human rights regime was not put in place before the ushering in of democracy. As a result, abusive and repugnant laws still remain in the statute books after two rounds of elections in Ghana. One example is Ghana's PNDC Law 48 on public order which was an affront to freedom of assembly but remained in place. It was not until 30th December, 1994 that the law was repealed by Parliament and in its place was enacted the Public Order Act, 1994.³² It is also interesting to note that even after the ushering in of the Constitution, PNDC Laws were being promulgated and back-dated to PNDC times on the excuse that they had already been made and were only awaiting publication. Incidentally, the Transitional Provisions protected these laws. Section 21 thereof states:

Where immediately before the coming into force of this Constitution any existing enactment had not been brought into force or was to come into force on a date subsequent to such coming into force, the enactment may be brought into force in accordance with its terms, or shall come into force upon such subsequent date, as the case may be.

Through Africa, most of the pro-democracy movements later turned into political parties and contested for political office.³³ Their main goal was to win back political power which they assumed was their "birthright" that was forcibly taken away from them through military coups d'état.³⁴ In this state of mind, they had and still have no new agenda to promote rights and democracy and move their countries forward except to unseat the incumbent and thereby claim their "birthright." As a result, not much hope for change could be anticipated in the march towards the establishment of participatory grassroots democracy through party political activity. The observation of Stephen Toope supports this assertion:

next day of the lecture series the venue for the lectures was invaded by military and police personnel, including the then-Army Commander himself.

³² This law, *inter alia*, affirmed the right to demonstrate and abolished the need to obtain a police permit before demonstrating. It also called for protection for demonstrators against police attacks and harassment.

³³ One can mention Frederick Chiluba of Zambia who fought dictatorship and one-partyism in Zambia through the Trades Union of Zambia. Also in Mali, two of the pro-democracy associations, the Alliance for Democracy in Mali (ADEMA) and National Congress for Democratic Initiative (CNID) evolved into the APEMA-PAS (African Party for Solidarity and Justice) and the CNID-FYT (Faso Yriwa Ton) parties, respectively. Also in Ghana, the NPP, for instance, was formed through the Danquah-Busia Club.

A palpable sense of frustration has descended upon many of the poor and upon those who work with them. The frustration is made worse by a perception that the political elites of the country are not paying adequate attention to issues of poverty and development ... Simply changing the names of those who hold the reins of power would not bring true democracy to Kenya. A social transformation is required whereby government is viewed as a servant of the citizen.³⁵

In Ghana, the Committee of Experts that was set up to develop the PNDC government's proposals³⁶ for a draft constitution was hand-picked by the PNDC government.³⁷ Their manner of appointment and how the PNDC government choreographed the whole transitional process³⁸ left much room to doubt the independence of the Committee of Experts.

There were also problems when it came to setting up the Assembly to prepare the draft Constitution. The Ghana Bar Association (GBA) argued for a Constituent, instead of a Consultative, Assembly.³⁹ For these and other reasons, the GBA boycotted its seat at the Assembly.⁴⁰ One controversial aspect of the Assembly's

³⁴ One could discern this conclusion from their pronouncements at election rallies, interviews and press conferences.

³⁵ S. Toope, "Preparing for the 1997-98 Kenyan Elections: The Role of Civil Society." 25 September, 1996, at 4. This report emerged from his visit to Kenya on the ticket of the International Centre for Human Rights and Democratic Development based in Montreal "to assist in the identification of key themes for legal and political reform and to suggest strategic options for potentially effective advocacy."

³⁶ The government's proposals were discussed in a so-called peoples' consultation it conducted across the country through the National Commission for Democracy (NCD). Oquaye describes the whole process thus: "The work of the NCD, which collected views on the future constitution of Ghana, was done in a climate of repression, such that voices of dissent were heard only in Kumasi and Takoradi. There were no independent newspapers to publish opposing views. The Theme of the fora, "The District Assemblies and the Evolving Democratic Process" was misleading as many perceived the fora as an evaluation of the work of District Assemblies. The debate itself was largely restricted to pro-PNDC groups and individuals." Oquaye, *supra* note 12 at 568. Most people who expressed critical views against the government were targetted and harassed. Some had to flee outside the country to save their lives. In confirmation of this, in an interview conducted with Stewart Istvanffy, an Immigration and Human Rights lawyer with a special interest on Ghana, one of the wave of refugees from Ghana did occur around this time. Interview held on November 1997. (Copy on file with the author).

³⁷ They were made up of nine members: five lawyers, one retired judge, two economists and one traditional ruler.

³⁸ For example, it was the PNDC that set up the Interim National Electoral Commission (INEC) appointed its members and assigned it the responsibilities of doing the voter registration, the conduct of referenda and elections, etc. The PNDC also set the dates for all the transitional processes.

³⁹ The proposals to be submitted by a Constituent Assembly were supposed to be final while the Consultative Assembly's proposals subject to modification by the PNDC.

⁴⁰ The other reasons included the fact that the Assembly had a majority of government sympathizers and nominees. 117 representatives were from the District Assemblies (mainly government appointees) who constituted 45% of the Consultative Assembly. The GBA was given only one seat while a group

work is the smuggling in of the Transitional Provisions into the Constitution. This represents the most polemical aspect of the Constitution which was drafted by the PNDC and was not allowed to be debated by the Assembly on the grounds of lack of time. Against this backdrop, one cannot help but agree with Oquaye that:

[T]he transition in Ghana was marred basically because, while the regime [the PNDC] was being haunted by its human rights violations, there were no strong internal forces to compel the PNDC to submit to its opponents. The regime had not lost control over its coercive power base – the military and paramilitary forces – and there was no credible group that could dexterously negotiate a safe exit for Rawlings and his men. Under these circumstances, the regime proceeded to monopolize and manipulate every stage of the transition as a mechanism of self-survival.⁴¹

Yet, judging by the way the transition was cleverly manipulated by the PNDC to suit its goal of continuing in power, no matter how strong a civil society Ghana had at the time nothing would have helped to arrange for a successful transition to democracy within the parameters set by the PNDC. The best a vibrant civil society could have accomplished would have been to abrogate the entire transition programme and to set up a new one with the full involvement of all elements of marginalised entities on the then development structure. One can therefore say that, absent a human rights movement to propel the transition process, the foundation for viable participatory grassroots democracy in tune with the aspirations of the people was not laid. On the face of it, this claim seems to be contradicted by the elaborate human rights provisions set out in the Fourth Republican Constitution of Ghana.⁴² It is therefore important to analyse the human rights provisions and the mechanisms put in place to protect them. It is also important to measure the government's attitude and efforts to promote, respect and protect and facilitate the exercise and enjoyment of human rights.

such as the fishing industry had 3 seats; the armed forces with a workforce of 20,000 had eight seats; the police, with 80,000 had two seats. Another reason was that members of the Assembly were not accorded unlimited immunity for comments they were to make during the sessions. Also, the language of the law establishing the Assembly alluded to the fact that it was created only to endorse a constitution to be fashioned by the PNDC.

⁴¹ Oquaye, *supra* note 12 at 568.

⁴² Hereinafter, the 1992 Constitution.

III: Human Rights Provisions of the 1992 Constitution of Ghana

The human rights provisions are covered in Chapter 5 of the Constitution. These provisions mark an innovation in some major respects from those of previous constitutions. While it is beyond the scope of this work to delve into a comparative analysis with the human rights provisions of Ghana's previous constitutions, I set out to examine some of the major innovations below.

One of the fundamental novel elements contained in this Chapter is the provision in clause (1) of the first article in Chapter 5 which states:

The fundamental human rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, where applicable to them, by all *natural and legal persons* in Ghana, and shall be enforceable by the courts provided for in this Constitution.⁴³

The provision represents an important inroad into the classical, Western liberal notion of rights which sees rights as imposing only a negative relationship between the government and the citizenry.⁴⁴ This means that the Constitution, like the theory of community emancipation, recognises the positive aspect of civil and political rights with regard to imposing obligations on the state to protect and promote rights.⁴⁵ It also lends support to the position of the theory of community emancipation that enjoyment of rights involves the performance of duties, both positive and negative. Thus, under the 1992 Constitution, individuals and legal personalities such as multinational corporations can be sued for breach of their human rights obligations, although such a case is yet to be tested in the courts. In fact, in the constitutional and legislative provisions outlining the functioning of the Commission on Human Rights and Administrative Justice (CHRAJ), it is explicitly stated that the Commission is empowered "to investigate complaints concerning practices and actions by persons, private enterprises and other institutions where those complaints allege violations of fundamental rights and freedoms under this Constitution."⁴⁶

⁴³ [Emphasis added]. Article 12 (1) of the Constitution.

⁴⁴ See, eg., Jack Donnelly, "Cultural Relativism and Universal Human Rights," in 6 (1984) No. 4 *Human Rights Quarterly*, 400; Juliane Kokott, "No Impunity for Human Rights Violations in the Americas," (1993) Vol.14 No.5-6 *Human Rights Law Journal*, 153.

⁴⁵ Refer to article 12 quoted above.

⁴⁶ See article 218 of the Constitution and section 7 (1) (c) of The Commission on Human Rights and Administrative Justice Act, Act 456, establishing the CHRAJ.

The importance of this “positive” provision lies in the fact that, apart from helping to hold non-state actors accountable, the provisions also give teeth and bite to the loose provisions on economic, social and cultural rights provided in the Constitution. How the judiciary uses this provision will help establish the organic relationship that should exist between civil and political rights and economic, social and cultural rights.⁴⁷ One key obligation of states under socio-economic rights is to protect the proprietary and other interests of the people from undue encroachment by non-state actors.⁴⁸ While most people, especially those in the rural areas are yet to avail themselves of these provisions in the Constitution,⁴⁹ most aggrieved workers have taken their employers to CHRAJ, invoking these new rules.⁵⁰

A: Economic, Social and Cultural Rights

Another important innovation on the human rights provisions concerns the inclusion of economic, social and cultural rights for the first time in the Constitution of Ghana.

⁴⁷ See theory of community emancipation, Chapter 1.

⁴⁸ See Henry Shue’s three tiered definition of economic, social and cultural rights in H. Shue, *Basic Rights: Substance, Affluence, and US Foreign Policy* (Princeton: Princeton University Press, 1980).

⁴⁹ There are several abuses going on by mining companies and other corporate interests operating in Ghana. Eg., in the Western region of Ghana, the land of the people of Wassa Fiase in the Tarkwa District has been invaded by at least 20 gold mining companies which have taken advantage of the government’s liberalized mining laws to prospect for gold through surface mining. This gold rush without regard to the environment and the health of the people has resulted in wanton destruction of the environment, high noise levels through the use of dynamite blasting, contraction of chest and nasal diseases caused by the unnecessarily high dust levels in the air, and skin rashes attributed to the contaminated water they drink from the streams which are also used to wash the gold dust collected. This unfortunate situation prompted 42 chiefs in Wassa Fiase to abandon decorum and tradition associated with the institution of chieftaincy and protest through the streets in mourning clothes and with placards. One of the placards read, “This is our land, we won’t let any foreigner destroy it and go away.” In the same locality, the people of Tebrebie complain of similar problems, in addition to the taking of their rich farming land and their resettlement on an enclosed area with farmlands. While in the case of the Tebrebie people some housing units have been put up for them, these shelters do not have utilities and essential facilities such as electricity, toilet, bathroom and kitchen. What is worse is that the youth of these areas are denied employment opportunities. It is my contention that if a right to work is recognised in the Constitution, a case can be argued for the mining companies to employ a certain percentage of the local youth population at the mining centres. In 1995, the chief and elders of a community within the mining jurisdiction of Ashanti Goldfields company (AGC), one of the richest gold mining companies in Africa, seized two vehicles belonging to AGC for polluting their environment. Yet, in all these cases, the government has done nothing to protect the interests of the people affected, neither has the Environmental Protection Agency although it has won awards for excellence in protecting the environment. Culled from AfricaNews Issue 17August 1997, <http://www.africanews.com>. Title: “Ghana – Hazardous Mining.”

⁵⁰ See details below on the functions and works of CHRAJ.

The provisions cover economic rights, educational rights, cultural rights and practices, women's rights, children's rights, rights of disabled persons, and rights of the sick.⁵¹ However, these provisions are loosely worded, apart from being non-justiciable. The economic rights, for instance, do not recognise the right to work *per se* but only "the right to work under satisfactory, safe and healthy conditions..."⁵² Yet, in presenting Ghana's first report on human rights before the African Commission on Human and Peoples' Rights,⁵³ the Ghanaian representative, Ambassador Wudu, mentioned the fact that Ghana has recognised the right to work in its Constitution.⁵⁴ In actual fact, the "right to work" only appears under the Directive Principles of State Policy,⁵⁵ article 36 (1) of which obligates the President to report on a yearly basis to Parliament regarding efforts being made "to ensure the realization of the basic policy objectives in this Chapter; and, in particular, the realization of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education."

The failure to recognise the right to work, however, is a retrogressive step. Perhaps it was a safeguard to protect the government from having cases lined up against it for the retrenchment exercise it has been embarking on to lay off workers under the exigencies of the SAP⁵⁶ and the "new capitalism" agenda. But the interpretation of

⁵¹ See articles 24-30, respectively. Most of these provisions were previously included under the chapter on Directive Principles of State Policy in the 1979 Constitution of Ghana. See article 9 thereof.

⁵² See a similar provision in article 15 of the African Charter on Human and Peoples' Rights which states that "every individual shall have the right to work under equitable and satisfactory conditions ..."

⁵³ Under Article 62 of the African Charter, Member States are obliged to report to the Commission on efforts being made to give legal effect to the provisions of the Charter.

⁵⁴ See African Commission on Human and Peoples' Rights, *Examination of State Reports* 14th Session December, 1993 at 31. But it is my contention that since the Charter itself does not recognise the right to work, the Commission did not have the mandate to discuss that issue.

⁵⁵ Chapter 6 of the Constitution which covers the aspirations and goals of the state and are supposed to "guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a free and just society." Article 34 (1).

⁵⁶ See Kwasi Adu-Amankwa, "Right to Employment and Social Security under Siege," in (July-Sept 1993) Vol.1 No.3 *Ghana Human Rights Quarterly*, 3. He argues, *inter alia*, that apart from undermining local employment instead of promoting it, the government's policies on labour retrenchment have been carried out without regard to laid down procedures and accepted international and national conditions under which workers are to be laid off their jobs. The African Commission on Human and Peoples' Rights have given similar reasons for not entertaining petitions based on

the provisions of economic, social and cultural rights goes beyond this.⁵⁷ While the right to work is to impose an obligation on governments to make progressive efforts to provide jobs for those without them, it is also aimed at protecting employed workers against unlawful dismissals.⁵⁸ The right to work is also to hold governments responsible in situations where it can be established that funds which should have gone into the opening up of some jobs have been diverted into private coffers, misappropriated or mismanaged.⁵⁹

It is gratifying to note, however, that at least in the case of protection of job security for employees, judicial precedents have been relied on to protect workers from arbitrary dismissals. The initial position of the law was that an employee was entitled to compensation only in the case of breach of contract and that the employer could terminate employment without assigning reasons for the dismissal. However, the Supreme Court of Ghana, in the case of *Nartey-Tokoli and Others v. VALCO*⁶⁰ has held that termination of employment in breach of the provisions of a collective agreement under the Industrial Relations Act, 1965, (Act 299) could be declared null and void. It is hoped that this ruling will be applied in such a way as to protect the interest of workers who have hitherto been dismissed with impunity in the face of palpable breach of contract by their employers. This way, the case law will help make

economic, social and cultural rights. See J. Oloka-Onyango, "Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa," (1995) Vol.26 No.1 *California Western International Law Journal*, 1.

⁵⁷ See a discussion on this as contained in the Limburg Principles, Yvonne Donders, "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights," (January-March 1997) *Africa Legal Aid*, 22.

⁵⁸ See article 23 of the Universal Declaration of Human Rights which states that "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment." [Emphasis added]. See also the contention of Kusi-Appea and Mbaye regarding the justiciability of economic, social and cultural rights in the African Charter: Nana Kusi-Appea and Bibiane Mbaye, "Advancing the Struggle," in *West Africa* 29 March-4 April, 1993, at 506-507. Also, *ibid*.

⁵⁹ This proposition is supported by article 36 (1) of the Constitution which stipulates that "The State shall take all necessary action to ensure that the national economy is managed in such a manner as to maximize the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Ghana and to provide adequate means of livelihood and suitable employment and public assistance to the needy."

⁶⁰ Civil Appeal No. 13/1989. This case remains the most authoritative pronouncement on protection of workers' rights against frivolous dismissals at the whim of their employers.

up for the defect in the provision on economic rights.⁶¹ While Ghana is yet to sign not only the International Covenant on Economic, Social and Cultural Rights,⁶² but also its Civil and Political Rights counterpart,⁶³ it does not absolve the government from its obligations under customary international law to protect and promote these rights. The Constitution guarantees that

The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.⁶⁴

A successful implementation of this provision will depend on an activist judiciary ready to engage in a liberal and generous interpretation and application of this provision. This way, it will avail itself of the room for judicial innovation that this and other progressive-oriented provisions offer in the Constitution.⁶⁵

A positive element of the economic rights aspect of the Constitution is the recognition of trade union rights⁶⁶ and their confirmation as an aspect of the right to freedom of association under article 21(1)(e). Kofi Kumado's reaction to this provision is that "[it] may well change the shape and structure of the trade union movement in Ghana as we know it now; at least to owe their existence and privileges to national legislation to the will of their members."⁶⁷ The inclusion of this right as both an economic and civil/political right is significant since it helps to entrench workers'

⁶¹ However, it is interesting to observe that most, if not all of the cases on wrongful dismissal have ended up with CHRAJ. See details below.

⁶² GA Res. 2200 A (1996), U.N. GAOR, Supp. No. 16, at 49.

⁶³ At a workshop organised by the Ghana Bar Association in 1992 a legal officer at the Foreign Affairs Ministry attributed this to oversight or inertia on the part of the government and that he hopes that it would be ratified soon. This is yet to be done. J. Oloka-Onyango's analysis indicates that over 30% of African states are yet to ratify the economic, social and cultural rights covenant. But what intrigues him is the late ratification of Nigeria and the non-ratification to date of Ghana due to the fact that "both are prominent and vocal proponents of the need to address socio-economic inequities on the international stage." J.O. Nyango, *supra* note 56 at 3.

⁶⁴ Article 35 (5) of the Constitution. Also, see articles 60 and 61 of the African Charter on Human and Peoples' Rights which also calls for a resort to international human rights instruments by the African Commission on Human and Peoples' Rights. See further discussion on this in Chapter 5.

⁶⁵ A detailed discussion of the role of the judiciary is found below.

⁶⁶ Article 24 (3).

⁶⁷ K. Kumado, *TUC and Human Rights*. Peter Meyer and Dennis Vormawor, eds., (Accra: FES, 1995), at 8.

rights as outlined above. More importantly, it goes beyond the conservative provisions of the African Charter.⁶⁸

B: Civil and Political Rights

The Constitution also guarantees civil and political rights. These include what are conventionally referred to as *fundamental freedoms*: freedom of speech and expression, which includes freedom of the press and other media; freedom of thought, conscience and belief, including academic freedom; freedom to practise any religion and to manifest such practice; freedom of assembly including freedom to take part in processions and demonstrations; freedom of association; the right to information; freedom of movement.⁶⁹ *Political rights*, dealing with the right to vote and to take part in government, are recognised, *inter alia*, under articles 42 and 21 (3) of the Constitution. In a conventional Western sense, the fundamental rights and freedoms are conceived within a political context only.⁷⁰ However, the traditional Akan notion of rights enunciated under the theory of community emancipation recognises two aspects of civil rights: *socio-economic* and *political* civil rights. The *socio-economic* civil rights are not recognised under Chapter 5 of the Constitution as human rights, nor in the African Charter on Human and Peoples' Rights. One can only infer a recognition of such rights under Chapter 6, article 37 (2) (a) of the Constitution:

The State shall enact appropriate laws to assure the enjoyment of rights of effective participation in development processes including rights of people to form their own associations free from state interference and to use them to promote and protect their interests in relation to development processes, rights of access to agencies and officials of the State necessary in order to realise effective participation in development processes; freedom to form organizations to engage in self-help and income generating projects; and freedom to raise funds to support these activities.

Other rights recognised in the 1992 Constitution include *legal rights*: the right to protection of personal liberty which includes the right not to be detained for more than forty-eight hours before being brought before a court of law; and the right to a

⁶⁸ For instance, while privileging economic, social and cultural rights over civil and political rights, the African Charter fails to recognise trade union rights, apart from a vague reference in article 10 (1).

⁶⁹ See Article 21(1)(a)-(g) of the Constitution.

⁷⁰ Eg., Irwin Cotler, echoing the conventional notion of civil rights as solely political, refers to them as "*fundamental freedoms or political rights*;" and political rights as *democratic rights*. I. Cotler, "Human Rights Advocacy and the NGO Agenda," in I. Cotler and F.P. Eliadis, eds., *International*

fair trial.⁷¹ There are also *liberty rights*, including the right to life in article 13 and the right to respect for human dignity, including protection against torture or other cruel, inhuman or degrading treatment or punishment.⁷² Freedom from slavery and forced labour is recognised in article 16. The Constitution also provides for a right to privacy and property, and protection against deprivation of property.⁷³

Equality rights are provided for in article 17 which allows Parliament to enact laws supporting affirmative action to redress social, economic or educational imbalance in the Ghanaian society. The article also allows the crafting of policy to make provision for different communities having regard to their special circumstances. While this article seeks to prevent discrimination, it does not offer affirmative action for disadvantaged groups such as women, children, etc. Of the clauses covering the provision on women's rights in article 27, two are provided towards special care for nursing mothers. The third is devoted to guaranteeing equal rights to training and promotion. Article 36 (6) also stipulates that the State shall, *inter alia*, take all necessary steps to ensure the full integration of women into the mainstream of the economic development of Ghana.

These provisions seem to represent an extra effort to promote the interests of women. However, the provisions are a far cry from laying the foundation for most women who remain in their pre-development stages, to attain their *being*, realise their self-development and contribute to community or national development. This can be done if provisions for their rights are recognised in a broader framework that enables the redressing of past injustices meted out to women. Without that being done, the country will continue to deny itself the valuable contribution of women to development. It is in this regard that the theory of community emancipation refers to economic, social and cultural rights which have become ripe for exercise in the *advanced political* stage that Ghana finds itself in now as *corrective rights*.

Human Rights Law: Theory and Practice (Montreal: Canadian Human Rights Foundation, 1992), 63 at 64.

⁷¹ Articles 15 and 19, respectively.

⁷² Article 15.

C: Mechanisms to Ensure Promotion and Protection of Rights

Osita Eze has outlined the following factors as playing a major role in determining the effectiveness of constitutional human rights provisions. They are:

- i. their location in the constitution;
- ii. the manner in which the relevant provisions have been formulated;
- iii. machinery and procedures for determining the constitutionality of legislative or executive action;
- iv. the possibility of legal action and remedy for individuals who have been deprived of their constitutional right;
- v. the degree of independence of institutions entrusted with deciding on human rights issues; and,
- vi. drastic changes which might lead to amendment or suspension of human rights provisions.⁷⁴

However, it is important to note that these factors do not all carry the same weight; when vital ones are undermined the rest may exist in name only. This observation is made in the context of a careful consideration of the place of human rights in the Ghanaian Constitution. First, with reference to the first two points, my analysis in the previous section shows that the human rights provisions in the Constitution are quite elaborate and look positive on the face of it. Second, taking the first part of the last point, it is noted that the provisions on human rights do not lend themselves to easy amendment. In fact, they are "entrenched provisions" whose amendment involves a laborious process.⁷⁵ The suspension of human rights provisions can only be done during situations of emergency. Elaborate provisions are set out in articles 31 and 32 of the Constitution to deal with the security of the person and to avoid an exploitation of the situation by the government in power during times of emergency. There are

⁷³ Articles 18 and 20, respectively.

⁷⁴ O. Eze, *Human Rights in Africa: Some Selected Problems* (Lagos: Nigerian Institute of International Affairs, 1984) at 18. These factors and related issues are expounded in B. Ambrose, *supra* note 25 at 86 ff.

⁷⁵ Article 290(2)-(4) stipulates that a bill to amend an entrenched provision will first have to go to the Council of State for its advice. It will then be published in the *Gazette* for 6 months. After that the bill will go to Parliament for the first time to be read. It will then be subject to a national referendum at

equally positive provisions to deal with the legality and constitutionality of the acts of the executive and legislature. The provisions guiding legislative and executive acts are addressed in chapters 8 (articles 57-68) and 10 (articles 93-124), respectively; and also under article 218 of the Constitution. The supreme provision to safeguard against abuse of these provisions is located in article 2 of the Constitution which states, *inter alia* that

A person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment; or any act or omission of any person is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.⁷⁶

The Supreme Court will then make such orders and give such directions that it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made.⁷⁷ Thus, in the case of the *New Patriotic Party v. Attorney-General (The 31st December Case)*,⁷⁸ the Supreme Court was called upon to decide whether judges in a democracy are entitled to determine questions of a political nature. It held that in exercising its constitutional duty of enforcing or interpreting the Constitution under articles 1,2,3 and 130, the Supreme Court might decide cases of a political nature such as those involving breaches of fundamental human rights. It held further that, unlike the British Parliament which is supreme absent a written constitution, the Ghanaian Parliament in a democratic system of government founded on a written constitution, is not supreme. Consequently, all laws enacted by Parliament and found to be inconsistent with the Constitution could be declared null and void and unconstitutional by the Supreme Court.

which at least 40% of the persons entitled to vote, voted at the referendum and at least 75% of the persons who voted cast their votes in favour of the passing of the bill.

⁷⁶ Clause (1) (a) and (b) thereof.

⁷⁷ Clause (4) of the said article stipulates that failure to obey or carry out the terms of an order or direction made or given under clause (2) of this article constitutes high crime under this Constitution and shall, in the case of the President or Vice-President, constitute a ground for removal from office under this Constitution.

⁷⁸ Sect. No. 18/93, 29 December, 1993 and 8 March, 1994. Unreported. cf S.Y. Bimpong-Buta, "The Role of the Judicial System in Governance in Ghana." Paper presented at National Workshop on Good Governance. June 16-18, 1997, at 17.

The role of the judiciary is also fully addressed in the Constitution.⁷⁹ There are elaborate provisions on the judiciary regarding its appointment and dismissal from office, etc which are meant to protect judicial independence. The legal aid system is also supposed to be one of the most well-established on the African continent.⁸⁰

However, structures and legal texts alone do not tell the whole story. The effectiveness of these provisions and the comments passed on them depend to a large extent on the independence of the institutions entrusted with deciding on human rights issues. This is the factor that should rank as fundamental. But at the same time it should be broadened to cover the independence of the human rights watch-dog groups in the country, especially the private press, human rights NGOs and independent human rights activists. One is here reminded of the relevance of groups (as one of the entities on the development structure) in ensuring political accountability which is reflected in the crucial role that, eg., the youth associations played in the Akan political system. Two other crucial points need to be added: first, how to place the necessary checks on institutions that are likely to be used as impediments towards the promotion of human rights or to perpetrate rights abuses themselves. The second is with regard to provisions in the Constitution that seek to protect past human rights abusers, witness the immunity clauses in the Transitional Provisions of the Constitution.⁸¹

D: The Judiciary and the Defence of Human Rights

Two institutions have been entrusted with responsibility to protect human rights in the country. These are the High Court and Supreme Court on the one hand, and the CHRAJ, on the other. Article 33 (1) of the Constitution provides that

⁷⁹ See Chapter 11 of the Constitution on the Judiciary (articles 125-161).

⁸⁰ This view was expressed by the Chairman of the Ghana Legal Aid Board during a seminar under the theme "Seminar on Reporting on Human Rights Development and Abuse" which was organised in Accra between 18 and 22 March, 1996 under the auspices of the European Union and the author had the privilege to attend while conducting field research. As a result of its more advanced status compared with other African countries, the Chairman went on to say that the Ghana Legal Board was not included on the list of African countries that the European Union was offering support to promote the legal aid concept in Africa. Article 294 of the Constitution deals with legal aid.

⁸¹ These issues are dealt with below.

Where a person alleges that a provision of the Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.

A person aggrieved by a decision of the High Court has the right of appeal to the Court of Appeal and a further right to appeal to the Supreme Court. The role of the Supreme Court in making declaratory judgments has already been dealt with. An aggrieved person has the right to seek redress directly to the Supreme Court under article 2, or the High Court under article 33. However, in the case of *Abel Edusei v. Attorney-General*,⁸² the plaintiff's claim for a declaration that certain sections of the Passports and Travel Certificates Decree, 1967⁸³ were inconsistent with, and in contravention of the letter and spirit of article 21 (1)(g) of the 1992 Constitution – on freedom of movement – was dismissed. The grounds for dismissal were that the Supreme Court was not clothed with jurisdiction to determine the case since it has no concurrent jurisdiction with the High Court to determine cases relating to enforcement of human rights. The proper forum was therefore the High Court. The reaction of Bimpong-Buta to this decision is relevant:

The majority decision of the Supreme Court in *Abel Edusei v. Attorney-General* regrettably portrays the Supreme Court, as inconsistent in the matter of enforcement of fundamental human rights in the light of its earlier decision in *NPP v. IGP* which had declared article 21 (1)(d), the right to demonstrate – another fundamental human right – as enforceable. The Supreme Court is invited to guard against such inconsistency in its decisions – especially in matters affecting fundamental human rights and freedoms.⁸⁴

The inconsistent nature of the Supreme Court decisions is also reflected in the case of *Ghana Bar Association v. A-G & Justice Abban*⁸⁵ where, without referring to the majority decision in *NPP v. A-G (The 31st December Case)*,⁸⁶ it held that the principle of non-justiciable political questions was applicable to the 1992 Constitution. The

⁸² SC, Writ No. 9/94, 13 February, 1996. Unreported. cf. S.Y. Bimpong-Buta, *supra* note 78 at 6.

⁸³ National Liberation Council Decree (NLCD) 155.

⁸⁴ *Ibid* 7.

⁸⁵ SC, 5 December, 1995, Writ No. 8/95. Unreported. cf. *Ibid*. In this case, the plaintiff sought a motion calling for the resignation of the Chief Justice on the grounds that his appointment was in breach of the guidelines set out in the Constitution for the appointment of a Chief Justice. It was contended on behalf of the Chief Justice by the Attorney-General that the issues involved political questions which the court did not have jurisdiction to entertain.

⁸⁶ This case involved the challenging of the celebration of the "revolution" that brought Jerry Rawlings to power for the second time by way of coup d'état in 1981 as a statutory public holiday. The objection by the defendant that the issue was a political one was overturned by the court. The court

court therefore upheld the preliminary objection of the defendants herein. It held that the Supreme Court had no jurisdiction to entertain the plaintiff's claim since the appointment of the second defendant by the President under article 144 (1) of the Constitution was a non-justiciable question specifically committed to the Council of State, Parliament and the President.⁸⁷

The general record of the Supreme Court leaves much to be desired, creating a public anxiety "that there is fear by some members of the bench and that some are looking for promotion and will not like to do anything to jeopardise that."⁸⁸ The President of the Ghana Bar Association further laments that:

The Court has been diluted by appointments which seem more political than based on the learning and integrity of those appointed. The Supreme Court has also since then had the membership increased from 9 to 13 ... Whereas a panel of 9 had sat (a full bench), now it is normal to have a panel of 5. The composition of a panel in most instance on constitutional matters gives the impression that the members are chosen to give a particular verdict in favour of the State. The pattern is often followed in the lower levels of the judiciary.⁸⁹

This perception is widely held among the members of the Bar and opposition members of Parliament, and a large percentage of the general public.⁹⁰ One major stumbling block here is the power given the Chief Justice to empanel a court or decide which judge sits on a particular case. This factor has become the real stumbling block to the presentation of a fearless and bold judiciary⁹¹ and has greatly contributed to the compromising of judicial independence. The manner of appointment of the Chief Justice makes all the difference. He is appointed by the President acting in consultation with the Council of State and with the approval of

then went ahead to decide that it was unconstitutional to celebrate that day as a statutory public holiday.

⁸⁷ The court came back to redeem itself in the case of *J.H. Mensah v. Attorney-General* in which it held that it had jurisdiction to determine political questions.

⁸⁸ S. Okudjeto, "The African Charter on Human and Peoples' Rights – Domestic Implementation Through Incorporations in Legislation and Constitutions; Judicial Strategies, Role of Lawyers, NGOs." Paper presented at The African Charter on Human and Peoples' Rights – Operational Review. May 19-23, 1996 at British Council Hall, Accra. This fear is with particular reference to the abduction and murder of 3 High Court Justices who were involved in reversing some major decisions by the AFRC which sought to wrongly confiscate the property of some people in the heady days of the June 4 1979 uprising. The head of the security service, Capt Kojo Tsikata and a former member of the AFRC were implicated in the crimes.

⁸⁹ *Ibid.*

⁹⁰ Interview with Honourable Freddie Blay, Second Deputy Speaker of Parliament at his office, State House, Accra. May 1997. (Notes on file with the author).

⁹¹ S. Okudjeto, *supra* note 88 at 11.

Parliament.⁹² Backed by a two-thirds majority of members in Parliament who have tended to rubber-stamp any decision of the President as representing party policy, the stage has been set for a serious compromising of judicial independence. A former President of the GBA, Mr. Nutifafa Kuenyehia, describes the judiciary as an extension of the executive arm of the state and decries the situation where the Chief Justice is allowed to accompany the President on tours and even to receive dignitaries with the President at the Castle, the seat of government.⁹³ Having compromised his position and shown his bias for the government in power, the power of the Chief Justice to empanel judges shows the extent to which judicial independence is in jeopardy in Ghana.

The picture painted of the Supreme Court is not to deny that it has had some positive impact in the promotion of human rights in Ghana under the Fourth Republic.⁹⁴ Some of its landmark decisions include the *NPP v. Inspector-General of Police*⁹⁵ case in which the Court held that a prior police permit was not required to organise public demonstrations in exercise of the right to freedom of assembly under article 21 (1)(d) of the Constitution. In so deciding, it held that certain sections of the Public Order Decree, 1972⁹⁶ contravened article 21 (1)(d) of the Constitution. They were therefore unconstitutional and unenforceable.⁹⁷ Also, before that, in the famous case of *NPP v.*

⁹² Refer to the *GBA v. A-G and Justice Abban* case *supra*. Under the 1979 Constitution, the Chief Justice and other Superior Court Justices were appointed by the President. In the case of the Chief Justice, acting in consultation with the Judicial Council; and with respect to the other Justices, on the advice of the Judicial Council. However, under the present Constitution, it is the rest of the Justices who are appointed on the advice of the Judicial Council and still in consultation with the Council of State and with the approval of Parliament. That is to say, the advice of the Judicial Council can be overridden by the consultative status granted the Council of State here. Also compared with, eg., the 1979 Constitution, one defect of the present composition of the Council of State is that it omitted past Presidents of the country to be on the Council. See article 106 of the 1979 Constitution. This omission was one of the criticisms levelled against the Constitution.

⁹³ Discussion at lunch with him and other participants at the Review Workshop on the African Charter at the British Council Hall, Accra. May 20, 1997.

⁹⁴ However, such decisions are usually given after a spate of controversial decisions have been made in favour of the government, leading to the assumption that such decisions are made to calm the waters or to appease critics of the judiciary.

⁹⁵ SC, 30 November, 1993. Unreported. cf *Bimpong-Buta*, *supra* note 78 at 5.

⁹⁶ National Redemption Council Decree (NRCD) 68.

⁹⁷ Following this decision, Parliament enacted the Public Order Act, 1994 (Act 491) which not only repealed NRCD 68 but also the Public Order (Amendment) Law, 1983 (PNDCL 48).

Ghana Broadcasting Corporation,⁹⁸ the Supreme Court, by unanimous decision, held that GBC was in breach of article 163 by not giving equal space to the opposition to air its views on the budget. The leading judgment of Francois, JSC is relevant here, especially with regard to the fact that he not only based his decision on article 163 but also on article 21 (1)(f) – the right to information:

It seems clear, that the Constitution spells out unambiguously a primary objective of making information readily available to allow for valued judgments from all its citizenry. This desired result is only possible if there is a free ventilation of views, which the imperative “shall” in article 163 places as a duty on all state media. Clearly, there is no discretion in the matter. To withhold this right is an interference with the freedom of the people and a violation of the Constitution. A contrary conclusion would mean a right given to persons, bodies or institution to exercise a censorship which would block avenues of thought and foreclose the citizens’ right of choice. Article 162 (2) forbids this. It emphatically states that there shall be no censorship in Ghana.⁹⁹

Though not formally bound by its own previous decisions, this particular decision should have influenced the Supreme Court in its treatment of the cases on press freedom which have come before it. But in these cases, the Supreme Court has performed very poorly. One such case involves the *Republic v. Tommy Thompson Books Ltd*¹⁰⁰, a libel case brought under section 112 (2) of the Criminal Code, 1960 (Act 29). It was argued by Counsel for the defendant that the libel provision, having been enacted under the dictatorial regime of Nkrumah to enable him silence his critics, should have no place under a constitutional regime. Consequently, it ought to be declared unconstitutional and inconsistent with the spirit and letter of articles 21 (1)(a) and 162 (1) and (4) of the Constitution. However, the Court held that although the offence of criminal libel was a limitation on freedom of the press and independence of the media, it was a law reasonably required in the public interest in terms of article 164 of the Constitution.¹⁰¹ It is my view that the Court ought to have

⁹⁸ In this case, the plaintiff sought for time on the government-monopolised public television station to respond to a broadcast on the 1993 budget made by officials of the ruling National Democratic Congress (NDC) government. The request was denied. A declaration was sought to the effect that the denial was in violation of article 163 of the Constitution which stipulates that “All State-owned media shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions.”

⁹⁹ Unreported. cf. Okudjeto, *supra* note 88 at 9.

¹⁰⁰ SC, Reference No. 2/96. Decided on 18 March and reasons given on 7 May, 1997. Unreported. cf. Bimpong-Buta, *supra* note 78 at 10.

¹⁰¹ Article 164 stipulates that “The provisions of articles 162 and 163 [on freedom and responsibility of the media and responsibility of state-owned media, respectively] are subject to laws that are reasonably

considered the history of the enactment of that legislation together with the fact that public figures lend themselves more to public scrutiny and criticism for their actions which affect the public. From this perspective, my conclusion is that that limitation of freedom of the press goes so far as to actually cripple press freedom and provide immunity for government officials.

The High Court is also not without its defects. For example, in an interview with Akoto-Ampaw,¹⁰² it emerged that it is becoming more difficult to obtain, for instance, a *habeas corpus* application by the High Court as provided for under the Constitution.¹⁰³ Meanwhile, applying High Court procedures and the attitude of judges can lead to unacceptable delays. The issue regarding procedures at the High Court is compounded by the fact that the Rules of Court Committee is yet to comply with the provisions in article 33 (4) to make rules of court with respect to the practice and procedure of the Superior Courts for the purposes of article 33 – protection of rights by the courts. The comment of Charles Hayfron-Benjamin, JSC over the question of non-compliance with article 33 (4) in his dissenting judgment in the case of *Edusei v. A-G* is pertinent:

The High Court then, though [it] has been invested with jurisdiction, there is no method whereby that court can be approached in human rights matter. I think that the policy reason behind the constitutional provision that the Rules of Court Committee should make rules with respect to the practice and procedure of the Superior Courts is to prevent human rights cases being bogged down by the notoriously unnecessary adjournments and delay procedures, now encountered in the Superior Courts which will defeat the very purposes of the Chapter 5 ... of the Constitution.¹⁰⁴

As the stewards and protectors of the democratic rights of the people, it is important that the courts founded their decisions on the human rights provisions of the Constitution and other related legislation. The example can be set by the superior courts and then followed by the inferior courts. The courts need to see themselves as the last bastion of hope for a successful implementation of democracy and the guarantee of human rights in Ghana. It is therefore crucial that it adopts an activist,

required in the interest of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of other persons.”

¹⁰² A human rights activist and lawyer, at his office, Accra in May, 1997.

¹⁰³ Article 33(2).

¹⁰⁴ Bimpong-Buta, *supra* note 78 at 20.

bold and unbiased involvement in seeking to uphold as sacrosanct the human rights provisions in the Constitution.

IV: The Commission on Human Rights and Administrative Justice (CHRAJ)

A: Its Mandate

The Commission on Human Rights and Administrative Justice¹⁰⁵ is established pursuant to Chapter 18 (articles 216-230) of the 1992 Constitution, and the Commission on Human Rights and Administrative Justice Act, 1992, (Act 456). The Commission represents the final mechanism put in place, not only to protect human rights, but also to promote them. It exercises concurrent jurisdiction with the High Court to decide on issues relating to human rights.

The Commission's mandate is spelt out in article 218 of the Constitution and section 7 of Act 456. It covers investigation of: (a) complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties;¹⁰⁶ (b) complaints concerning the functioning of the Public Services Commission, the administrative organs of the State, the Armed Forces, the Police Service and the Prisons Service in so far as the complaints relate to the failure to achieve a balanced structuring of those services or equal access by all to the recruitment of those services or fair administration in relation to those services;¹⁰⁷ (c) complaints concerning practices and

¹⁰⁵ Hereinafter referred to as the Commission or the CHRAJ. The concept was borrowed from the Namibian Independence Constitution.

¹⁰⁶ Making a comparative study with the mandate of the Ombudsman's office, the predecessor of CHRAJ, Fui Tsikata brings out some innovations that the Commission enjoys over the Ombudsman (under the repealed Ombudsman Act, 1980 (Act 400)). Regarding the scope of work, he states that CHRAJ has a broader mandate to investigate political office holders, unlike the Ombudsman who was limited to investigating acts of the bureaucracy only. See F. Tsikata, "The Commission on Human Rights and Administrative Justice: Mission and Prospects." Paper presented at seminar on "The Promotion, Monitoring and Enforcement of Human Rights." Novotel Hotel, Accra, December 20, 1993).

¹⁰⁷ Conspicuously absent here is the operations of the BNI, the intelligence/security organ of the State. See below.

actions by persons, private enterprises and other institutions where those complaints allege violations of fundamental rights and freedoms under this Constitution.¹⁰⁸

The Commission is to take appropriate action that calls for the remedying, correction and reversal of abuses revealed in its processes through fair, proper and effective means.¹⁰⁹ The measures suggested include negotiation and compromise between the parties concerned; causing the complaint and its findings to be reported to the superior of an offending person; bringing proceedings in a competent Court for a remedy; or to restrain the enforcement of such legislation or regulation which offends the Constitution or the rights of the complainant.¹¹⁰ Apart from paragraph (ii) which is in fact an expansion of section 18 (1) of Act 456,¹¹¹ the rest of the paragraphs in article 218 (d) and section 7 (1)(d) conflict with section 18 of Act 456. The said section 18 (1) states, *inter alia*:

Where after making an investigation under this Act, the Commission is of the view that the decision, recommendation, act or omission that was the subject matter of the investigation amounts to a breach of any of the fundamental rights and freedoms as provided in the Constitution [etc] the Commission shall report its decision and the reasons for it to the appropriate person, Minister, department or authority concerned and shall make such recommendations as it thinks fit and the Commission shall submit a copy of its report and recommendations to the complainant.

Section 18 (2) further states that the Commission can take the appropriate person, authority or department to court if no response to the report and recommendations sent is received within 3 months. However, when one considers article 218 (d)(i-iv)/section 7 (1)(d)(i-iv) closely, it is clear that the Commission can proceed immediately to court without having to wait for a response within the 3 month stipulated period. This view is in light of the fact that the CHRAJ has arbitrated in cases¹¹² without exhausting the 3 month wait-and-see period. The rest of the

¹⁰⁸ The innovative mandate of the Commission regarding the ability to sue a private enterprise for breach of rights is already dealt with above.

¹⁰⁹ Article 218 (d), and section 7 (1)(d) of Act 456.

¹¹⁰ Paragraphs (i)-(iv) of Article 218 (d), and section 7 (1)(d) of Act 456. It is to be noted that the provision says "including" which is to say that the Commission has a wide discretion here to adopt any other measures that it thinks are "fair, proper and effective" to rectify the abuses detailed before it.

¹¹¹ Respecting the procedure to be adopted after investigation by the Commission.

¹¹² In fulfilment of its mandate under article 218 (a) and s. 7 (1)(a). See eg., Case No. CHRAJ/561/93 and Case No. CHRAJ 44/94 in which parties were invited for discussion after the Commission had studied the complaint of the petitioners. CHRAJ, *The Commission on Human Rights and*

functions of the Commission set out in section 7 (1)¹¹³ and article 218 should be caught by section 18 of the Act. Yet, the Commission has felt itself bound by the said section 18 and expressed reservations about it, thinking that it limits its effectiveness.¹¹⁴ It is my view that it will be a better idea for the Commission to seek to have its decisions enforced directly as contended in its first report.¹¹⁵

B: The Kwesi Pratt, Jnr Case - A Critique of CHRAJ

The Kwesi Pratt, Jnr. case involves a petition submitted by Kwesi Pratt, Jnr, a renowned human rights activist, journalist and politician. He called for an investigation by the Commission into the "disappearance" of about 500 people during the PNDC regime.¹¹⁶ This petition was, however, turned down by the Commission for three reasons. First, that it contravened section 12 (6) of Act 456¹¹⁷ since the petitioner was not an interested party. The Commission based its decision on section 13(2)(b)(iii) of Act 456 which states that the Commission may refuse to investigate or cease to investigate any complaint if it considers that the complainant does not have sufficient personal interest in the subject matter of the complaint. The Commission could not entertain an application *in abstracto* or what is called an *actio popularis*. The second reason was that the complainant was barred under section 13 (2) for bringing the case out of time.¹¹⁸ Finally, it was the Commission's view that its

Administrative Justice First Annual Report (1993-1994) (Accra: Safeway Printing Press Ltd, 1994) at 43.

¹¹³ These other functions include: (e) "to investigate allegations that a public officer has contravened or has not complied with a provision of Chapter Twenty-four (Code of Conduct for Public Officers) of the Constitution; and (f) to investigate all instances of alleged suspected corruption and the misappropriation of public moneys by officials and to take appropriate steps, including reports to the Attorney-General and also the Auditor-General, resulting from such investigations."

¹¹⁴ Interview with the Commission at his office, Accra, March 1996. (Notes on file with the author).

¹¹⁵ CHRAJ Report (1993-1994), *supra* note 112 at 2.

¹¹⁶ CHRAJ Ruling on Investigations into Extra-Judicial Killings under PNDC. 23 September, 1994; M. Oquaye, "Human Rights and Conflict Resolution under the Fourth Republic: The Case of the Commission on Human Rights and Administrative Justice." (Unpublished. Copy on file with the author). See details of the disappearance issue in K. Pratt, "Let's Find Them," (July-Sept 1993) Vol.1 No.3, *Ghana Human Rights Quarterly* at 10.

¹¹⁷ Which provides that "where a person by whom a complaint might have been made under this Act has died or is for any sufficient reason unable to act for himself, the complaint may be made by his personal representative or by a member of his family.

¹¹⁸ S. 13 (2) of Act 456 states that: The Commission may refuse to investigate or cease to investigate any complaint if the complaint relates to a decision, recommendation, act or omission of which the complainant has had knowledge for more than twelve months before the complaint is received by the Commission."

functions and powers under the Constitution and the enabling Act precluded it from acting as the proper forum to conduct broad investigations into cases of disappearances and extra-judicial killings since 1982.

My reaction to the first holding is that an individual or NGO need not be a victim or be connected to a victim before he, she or it could be involved in human rights protection work with the Commission. In the case of human rights, what affects one directly affects all indirectly. That should be the rationale to determine who should participate in complaint filing. Indeed, under CHRAJ's mandate, "any individual or a body of persons whether corporate or unincorporated," can make a complaint before it.¹¹⁹ This seems, on the face of it, to indicate that there is no limit as to who can make a complaint before the Commission. However, clause (6) of the same section stipulates that "where a person by whom a complaint might have been made under this Act has died or is for any sufficient reason unable to act for himself, the complaint may be made by his personal representative or by a member of his family¹²⁰ or other individual suitable to represent him." Reading the two clauses together indicates that "any individual" in clause (5) does not only refer to a victim but anybody else. It is perhaps "the body of persons" that is not limited since there is another clause or provision that qualifies that phrase. Yet still, the definition of the last category of complainants in clause (6) is left to the discretion of the Commission. This is where the CHRAJ should have considered, *inter alia*, the complainant's interest and commitment as a renowned rights activist, a respected journalist and a personal friend to some of the victims to entertain his petition.¹²¹

¹¹⁹ Section 12(5) of Act 456.

¹²⁰ As defined under section 27 of the enabling Act.

¹²¹ However, the Commission based its decision on section 13(2)(b)(iii) which states that the Commission may refuse to investigate or cease to investigate any complaint if it considers that the complainant does not have sufficient personal interest in the subject matter of the complaint. It is contended that this is a retrogressive step in the Act. It may be subject to abuse by a Commission that panders to the wishes of the government to deny a hearing to critical cases of rights abuse on the flimsy grounds of lack of personal interest. But human rights activism is not provoked by parochial personal interest but for the sake of humanity in general. The extension of this provision to other aspects of the Commission's work will present major stumbling blocks since it can be invoked to deny hearing to other petitions.

It is my suggestion that the Commission should use its discretion to introduce the *amicus curiae* concept to allow interested parties and groups to become more involved in its sittings.¹²² The significance of *amicus curiae* intervention lies in the fact that *amici* are allowed to be involved in a case where the judicial forum believes that the case is of important public interest. Also, they help provide detailed analysis on points of law or supplement them for the parties. They may discuss the broader implications of decisions that parties may consciously or unconsciously fail to address. In addition, they collate expert knowledge and expertise as well as provide scholarly exposition by supplying detailed legislative or jurisprudential history on the subject in issue.¹²³ *Amici* can also suggest issues of fact to the court.

Thus, instead of having to call informants to provide the necessary information it requires under section 15 of the Act, the Commission can use its discretion to allow credible rights activists to act as *amicus curiae* by generously interpreting the "other individual suitable to represent him" clause to that effect. This will help develop the jurisprudence on who can represent whom. Factors that may have to be considered should include the ability, interest and readiness of the victims' family members to testify. They may not be literate, be afraid to testify on behalf of their relative or may think that they just do not have the expertise or enough facts to make a complaint and subject themselves to cross-examination and other legal technicalities. In such a case, an *amicus* can be allowed to testify. Such a person should be a person of credibility and with expert knowledge of the issues at stake.

It is also suggested that the human rights committee of the GBA become seriously involved in the *amicus curiae* project by not only representing victims on questions of law but also training other human rights NGOs to be involved in this exercise. This is in view of the fact that there are no fetters in the way of NGO participation in the

¹²² This concept was developed out of Roman law and incorporated into common law due to the then common law position that "parties to a controversy shall have the right to litigate the same, free from the interference of strangers": *Consolidated Liquor Corp. V. Scotello & Nizzi*, 155 P. 1089, 1093, 21N.M. 485, 494-95 (1916). cf. Dinah Shelton, "Nongovernmental Organizations in International Judicial Proceedings," (1994) Vol.88, *American Journal of International Law*, 611 at 616.

¹²³ *Ibid* 618.

operations of the Commission. NGOs are supposed to register as corporate bodies at the Registrar-General's office. But their registration is not relevant to give them the *locus standi* to make complaints before the Commission. At least in one instance, a petition by the TUC on behalf of the victims of the Kume Preko demonstration was entertained by the Commission.¹²⁴ In the view of the Commissioner, NGOs act as the bridge between the Commission and victims by drawing the latter's attention to abuses.¹²⁵

The second holding, in my view, was equally faulty. One must assume that the limitation section applies to cases that petitioners and informants have been aware of since the coming into operation of the Commission, not before. In other words, that time would begin to run against the complainant and informant from the time of the inception of the operations of the Commission, but not before. To apply it otherwise is to limit the Commission's jurisdiction unduly. Regarding the third holding, one is not sure if the CHRAJ thought its jurisdiction did not cover this case or whether it decided to decline jurisdiction due to the magnitude of the task involved in the undertaking.¹²⁶ A narrow interpretation of article 218 (a) and section 7 (1)(a) would absolve CHRAJ of jurisdiction since it refers to acts committed by "a public officer" but not "public officers." But a broader interpretation can be applied to cover "public officers" or people acting under the authority of a public officer. It is my view that the Commission adopted a tactful way of steering away from a politically sensitive issue. Moreover, it was probably worried by the sheer magnitude of the work involved. The Commission cannot order the creation of a commission of inquiry, but would have to do justice by deciding to delve into each case of a purported disappearance. The Commission is already bogged down with too many cases and it still takes new ones. One can also say that the Commission is limiting its own mandate by involving itself in an excessively positivistic and legalistic analysis of jurisdiction.

¹²⁴ Even though it is being challenged by the Attorney-General. See below.

¹²⁵ Interview with him on relationship between NGOs and the Commission, *supra* note 114.

¹²⁶ The latter reason came out in interview with the Commissioner. *Ibid.*

On the whole, the Commission seems to have expressed some timidity regarding the way and manner in which it has addressed some politically sensitive cases brought before it. One equally important case is CHRAJ/GAR/30-43/94. The petitioners asked the Commission to restore to them a house which they claim was bought and gifted to them by their father, J.K. Siaw, before his assets were confiscated in 1979 during the AFRC era. Petitioners also claimed for refund of all rent collected during the period of confiscation. After investigation, it was found that the house lawfully belonged to the petitioners by way of gift *inter vivos*, and by virtue of s.35 (2) of the Transitional Provisions they were entitled to restoration of the said property. However, the second order was refused on the grounds that "that would have amounted to a declaration that the confiscation was wrongful, a declaration which the Commissioner had no power under section 35 (2) to make."¹²⁷ With due respect to the Commission's decision, this reasoning is wrong for nowhere in the Transitional Provisions is such a jurisdictional limitation imposed on the Commission. If denial of rectification can be justified at all, such denial should not be based on whether the confiscation was wrongful. After all, if the confiscation was not wrongful in the first place, it would not have been in the power of the CHRAJ to deconfiscate the property. In fact, that is the import of that particular section: to determine if the act was wrongful and then to restore the property.

Some other provisions of Act 456 which inhibit effective fulfilment of the mandate of the CHRAJ include the provision in section 13 (a) that CHRAJ may refuse to investigate or cease to investigate any complaint if under the existing law or administrative practice there is adequate remedy for the complaint, whether or not the complainant has availed himself of it. This provision is confusing considering the fact that CHRAJ has concurrent jurisdiction with the High Court to decide upon human rights cases. Therefore, the question is whether or not it can turn down an application on the grounds that the complaint must go to the High Court or some other forum first. One is not sure if this provision influenced the Commission in its decision in the Kwesi Pratt, Jnr case in which it advised the petitioner to try a

¹²⁷ CHRAJ, *supra* note 112 at 47.

commission of inquiry. As the provision stands now, it seems to create the impression that CHRAJ has the status of an international human rights commission or tribunal, such as the African Commission, whose admissibility requirement calls for exhaustion of local remedies before a petition can be launched. This is a provision that can be used by the government to challenge the jurisdiction of CHRAJ over certain cases that have the potential to embarrass the government.¹²⁸ Another danger with this provision is that where an adequate remedy exists, but is not offered effectively, the complainant may be barred from making a new claim to CHRAJ.

C: CHRAJ's Activities

As of the end of 1994, when the Commission presented its first report to Parliament,¹²⁹ it had received a total of 3,197 complaints.¹³⁰ Of these, labour-related disputes covered 62%, a reflection of the impact of the economic liberalisation policies being pursued by the current government which has left workers at the mercy of employers and investors.¹³¹ It is also interesting to note the percentage of cases brought against private individuals and organisations out of the labour-related cases: 55.5%. This shows the level of abuse that is perpetrated by non-state actors and the importance that should be attached to promoting human rights "horizontally." During the 1995 period, an increase of 20% in cases was recorded, bringing the total number of cases to 4012.¹³² This shows an increased awareness of the existence of the CHRAJ. It may also reflect the fact that the level of accessibility occasioned by the opening up of more offices at the district level has helped open means of justice to more people; and also increased confidence in the operations of the CHRAJ. There was, however, a decrease in labour-related cases in 1995 from 62% to 42.6%, although on the whole labour issues still top the list of cases brought before the

¹²⁸ See eg., below, regarding attempts by A-G to wrestle jurisdiction from the CHRAJ.

¹²⁹ As required under article 218(g) and section 7(1)(h) of Act 456.

¹³⁰ CHRAJ, *The Commission on Human Rights and Administrative Justice Second Annual Report* (1995) (Accra: City Printers, 1996) 180 at 1. Out of these 31%, representing 1004 cases, were disposed of.

¹³¹ The Commissioner describes this situation as "distressing." *Ibid* 15.

¹³² Together with cases carried over from the previous year, the total of cases that were before the Commission in 1995 was 6,538. Of these 3,762 were closed, representing 58% of the total. This shows that on the whole the Commission has handled a total of 7,542 cases since its inception and disposed of 4,766. CHRAJ, *supra* note 112 at 17.

Commission. The number of petitions against private persons also continued to dominate at 46.5%, with private companies and enterprises comprising 13.8% of respondents. The Police, Prisons and Fire Service accounted for 7% cases, including cases of unlawful arrest and detention by police officers.¹³³

An important work which the Commission considered as part of its research mandate was the nationwide prison inspection it conducted in 1995. The programme was aimed at determining, *inter alia*, the suitability of prisoners' accommodation, feeding, medical and health facilities as well as seeking to help persons who have been in remand for long periods of time without trial and those in prison in breach of the 48-hour detention limit without appearance as stipulated under the Constitution. The project was commissioned in March 1995 and commenced in August of the same year. The report and recommendations were published in March 1996. This was a brave and important effort by the Commission due to the deplorable conditions that prisoners face.¹³⁴ However, it need be noted that the Commission's finding that Ghanaian prisons contained no political prisoners were found in the prisons is not substantiated.¹³⁵ Also, the Commission did not extend its inspection to the Bureau of National Investigations (BNI) Headquarters, and Gondar Barracks which acts as an extension of the BNI¹³⁶ torture wing. This omission further confirms the limitations that are placed in the way of the Commission to fulfil its entire mandate.

¹³³ 28 such cases were brought to CHRAJ headquarters in Accra.

¹³⁴ Previous attempts by journalists and others concerned with prisoner rights have been refused by the former Minister of Interior, Lt. Col. Osei-Wusu, on the grounds that "the prisons are not centres for tourist attraction."

¹³⁵ At the seminar organised to mark the 5th anniversary of CAPSDH, an established human rights NGO in the country, one of the presenters, George Naykene, a former convict on political grounds, exposed the fact that there are at least 10 political prisoners still in jail at the Nsawam Medium Security Prison. Also during an interview with Adam Hamidu, also a former detainee, it came out that there are at least 3 people still in detention who are personally known to him. They include one Capt. Ampofo who was cited as early as in 1994 as being in political detention at Nsawam Prison: (1994) Vol.2 No.2 *Ghana Human Rights Quarterly*, at 2. Contrast CHRAJ, "The Report of the Inspection of the Country's Prisons, Prison Camps and Police Cells." (March 1996) at 16, which indicates that there were no political detainees in Ghana, with the report in the *Free Press* (March 22-28, 1996), at 1 and 12 in which the reporter mentions the fact that while on remand at the James Fort Prison he encountered political detainees there. Also, during the "Seminar on Reporting on Human Rights Development and Abuse" (18-22 March, 1996) in which he lectured on "Techniques and Approaches to Human Rights Reporting," Kwesi Pratt mentioned that there were some alleged coup plotters in a BNI detention camp.

¹³⁶ See some analysis on the activities and operations of the BNI below.

Another important function of the Commission is the promotion of human rights. The mandate is "to educate the public as to human rights and freedoms by such means as the Commissioner may decide, including publications, lectures and symposia."¹³⁷ CHRAJ has been able to organise workshops and seminars for different strata of society and for governmental organisations, including the police, army, prisons, the judiciary, the civil service, etc. However, what is discerned in the various presentations made at these workshops is that they do not allude to the fact that Africa has its own history and tradition of rights. The presenters rather always seek to trace the origin of rights from the Enlightenment, and the French and American Revolutions. The only connection drawn to Africa is reference to the usual emphasis by African leaders on the importance of economic, social and cultural rights. This approach tends to reinforce the politically repressive view that human rights is a "foreign" imposed concept. It is high time the concept of human rights is indigenised and its proper links to development highlighted and brought home to the ordinary people. This is one of the principal missions of the theory of community emancipation.

The Commission's relationship with human rights NGOs seems to be quite positive. As of 1997 it had organised at least two workshops for local and international human rights NGOs operating in Ghana.¹³⁸ Among the issues discussed at the first workshop were how to involve the human rights NGOs in the operations and activities of the

¹³⁷ Article 218 (f) and s. 7 (1)(g) of Act 456. This responsibility of promoting human rights is shared with another institution set up by the Constitution, solely for promotional purposes: the National Commission for Civic Education (NCCE), under Chapter 19 (articles 231-239). Its functions include: creating and sustaining within the society the awareness of the principles and objectives of the Constitution as the fundamental law of the people of Ghana; and to formulate, implement and oversee programmes intended to inculcate in the citizens of Ghana awareness of their civic responsibilities and an appreciation of their rights and obligations as free people. See article 233 and in general, The National Commission for Civic Education Act, 1993 (Act 452), esp. s.2 regarding its functions. The NCCE has organised a number of joint activities with the CHRAJ and many are planned. Interview with the Commissioner for the CHRAJ, *supra* note 114.

¹³⁸ I had the opportunity to attend one organised for Ghanaian NGOs at the Teachers' Hall in Accra, 2-4 April, 1997, and the African Charter on Human and Peoples' Rights – An Operational Review Workshop, at the British Council Hall, Accra, 19-23 May, 1997. The latter workshop involved participants of NGOs, national human rights institutions and the various Bar associations from the West African sub-region. It was organised by the GBA and sponsored by the British Council.

CHRAJ and how the CHRAJ can help make the activities of human rights NGOs more effective by, for example, helping to co-ordinate their activities. This trust and a working relationship, however, needs be further developed to enhance common effectiveness.

V: Stumbling Blocks to the Attainment of Human Rights and Democracy in Ghana

Although there are “formal” democratic structures in place in most African states, and certainly in Ghana, most institutions of the state are eventually used to frustrate the constitutional provisions meant to protect and promote human rights and democracy. As a result, the hope of globalisation to promote democracy and human rights, and in the context of the theory of community emancipation, to restore the development structures of African states and return the marginalised entities on them, seems likely to remain an unfulfilled dream. “Democracy” only invokes an empty gesture to legitimise undemocratic processes as African governments have adopted subtle and sophisticated, and sometimes sinister, ways to continue the culture of repression. This is as a result of the fact that economic democracy has been emphasised over and above human rights in order to promote market reforms. This form of democracy focuses on freedom of movement of goods, services, capital and persons, the right to property and freedom to contract. It is best implemented by limiting their enjoyment to the national level by involving the people only in the casting of votes during periodic elections. This form of democracy disregards abuse of rights if they fall outside the range of the types mentioned above. Abuse of rights is also tolerated if it is to curb the exercise of rights that are deemed not to be in the best interest of the market. It does not encourage a form of citizen participation at the grassroots level that will allow the people to take their destinies into their own hands.

Taking the case of Ghana, I attempt below to expose and discuss some of the structures and institutions which remain in place, have recently been put in place or have been “reformed” in order to upset attempts by emerging individuals and groups to expand the limited parameters offered for the exercise of rights. These institutions

and structures of the state are those that support the ruling group to maintain its hegemony on the dependence structure and are in conflict with the emerging progressive forces, the latter of which are vying to displace them.

A: The Bureau of National Investigations (BNI)

In Ghana, the BNI represents a fundamental threat to the development of a human rights culture in the country.¹³⁹ Initially established to do classical intelligence work as a state security agency, the Military Intelligence and Special Branch security organisations were replaced with the BNI by the PNDC regime and given extra powers and functions that are far in excess of classical intelligence work. While not established pursuant to any decree or law of the PNDC administration, the BNI was given extended mandate to inflict serious human rights abuses on target opponents of the government, the so-called “enemies of the revolution.” These ranged from intimidation to torture and political assassinations. The number of “disappearances” in the country during the PNDC era which has been documented at roughly 500, is tied mainly to the handiwork of the BNI.¹⁴⁰

The BNI is composed of three wings. The Intelligence wing is committed to gathering information on persons who are likely, or are considered, to be a threat to the government. All critics of government policies, even in the current democratic dispensation, are alleged to be on BNI file, including elected opposition members of Parliament. During the PNDC era, potential coup-plotters and critics of the governments were the principal targets. Under the current democratic direction, more emphasis is placed on the activities of the opposition in its attempt to win political support and unseat the incumbent. During the transition to democracy the intelligence wing was used to spy on, and track down, vociferous critics of the government and in general to facilitate the government’s stage-managing of the transition process. The second wing of the BNI is the Electronic Surveillance section which allegedly

¹³⁹ Information on the BNI was offered, in part, by a former operative of the organisation. (Notes on file with the author).

¹⁴⁰ Interview with Kwesi Pratt, Jnr., March 1996. (Notes on file with the author). Also see K. Pratt, Jnr., *supra* note 116.

involves itself in phone and fax tapping, and accessing local and international media to gather information on the reaction of government policies in breach of such rights as the right to privacy and freedom of expression. The two wings described above constitute the research department which are linked to the office of the former PNDC member responsible for Foreign Affairs and National Security, Capt. Kojo Tsikata.¹⁴¹

These sections of the BNI report to the intelligence headquarters at the Castle, Osu and BNI Headquarters. Based on their reports of the members, the third wing of the organisation, the commando unit, are dispatched to commit various atrocities against "the enemies of state." These operatives are given special training to use "strong arm tactics" to torture -- physically, mentally, emotionally, etc -- in order to interrogate and extract information from suspects; to arrest, detain, kill, maim, intimidate and silence. A final unit is the Commando-Intelligence section which is based at the Castle.¹⁴²

The concern of human rights activists to the activities of the BNI operatives is that there is no limit to the exercise of their powers. Their activities are not subject to legal/judicial control. They can therefore act abusively in their assignments without being held legally responsible or even disciplined. They are also above check by the ordinary security forces because they do not need any warrant to operate. The police themselves can be targets of commando abuse. For this reason, when one becomes a commando or BNI target, one may be forced to seek protection outside the country as the safest measure. The inability of the police, army and prisons services to control the BNI operatives is compounded by the fact that these security services depend on the BNI for information to enhance their operations. Indeed, the Criminal Investigations Department (CID) of the police service is now merged with the BNI¹⁴³ and brought under its control. This act constitutes a more serious threat to the ability of the police to offer protection to the individual under Chapter 5 of the Constitution

¹⁴¹ His office is referred to as the "Blue House" and is separate and distinct from the Ministry of Foreign Affairs which has a separate budget, as do other security agencies such as the police, military, etc. See *The Ghanaian Chronicle* Week-ending July 11, 1993 at 1.

¹⁴² These are all trained in Cuba.

as it enables the BNI to infiltrate the latter's camp and gather information about the possible protection they may offer a potential "enemy" of the government.

It is important to note that not much has changed at the BNI under the current democratic dispensation in Ghana. The organisation remains the repressive and brutal BNI that existed under the PNDC. There is no denying that some of the brutal means of suppression have waned, but they have not stopped.¹⁴⁴ The BNI has admittedly become slightly more accessible, but it still remains an essentially closed organisation.

Indeed, the legal basis of the operations of the BNI is shrouded in mystery. The Constitution provides that

No agency, establishment or other organisation concerned with national security shall be established except as provided for under this Constitution.¹⁴⁵

Yet the establishment of the BNI is not provided for in the Constitution. The security forces mentioned are the Police Service¹⁴⁶, the Prisons Service¹⁴⁷, and the Armed Forces.¹⁴⁸ However, the Constitution calls for the setting up of a National Security Council (NSC). The membership and functions of the NSC coincide with that of BNI in certain respects. For example, the composition of the NSC includes Director of External Intelligence; the Director of Internal Intelligence and the Director of Military Intelligence.¹⁴⁹ The functions of the NSC include

- (a) considering and taking appropriate measures to safeguard the internal and external security of Ghana;
- (b) ensuring the collection of information relating to the security of Ghana and the integration of the domestic, foreign and security services relating to it so as to ensure the security services and other departments and agencies of the Government to co-operate more effectively in matters relating to national security.¹⁵⁰

¹⁴³ The former BNI boss, Peter Nanfuri is now the Inspector-General of Police.

¹⁴⁴ All confirmed during interviews with Kwesi Pratt, Jnr., Akoto-Ampaw and Kwabena Essem, the Press Secretary of the NPP and a renowned rights activist. (Notes on file with the author).

¹⁴⁵ Article 85.

¹⁴⁶ Articles 200-204.

¹⁴⁷ Articles 205-209.

¹⁴⁸ Articles 210-215.

¹⁴⁹ Article 83(1)(f)-(i). One can also include paragraph (e) which covers the Commissioner of Police responsible for Criminal Investigations Department. This is in light of the fact that the BNI and CID are now merged.

¹⁵⁰ Article 84.

These functions cover those that are supposed to be performed by the BNI as a normal intelligence/security agency of the state. However, its major role has been devoted to the protection of the government in power. And this job is seen to be best done by hunting down and suppressing all those who are considered a threat to the government.

B: The “Macho Men” and the ACDRs

Apart from the BNI, there also exist surrogate organisations like the so-called “macho men” and the Association of Committees for the Defence of the Revolution (ACDRs). Their functions are no different from the commandos, although performed in a less organised and less coordinated fashion. Incidentally, though the ACDRs are supposed to act as a form of “vigilante group” and a para-military organisation, they are registered, like the 31st December Women’s Movement, as NGOs. In reality, they are government agencies behaving as NGOs – GONGOs – in order to divert attention from their political bias. In the first budget under the 4th Republic, the Committees for the Defence of the Revolution (CDRs) and Civil Defence Organisations (CDOs), both defunct organisations under the Constitution, were allocated 3.1 billion and 200 million cedis, respectively.¹⁵¹ The BNI was allocated 4 billion cedis, about half of which amount went to the office of the head of National Security at the “Blue House.”¹⁵² The ACDRs and the “macho men” were allegedly responsible for the killing of 8 people during the historic “Kume Preko” demonstration organised by the Alliance For Change (AFC) and held in central Accra on May 11, 1995 to protest the introduction of the Value-Added Tax (VAT) which was never debated in Parliament.

C: The Anti-CHRAJ Campaign by the Executive

It is a positive development that the Commission, which it was feared would be a mere tool in the hands of the government, has come to win the confidence of the

¹⁵¹ Like the Transitional Provisions, this budget was smuggled in two days before the dawn of the 4th republic and for over 6 months after Parliament assumed seating, the budget was never debated: “Defunct CDRs get 3 billion cedis,” *The Ghanaian Chronicle* Week-ending July 11, 1993 at 1. This is contained in the Appropriation 1993 Financial Year Law document, PNDCL 314.

¹⁵² Incidentally, a similar amount was budgeted for all the hospitals in the country combined.

people. On the political front, this is particularly true with reference to the manner it has conducted investigations into alleged corruption exposed by the private press against key government officials during the PNDC era.¹⁵³ Adverse findings were made against two of them and this was hailed as a victory for democracy. The government attempted to discredit the CHRAJ report and vindicate the respondents by issuing a so-called "White Paper." The White Paper purported to override the decision of the Commission and also suggested that the Commission punish those who make frivolous allegations against public officers. The infamous White Paper received general public condemnation. In his reaction to the White Paper, the Commissioner reiterated the fact that:

The Commission can find nothing in the Constitution or any other law to justify the Government issuing a White Paper on the findings, recommendation and directives of the Commission as contained in its reports. The Commission conducted its investigations pursuant to Article 218 (e) of the 1992 Constitution and sections 7 (1)(e) and (f) of the Commission of Human Rights and Administrative Justice Act 1993, Act 456 as well as Article 287 of the Constitution. Where the Commission is exercising its statutory functions, as it did in these investigations, neither the Constitution nor any convention or administrative practice justifies the release of a White Paper which has a legal and technical connotation. Such a document would have been appropriate if the President had appointed, by Constitutional instrument, the members of the Commission to investigate the said allegations of corruption. The Commission however concedes that Government is entitled to comment on its report as provided for in section 18 (2) of Act 456. The Commission therefore treats the "White Paper" as the comments of Government on its reports.¹⁵⁴

This was an attempt by the government to cow CHRAJ in the performance of its functions, to the extent of inferring that it was allowing itself to play into the hands of the opposition.¹⁵⁵ A related effort to stifle the Commission's work was the government's attempt to frighten off potential informants by asking the CHRAJ to punish those whose information is found to be groundless. The Commissioner's public response was designed to counter the veiled attempt by the government to overturn the CHRAJ's decisions. However, it would seem that part of the Commissioner's response was inappropriate in that it leaves open the possibility that

¹⁵³ They include the then *de facto* Prime Minister, P.V. Obeng, Col. (Rtd) E.M. Osei-Wusu, Dr. I.K. Adjei-Marfo, and Mr. Ibrahim Adam.

¹⁵⁴ "CHRAJ reacts to Govt White Paper," *Daily Graphic*, April 28, 1997 at 11.

¹⁵⁵ Please refer to the "White Paper" report. It mentioned that it does not understand why the CHRAJ report was issued to coincide with the 1996 elections. The reaction of the Commissioner to this insinuation of bias in favour of the opposition is as follows: "The observation in the "White Paper" that the Reports were issued shortly before the election is most unfortunate. The Commission is a non-

the Commission could punish informants whose information may lack enough evidence to establish liability.¹⁵⁶ Even as a hint, this could have a dangerous chilling effect upon legitimate complaints.

Another subtle attempt to disable the effective functioning of the Commission is to starve it of the needed logistical support.¹⁵⁷ This problem is related to the fact that CHRAJ is not a financially autonomous institution. It has to pass its budget through a Parliamentary Committee for approval (which is not guaranteed) before funds will be issued it by the Ministry of Finance and Economic Planning.¹⁵⁸ The Commissioner contended in CHRAJ's first report to Parliament that the "hearings and budgetary cuts undermine the independence of the Commission as provided for in Article 222 of the Constitution."¹⁵⁹ This was repeated in its second report in which the Commissioner re-emphasised the point that "the independence of the Commission can be fully realised only if its budget is submitted directly to Parliament for vetting and approval."¹⁶⁰ Facilitation is a key aspect of the human rights duties imposed on governments since it acts as a catalyst to enable governments to fulfil their obligations to protect, promote and respect human rights. Therefore to place such stumbling blocks in the way of CHRAJ amounts to an abdication of the responsibility on the part of the government to promote human rights under the Constitution.

partisan and independent institution and is not motivated by any political considerations in discharging its functions. The reports were issued at the particular time because they were ready." *Ibid.*

¹⁵⁶ According to the Commissioner, the Commission does not have jurisdiction to protect the rights of victims of false allegations and that the proper forum is the courts. But he first remarked: "It is to be noted that those persons were private persons and it is the considered view of the Commission that, it can only investigate and take the necessary action against public officers as defined by the Constitution and not private individuals." One is at a loss as to which portion of the enabling Act or Chapter 18 of the Constitution the Commissioner is referring to. It looks as if the Commissioner is confusing punishing those against whom adverse findings are made with informants who make unfounded allegations before the Commission. *Ibid.*

¹⁵⁷ This issue was expressed during informal discussion between some of the lawyers who attended the review workshop on the African Charter and a lawyer at the Commission who conceded to that fact.

¹⁵⁸ This is in spite of the fact that the expenses of the Commission, including salaries and allowances are charged on to Consolidated Fund. Interview with the Commissioner, *supra* note 114.

¹⁵⁹ CHRAJ, *supra* note 130 at 2.

¹⁶⁰ CHRAJ, *supra* note 112 at 3.

Perhaps the greatest stumbling block is that the Commissioner is not immune from harassment and a possible threat to his life from the BNI.¹⁶¹ This fear, which may be substantiated by the murder of the three High Court judges and a retired army officer, is probably responsible for the refusal of the Commission to entertain and investigate the petition of Kwesi Pratt, Jnr., discussed above.

However, it is encouraging to note that the CHRAJ has overcome some of these hindrances by taking the government to court.¹⁶²

D: The Attorney-General

It is quite an irony that the Attorney-General should be cited as a hindrance to rights promotion and protection in the country. The Constitution mandates the A-G to act as the principal legal adviser to the Government. He is responsible for the initiation and conduct of all prosecutions of criminal offences, and also for the institution and conduct of all civil cases on behalf of the State.¹⁶³ Yet, throughout his tenure of office, the A-G has more often than not acted as the lawyer for the NDC party rather than for the government on behalf of the nation as a whole. One can substantiate this claim, *inter alia*, by reference to the nature of the cases the Attorney-General has sought to challenge or file in court.

A typical example is the case of *A-G v. CHRAJ*. Here, the A-G has sought to challenge the ability of the Commissioner to exercise jurisdiction over a petition brought by the TUC against the Minister of Interior for negligence and gross dereliction of responsibility over the Kume Preko march. An initial objection regarding the competence of the Commission to entertain the petition which was raised by the A-G's office was turned down by the Commissioner. Consequently, CHRAJ gave notice to the Minister of Interior to appear before it. Among the reasons for the challenge is that the powers CHRAJ wants to exercise are actually vested in

¹⁶¹ Interview with former BNI operative, *supra* note 139.

¹⁶² See under the next sub-section.

¹⁶³ Article 88 of the Constitution.

Parliament under article 82 of the Constitution.¹⁶⁴ It is submitted that the position of the A-G is wrong because “public officer” as defined under Chapter 24 of the Constitution is “a person who holds public office.” Such persons include a Minister of State or Deputy Minister.¹⁶⁵ Furthermore, section 14(1) of Act 456 does not limit who can appear before the Commission. It states that

Where the Commission decides to conduct an investigation under this Act, it shall give the authority or person concerned and to any other person who is alleged in the complaint to have taken or authorised the act or omission complained of, an opportunity to comment on any allegations contained in the complaint and the representative of the authority or person concerned shall submit his comments within such time as the Commission may specify.

Also, section 15(1) stipulates that the Commission may require “any person who, in its opinion, is able to give any information relating to a matter being investigated by the Commission” to provide such information. Clause (2) further mandates the CHRAJ to summon such a person and examine him on oath or affirmation. The CHRAJ also has the power to subpoena any person or any record deemed relevant to the conduct of its investigations. Such a person shall be required to disclose truthfully and frankly any information within his knowledge relevant to any investigation by the Commissioner.¹⁶⁶ The only situation where the Minister of Interior can be exempted from appearing before the Commission is where the information to be disclosed is considered an official secret.¹⁶⁷ But the present case did not concern official secrets.

The attitude of the A-G delays and frustrates the work of the Commission in the short-run. In the long-term this may cause a recourse to the use of the courts which are more pliable to the caprices of the government in power to rule on, and limit, the powers of CHRAJ. In his report to Parliament, the Interior Minister sought to defend

¹⁶⁴ Article 82 deals with the passage of a resolution by Parliament to pass a vote of censure against a Minister of State. The A-G argued further that “Other objections included the fact that so acting would infringe the principles of collective responsibility of the Cabinet as the Minister would be compelled to disclose discussions of the Cabinet in relation to the running of the Ministry. Besides, the Minister is not a public officer “subject to ordinary process of discipline and investigation as public servants in the public service.” *The Ghanaian Chronicle* May 21-22, 1997 at 12.

¹⁶⁵ Article 286(5)(d). One can dig deeper and refer to the interpretation of article 295(1) of the Constitution which defines “public office” to cover an office where the holder is paid out of the Consolidated fund. This covers members of Parliament, Ministers of State, etc.

¹⁶⁶ Article 219(1) and section 8(1) of Act 456.

¹⁶⁷ Section 15(3).

the action of the ACDRs in the “Kume Preko” demonstration saying that they formed a human chain to protect the wares of the market women from being looted by the demonstrators. This is against overwhelming evidence that the ACDRs were specifically sent out with arms to disrupt the demonstration, kidnap, torture and kill.¹⁶⁸ The attitude of the A-G and the Minister of Interior in defence of the ACDRs represents what is described as “privatised” or “surrogate” repression which is characterised as “violence,” instead of “human rights violations.”¹⁶⁹ Hence the refusal of the A-G to see the abuses perpetrated as falling under the jurisdiction of CHRAJ under article 218 (a) and section 7 (1)(a) of the CHRAJ Act. The problem with this “privatised” form of repression is that its intent is to evade detection of rights abuse from human rights monitors and it carries the implication that all sides bear an equal responsibility in the issue. That is to say, “if you do not demonstrate, we will not intervene to kill you.”

Another case between CHRAJ and the A-G involves the latter’s objection to the exercise of jurisdiction by CHRAJ under section 35 (2) of the Transitional Provisions. This involves the case of confiscation of property belonging to an army officer who was tried in absentia by an AFRC appointed tribunal. The A-G’s claim is that the tribunals were courts of competent jurisdiction and therefore CHRAJ should be restrained from investigating their actions. But the mandate given the CHRAJ under section 35(2) of the Transitional Provisions overrides the issue of forum and concentrates on whether the property was lawfully acquired before the person

¹⁶⁸ In its report on Ghana, the US State Department implicated the government in the abuses that occurred and specifically cited the Minister for Youth and Sports, E.T. Mensah, for inciting and organising the thugs to unleash the abuses on the peaceful demonstrations. This aspect of the report states: “In the year’s most disturbing development, on May 11 unknown persons fired upon peaceful demonstrators in the process of dispersing, killing four persons. At year’s end, it was still unclear who had been ultimately responsible for arming the counter-protestors, but there were credible accusations that the Minister for Youth and Sports was responsible. However, the Government failed to establish an independent commission to investigate the incident, thereby staining its human rights record.” See, US Department of State Report on Human Rights, 1995 (Ghana) at <http://www.usemb.se/human/human95/ghana.htm>. In the view of the former BNI operative interviewed, the attitude of the ACDRs is a popular strategy of the BNI. He is therefore of the view he would not be surprised to know that the BNI was behind the attacks.

¹⁶⁹ The Swedish NGO Foundation for Human Rights and International Human Rights Internship Education, *The Status of Human Rights Organisations in Sub-Saharan Africa* (<http://www.umn.edu.humanrts/africa>), at 3.

assumed a public or political office. This is the basis of the decision by the CHRAJ in the case of CHRAJ/GAR/30-43/94.¹⁷⁰ A third attempt by the A-G to limit the powers of the Commission that can be cited concerns cases it inherited from the Ombudsman's office. The A-G has argued that since the Ombudsman could only make recommendations and not enforce its decisions, its cases which have been taken over by CHRAJ should be treated in a similar fashion.¹⁷¹ This is also in clear view of s.28 of Act 456.¹⁷² These are clear-cut cases which the Attorney-General should not interpret otherwise.

One must also mention the role of the A-G in the case of *Amoo v. Electoral Commission*.¹⁷³ In a preliminary ruling on the case, it was pronounced that the A-G was not a disinterested party and that his allegiance to his party was likely to prompt bias in the case. Indeed, the Court went ahead and reprimanded the A-G's office for falsifying documents and claims to let the NDC candidate win the case. Also in the case of *Republic v. Yebbi and Avalifo*,¹⁷⁴ the A-G himself caused the accused to be locked up for two weeks, contrary to article 14 (3) of the Constitution, before the police started their investigations and subsequently laid charges. The case of the A-G is not in isolation. In another example, a Principal State Attorney is reported for writing a letter to the police to detain a suspect who had been released on bail. To add insult to injury, the letter further authorised the people to "arraign her before Court on

¹⁷⁰ Referred to above.

¹⁷¹ "CHRAJ battles AG at court," *Public Agenda* May 26-June 1, 1997.

¹⁷² Clause (1) thereof repeals the Ombudsman Act, 1980, (Act 400) and clause (2)(b) states that "Any complaint pending before the Ombudsman immediately before the coming into force of this Act may be proceeded with under, and shall be subject to the provisions of, this Act."

¹⁷³ This involved a case in which the Electoral Commission wrongly switched votes between the NDC and NPP candidates in the Ayawaso Constituency which enabled the NDC candidate to be declared the winner. The EC later realised the error it committed and issued a note declaring the NPP candidate the winner. However, the A-G's office representing the Electoral Commission, denied in an affidavit regarding the admission of administrative error by the Commission.

¹⁷⁴ The case is still before the Greater Regional Tribunal at the time of writing. It involves the alleged theft of 100 million cedis by the first and second accused persons when they were guards at the residence of the A-G during the period of the 1996 electioneering campaign. The A-G argues in the case that in his capacity as the Chairman of the Finance Committee of his party, the NDC, party moneys were lodged with him for disbursement for party activities. It was part of this money that the accused are alleged to have stolen.

three charges for six months sentence in hard labour, which I can arrange with the Magistrate.”¹⁷⁵

E: The Court System

The influence that the government wields over the courts is crucial in an assessment of the government's human rights record. It is observed that, apart from the Superior courts, the lower courts have also been used to further the government's anti-human rights agenda. For example, in politically sensitive cases, the courts are noted for dragging their feet while the defendant languishes in custody.¹⁷⁶ The way to circumvent articles 14 (3)¹⁷⁷ and 19 (1)¹⁷⁸ of the Constitution is to send the accused to court where charges are merely read to them and their pleas reserved. The accused person is then placed on remand by the order of the court and the case adjourned for an unduly long period of time. Where the suspect is arrested for the offence of treason or subversion, under section 96 (7) (a) of the Criminal Procedure Code, 1960,¹⁷⁹ as amended by the Criminal Procedure Code (Amendment Decree), 1975,¹⁸⁰ the court has greater powers to refuse bail. This is in spite of the fact that procedurally, the court is supposed to conduct committal proceedings to see if there is sufficient evidence to a charge of treason or subversion and base the decision to grant bail on that. What is more serious is that the accused in this case is not even charged, as stipulated under article 19 (1) of the Constitution. Even where committal proceedings are held, the accused person most often is committed for trial and is subsequently placed indefinitely on remand.¹⁸¹ Thus, the court can play with the

¹⁷⁵ “State Attorney Orders Detention,” (July-Sept. 1993) Vol. 1 No. 3 *Ghana Human Rights Quarterly*, at 4.

¹⁷⁶ Interview with Akoto-Ampaw, a rights activists and lawyer, at his office, April 1997. (Notes on file with the author).

¹⁷⁷ Which forbids the detention of suspects for more than 48 hours before being brought to court to be charged for a particular offence.

¹⁷⁸ This provision states that “A person charged with a criminal offence shall be given a fair hearing within a reasonable time by the court.”

¹⁷⁹ Act 30.

¹⁸⁰ NRCD 309, which imposes a mandatory duty on the court to refuse bail.

¹⁸¹ Interview with Akoto-Ampaw, *supra* note 176.

question of bail to indefinitely place a suspect in jail to suit the whim of those who tread the corridors of power.¹⁸²

This attitude of the courts in collusion with the government is one of the subtle and more sophisticated attempts being employed by the government to neutralise the reports and criticisms of local human rights NGOs; and thereby deflect and deflate the pressure of the international community and human rights NGOs that, by their mandate, express disapproval over the use of detention without trial. In their report on the status of human rights NGOs in Africa, the researchers stated:

Arresting authorities – aware of the constant refrain from human rights groups that political prisoners should be “charged or released” – increasingly respond by the use of criminal charges against political opponents, journalists and human rights activists themselves. In some countries a pliant judiciary is prepared to comply with the wishes of the executive and imprison critics of the government in a parody of due process. This has been the case in, for example, Togo, Cote d’Ivoire, Cameroon and for sometime Kenya. Elsewhere, criminal charges have been used frivolously, with no intention that the accused will ever be brought to court. Instead opposition politicians, journalists and others must labour with the threat of outstanding sedition or subversion charges. In the worst cases, the accused are refused bail and spend months or years in prison before charges are dropped.¹⁸³

This picture, expressed in an era of consolidation of democracy in Africa, applies in its entirety to Ghana although the report did not single out Ghana as one of the worst culprits. The “professional” nature of the abuses have managed to evade detection by the methodology that Amnesty International (AI) adopts in monitoring human rights abuses under its mandate.¹⁸⁴ For example, in the case of Ghana, in 1996, AI did not cite any human rights abuses in Ghana under its mandate of calling for fair and speedy trials and unconditional releases.¹⁸⁵ But the situation described above existed.

Unfortunately, in such a situation, CHRAJ may not be ready or willing to help. This position is spelt out in its decision in Case No. NR/14/95 in which a suspect who was alleged to have stolen a bicycle was remanded in custody by a District Court for 13 months and 3 weeks awaiting trial. The Commission was initially inclined to decline

¹⁸² For example, in the Tommy Thompson case, the accused was denied bail at the circuit court. When the decision was appealed to the High Court, it held that the applicant had to go back to the circuit court to re-apply for bail.

¹⁸³ The Swedish NGO Foundation for Human Rights and International Human Rights Internship Education, *supra* note 169 Chapter 3 at 1.

¹⁸⁴ See details in the next chapter on the question of methodology.

jurisdiction in the matter by virtue of section 8 (2)(a) of Act 456 which precludes it from investigating cases pending in court. It only intervened on the basis that "the court which remanded the accused in custody had since become defunct and that must have accounted for the delayed trial."¹⁸⁶ But this decision is a retrogressive step taken by the Commission regarding the responsibility entrusted it to promote and protect human rights in the country. It is my contention that the issue is not a question of jurisdiction of the court. The section says that the Commission is precluded from doing the very thing a court is doing. That is to say, one cannot send the same petition to two places at the same time. But it does not say that where a breach of human rights occurs that is not directly related to the proceedings of the case the Commission cannot intervene. In this case, the failure was the overdue detention which is in breach of articles 14 (4),¹⁸⁷ 15 (3)¹⁸⁸ and 19 (1).¹⁸⁹ It is hoped that the Commission will review this decision and not impose such undue limitations on itself.¹⁹⁰

Another way of overcoming the requirement of speedy trials is to try the case in the usual time frame and then stall it when it comes to delivering judgment. Such is the fate of the case of *Republic v. Karimu*¹⁹¹ where judgment has been adjourned five times.¹⁹² The retention of the public tribunal system is also a cause for concern for the dispensation of justice and human rights in Ghana. In an answer to a question

¹⁸⁵ See AI, *Amnesty International Reports 1996* (London: Amnesty International, 1996).

¹⁸⁶ CHRAJ, *supra* note 130 at 49.

¹⁸⁷ If a detained suspect is not tried within a reasonable time he should be released unconditionally or upon reasonable conditions.

¹⁸⁸ Separation between suspects and convicted persons in prison.

¹⁸⁹ Regarding fair hearing within a reasonable time.

¹⁹⁰ See details below.

¹⁹¹ Suit No. 1827/94.

¹⁹² A copy of the letter drafted by the accused person's counsel, Akoto-Ampaw, and addressed to the Chief Justice asking for a meeting to set a date for judgment is on file with the author. Counsel informed me that there was even the fear that the case might go for retrial and that they would raise that issue up in their meeting with the Chief Justice. The case involves a former NDC member who switched camp to NPP and who was arrested by the notorious BNI in May 1994 for conspiring to wage war against the state. He was held up in the cells of the Bureau of National Investigations (BNI) *incommunicado* and severely tortured until his case was exposed by the diligent private press. He was then immediately rushed to a magistrate court for committal proceedings and remanded in custody by an order of the court. He was to be tried the following year and because the case has caused a lot of embarrassment to the government, it has decided to dilly-dally with the judgment and let the accused suffer.

regarding the continued presence of the public tribunal system in Ghana's judicial system, Ambassador Wudu said that the jurisdiction existed only to clear the backlog of cases and that they ceased to exist 6 months after the coming into force of the Constitution.¹⁹³ But that is not entirely accurate. These Regional Tribunals have been incorporated into the traditional court structure under articles 142 and 143. The problem with them is that they are mostly headed by former chairmen of the notorious Public tribunals. Some such chairmen were actually dismissed for extortion, bribery and perversion of justice but, ironically, have found themselves reinstated under the democratic dispensation.¹⁹⁴ Yet these same people continue to act as appendages of the government in power. And judging by the fact that these tribunals are to try only "such offences against the State and the public interest," invariably referring to political cases, it is feared that the regional tribunals will lend themselves to the perversion of justice against opponents of the government. The case of *Republic v. Karimu*, tried by a special tribunal, is a perfect exemplar. Another repressive technique is to refer cases which do not fall under "offences against the State and the public interest," but are of interest to the ruling NDC, to the regional tribunals. A typical example is the *Republic v. Yebbi and Avalifo* case.

F: Immunity Clauses in the Transitional Provisions

The point made with regard to the role of immunity clauses in safeguarding human rights is also key in assessing the effectiveness of human rights protection under the Constitution. Section 34 (1) of the Transitional Provisions states:

No member of the Provisional National Defence Council, Provisional National Defence Council Secretary, or other appointees of the Provisional National Defence Council shall be held liable either jointly or severally, for any act or omission during the administration of the Provisional National Defence Council.

Section 35 (3) states more forcefully and firmly that:

For the avoidance of doubt, it is declared that no executive, legislative or judicial action take or purported to have been taken by the Provisional National Defence Council or the Armed Forces Revolutionary Council or a member of the Provisional National Defence Council or the Armed Forces Revolutionary Council or any person appointed by the Provisional National Defence Council or the Armed Forces Revolutionary Council in the name of either the Provisional National Defence Council or the Armed Forces Revolutionary Council shall be

¹⁹³ This is in reference to Part III section 5 of the Transitional Provisions to the 1992 Constitution.

¹⁹⁴ Interview with Adam Hamidu in Accra, Ghana. April 1997.

questioned in any proceedings whatsoever and, accordingly, it shall not be lawful for any court or other tribunal to make any order or grant any remedy or relief in respect of any such act.

Clause (5) of the instant article further states that it will be unlawful for any court or tribunal to entertain an action instituted in respect of an act or omission against a person acting or omitting to act, on the instructions of the PNDC or the Armed Forces Revolutionary Council (AFRC).¹⁹⁵ To confirm the approach, section 37 states categorically that "Notwithstanding anything in Chapter 25 of this Constitution [the amendment provision], Parliament shall have no power to amend this section or sections 34 and 35 of this Schedule." Thus, sections 34, 35 and 37 remain the only provisions in the Constitution that are not subject to amendment.

These provisions were the thorniest issues that confronted the public when it came to voting in the referendum to endorse the draft Constitution.¹⁹⁶ Two schools of thought seemed to inform the discussion on the necessity or otherwise of the immunity clauses.¹⁹⁷ My intention is not to explore these debates in detail, but rather to analyse the consequences of these provisions in giving effect to the human rights provisions in the Constitution. Kokott has outlined three positive duties on governments when it comes to promoting and protecting human rights. The first, which is firmly anchored in the theory of community emancipation, is, the duty to protect individuals (including legal persons) from each other. The second is the ability of an individual victim to initiate criminal proceedings against an accused person; and, third, the duty on the state to prosecute past perpetrators of rights abuses and to offer compensation to victims.¹⁹⁸ The first two elements are present in Ghana's existing laws. The first has already been identified under, *inter alia*, articles 12 (1) and 218 (c) of the Constitution and section 7 (1)(c) of Act 456. The second positive obligation is located in the Criminal Procedure Code, Act 30, which allows private individuals to

¹⁹⁵ The Armed Forces Revolutionary Council was the first Rawlings regime that overthrew the SMC military administration on June 4, 1979 and unwillingly returned the country to constitutional rule in September of the same year.

¹⁹⁶ See, eg., the reaction of the Catholic Bishops' Conference, one of the most vocal critics of dictatorship in the country, in *Agence France Presse* April 13, 1992. Also, *West Africa* 13-19 April, 1992.

¹⁹⁷ Oquaye, *supra* note 12.

¹⁹⁸ J. Kokott, *supra* note 44.

sue alleged criminals, though it need be noted that this provision has hardly ever been used. Therefore, one would expect that the laws of the land will recognise the third duty on the government as well. For that reason, the breaks put on the exercise of the third aspect of the positive duties renders the emphasis placed on positive rights in the Constitution incomplete and ineffective. On the face of it, the Constitution seems only to empower the CHRAJ to order the return of property or part thereof confiscated under the PNDC or AFRC regimes if CHRAJ is able to establish that the property or part of that property was acquired before the affected person assumed political or public office or it was otherwise lawfully acquired.¹⁹⁹ But, as is noted above, it is possible for the CHRAJ to investigate and assess other human rights issues.

Apart from the positive obligations, the right to information also challenges the Transitional Provisions. In its Annual Report 1985-86, the Inter-American Commission on Human Rights held that “every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future.”²⁰⁰ It is also important to refer again to His Lordship Francois, JSC regarding the recognition of the right to information in the case of *NPP v. GBC* discussed above.

However, it is my considered opinion that there is a loophole which can be exploited to circumvent the Transitional Provisions. That is to bring a petition before the Commission on Human Rights and Administrative Justice, since it is neither a court nor a tribunal, and these are the only two fora specifically prohibited from inquiring into the past misdeeds of the PNDC and AFRC regimes. In this respect, a commission of inquiry, under Chapter 23 (articles 278-283) of the Constitution, can

¹⁹⁹ Section 35 (2) of the Transitional Provisions. Even that is being challenged by the A-G at the Supreme Court at the time of writing this dissertation. See details below.

²⁰⁰ J. Kokott, *supra* note 44.

also be set up for a similar purpose.²⁰¹ This view is supported by the CHRAJ decision in the Kwesi Pratt, Jnr petition in which it did not dismiss the case on the grounds of lack of jurisdiction. The only other possible legal remedy for past abuses is to institute action against unauthorised acts committed by agents of the PNDC or AFRC under section 34 (5) of the Transitional Provisions.

G: Other Governmental Strategies to Create Stumbling Blocks to the Exercise of Human Rights

These include placing an unreasonable cap on party funding. Under PNDC Law 281, citizens were prohibited from contributing “an amount whether in cash or in kind, exceeding 200,000 cedis.” The law was later changed to allow a maximum of a million cedis, after the case was successfully contested in court. Meanwhile, although the opposition remains underfunded, the ruling party has found a way to accumulate funds by awarding contracts to party faithful not based on merit or experience. The contract awardees are then made to pay a certain percentage into the party’s fund.²⁰² A deliberate policy also exists to drive the business enterprises of the opposition underground to prevent them from being in a position to fund their parties. The President himself has on one occasion openly called, on national television, for the boycott of goods produced by opposition party functionaries. This act is in clear breach of the non-discrimination clause of article 12 (2) of the Constitution and also an infringement of rights of free enterprise. Rights exercise is supposed to expand the capacity of individuals to realise their potentials and contribute to development. But in a situation where rights are guaranteed on paper in the Constitution, but honoured more in the breach than in practice, the goal of using rights to promote development becomes jeopardised and everybody suffers in the end, except for those who tread the corridors of power.

²⁰¹ However, the obstacle here is that it is only under the authority of the President that a commission of inquiry can be set up.

²⁰² This issue was raised by most of the people I interviewed in Ghana. It is believed that the money that was stolen from the A-G belongs to this fund. See also, *Ghanaian Chronicle* editorial captioned “Jobs and Cash for NDC Supporters?” Sept 5-8, 1996, at 5.

Another governmental strategy is to promote self-censorship and even impose censorship on the private press. This has arisen in myriad ways. One is to organise physical attacks on the premises of private press houses. The offices of *The Ghanaian Chronicle*, *The Free Press*, *The Citadel Press*, to name a few, have been targets of vandalism. Another line of attack is to slap several court actions on media outlets and then to single out one or two of them in which the “culprits” are stretched to the full by being denied court bail in misdemeanours such as libel,²⁰³ to serve as a “deterrent” to others. In more serious cases, the accused face maximum prison sentences of 10 years if convicted. In reaction to this process to criminalise freedom of expression, the current President of the Ghana Journalists Association (GJA), has stated:

Our message to them is, do not seek the emergence of a qualitative press in this country in the marshalling of draconian laws and measures that will stifle growth. We should be the first to admit that laws and decrees which detain people for the mere expression of critical views do not produce a good press ... It is a paradox of our story of independence that laws that the colonial masters used to stifle free expression are still on our books and resorted to by our own kind.²⁰⁴

In spite of the fragility of press freedom, the chairman of the Parliamentary Committee on Information has called for the tightening up of the already repressive laws concerning the press.²⁰⁵ In a more shocking manner, a former member of the PNDC, and now a member of the National Economic Commission, who ironically is also the Executive Director of a human rights NGO (Centre for Conflict Resolution), warned at the CHRAJ-organised workshop at which I was a participant that if journalists can use their pen to insult and defame he too can exercise his gun to shoot them.²⁰⁶ A third stratagem against a free press is to cut the supply of print material (which remains a government monopoly) or to increase the cost at an arbitrary rate.

²⁰³ As of June 1997, before I returned from my field trip, over twenty libel cases were pending in court.

²⁰⁴ Gifty Afenyi-Dadzie, GJA President at GJA Annual Awards ceremony. Culled from *The Ghanaian Chronicle*, April 23-24, 1997 at 8.

²⁰⁵ Hon. Ken Dzirasah, Speech at 34th anniversary of the Ghana Institute of Journalism (GIJ): “Freedom of the Press on the Defence,” (July-Sept) Vol.1 No.3 *Ghana Human Rights Quarterly* at 8.

²⁰⁶ This issue drew an uproar in which I was one of those who intervened, just to know what the objectives of the Centre for Conflict Resolution are. In a similar vein, the Forces Sergeant Major, WOI Isaac Frempong has called for the right to assassinate journalists as a counter to the right to free expression. This statement was made in the presence of the President who is reported to have nodded his approval. *Ibid.*

As part of the overall strategy to silence the press, the National Media Commission (NMC) which was supposed to have been set up within six months after the coming into force of the Constitution,²⁰⁷ was actually established before the ushering in of the Fourth Republic and packed with sycophants of the NDC. It took a good fight to dismantle this unconstitutional structure and replace it with a new one which was sworn-in nine months after the coming into force of the Constitution.²⁰⁸

The restrictions on freedom of expression are extended to the Opposition in Parliament as well. In an interview with certain members of the Opposition, including the Second Deputy Speaker, it became apparent that the Opposition MPs are not reported in the government-controlled media even when they raise issues of critical national importance. It also emerged that the more vociferous critics are not given the opportunity to travel outside to attend conferences, workshops, etc. A more subtle means of control is for the Speaker to “fail” to “catch an MP’s eye.”²⁰⁹ The general effect of press censorship on development is that it stifles free expression and debate over issues of national importance. Thus, the country has become the poorer by not affording its citizens the opportunity to exercise their rights in full and to use them as a tool to attain development.

Other subtle attempts to restrict measures aimed at promoting respect for human rights are reliance on statements by members of the diplomatic corps to the effect that human rights abuse is a thing of the past in Ghana, and on decisions by immigration

²⁰⁷ Article 166 of the Constitution. The functions of the NMC are spelt out in article 167. They include: (a) to promote and ensure the freedom and independence of the media for mass communication or information; and, (c) to insulate the state-owned media from governmental control. See also the National Media Commission Act, 1993 (Act 449).

²⁰⁸ The government had been able to orchestrate a composition that would serve its interests. But in an interview with Kwabena Essem who used to be on the committee, he revealed that some of the expected government sympathisers were able “to see the light” and at most times voted against a government move. This situation led to a dismantling of the NMC and the physical lock-out of the members from its offices by the Chairman. It was only in October 1997 that a new NMC was established.

²⁰⁹ Interview held with the Second Deputy Speaker of Parliament. May 1997. (Notes on file with the author).

tribunals that the human rights situation is now satisfactory in the country.²¹⁰ Others include the enactment of laws that tie the hands of potential “enemies” in the opposition;²¹¹ the campaign of “intellectual hostility” against rights activists, relying on the old canard that human rights are attributes of foreign culture²¹² or that those who engage in rights activism themselves have something to hide.²¹³

H: Abuse of *Socio-Economic* Civil Rights

This issue has been partly dealt with in the previous Chapter which discusses the role of development NGOs in the rural communities. But from the government angle, abuse is exemplified in the imposition of projects on local people, in spite of the government’s decentralisation programme under the District Assembly Act, 1993 (Act 462), which establishes the District Assemblies.²¹⁴ According to the decentralisation concept, unit committees are supposed to operate at the grassroots

²¹⁰ Canada launched its Country Assessment Approach to immigrants from Ghana in 1991, in the wake of the opening up of democratic space. Then in 1992, together with other countries of Western Europe, US and Australia, an Inter-Governmental Consultation (IGC) on Asylum, Refugee and Migration was held on Niagara-on-the-Lake between June 27 and July 1, 1992. It was decided at the meeting that the Cessation Clause be applied to Ghana. The Cessation Clause is based on section 2 (2) of the Immigration Act of Canada which states a person shall cease to be a Convention Refugee when “the reasons for the person’s fear of persecution in the country that the person left, or outside of which the person remained, ceases to exist.” The fear of persecution is considered absent when the objective element of the fear no longer exists. A change in circumstances is indicated when the substantial change in the state apparatus responsible for creating the fear of persecution assures the refugee claimant a humane treatment upon return to the country of origin. See “Critique on the Country Assessment Approach Report on Ghana” compiled and presented by the Research and Document Unit of the Ghanaian Canadian Association in Montreal (February 28, 1997) in response to “Report of IGC Country Assessment Approach Working Group on Ghana.”

²¹¹ Eg., the Serious Frauds Office Act, 1993, Act 466. The Act establishes a Serious Fraud Office as a specialised agency of Government to monitor, investigate and, on the authority of the Attorney-General, prosecute any offence involving serious financial or economic loss to the state and to make provision for connected and incidental purposes.” This law is a re-enactment of the section 9 (f) of the Public Tribunals Law, 1984, PNDCL 78, which made it a “special offence” “to do any act with intent to sabotage the economy of Ghana.” This provision was employed to conduct witch-hunts and to prosecute all opposition elements whom the then-regime could not directly pin down for committing “politically sabotaging” acts, especially the businessmen and businesswomen among them.

²¹² “Human Rights not foreign Culture,” *Free Press*, March 22-28, 1996, at 12, attributed to Professor Kofi Kumado, Chairperson of HURIDOCS.

²¹³ Kofi Kumado, “The Role of NGOs – National and International – In the Promotion, Monitoring and Implementation of Human Rights,” Paper prepared for the seminar on “Promotion, Monitoring and Implementation of Human Rights.” Novotel, Accra, 20th December, 1993 by the Human Rights Study Centre of the Faculty of Law, University of Ghana, Legon.

²¹⁴ This is a laudable idea. It covers devolution – transfer of power from central government to lower levels of government, and deconcentration – transfer of certain powers to civil servants operating at the

level and form the cellular base of people's power and popular participation in the decision-making process.²¹⁵ However, this power is indirectly hijacked by the District Chief Executive (DCE)²¹⁶ who is supposed to be the chief representative of the Central Government in the District.²¹⁷ With the perception of the government's role as the "provider" diminishing in most rural areas²¹⁸, the government is likely to use the DCEs and its other agents to by-pass the local assemblies and carry goods directly to the people in order to enhance its image in the local communities.²¹⁹ Even where the local authorities are involved, most often policies are designed from above by a ministry or from a foreign donor agency which directly oversees the project.²²⁰ This amounts to abuse of the *socio-economic* civil rights of the poor which in turn affects the effective use of their *political* civil rights and political rights proper.

Most Assemblymen have also turned themselves into tin-gods in their localities. The CHRAJ report indicated that "with the establishment of the District Assemblies in addition to other decentralised structures already in place in the districts and sub-districts the chances for human rights violations and acts of public maladministration have been multiplied."²²¹ Hence the call to have district offices of CHRAJ set up in all the 110 districts of the country.²²²

The situation in Ghana is generalisable to other African countries. In spite of the so-called wind of democratic change blowing across the continent, a lot more needs to

local level. It also involves deeper decentralisation to the sub-metropolitan, urban, zonal, town/area councils and unit committee level.

²¹⁵ Oquaye, *supra* note 116 at 26.

²¹⁶ Under the Constitution, he or she is to be appointed by the President subject to the approval of not less than two-thirds of the members of the District Assembly present and voting at the meeting: article 243 (1) of the Constitution.

²¹⁷ Article 243 (2)(c) of the Constitution.

²¹⁸ According to a CIDA survey in the rural communities of Ghana, people look up to NGOs and government for the provision of credit for farming and small-scale trading activities; and NGOs for improved access to and quality of water and sanitation. See CIDA, *Poverty and CIDA programming in Ghana: An analysis of current programming* (June 1996).

²¹⁹ This was what happened during the last elections in which even an NGO – CIBA -- was used to channel sewing machines, farm equipments, etc to the local people to enable the NDC win votes in the rural communities. This is largely responsible for the attempts by government to enact the NGO Bill.

²²⁰ This is what is referred to as "policy level dialogue" which CIDA admits has a comparative advantage for it. CIDA, *supra* note 218.

²²¹ CHRAJ, *supra* note 130 at 1.

be done to create a conducive human rights environment. It is therefore important to refer to Michael Chege who argues that

The war against dictatorships has hardly been won. The heads of government have clung to power through a combination of brute force, manipulation of gullible opposition parties, bribery, crafty exploitation of ethnic loyalties, cosmetic constitutional reforms to appease Western donors who demand 'good governance' as a precondition for further development aid.²²³

²²² So far only about 38 district offices have been opened.

²²³ *Washington Post* (Wire Service) "Africa's "Big Men" Reversing Tide of Democracy," January 1, 1995.

CHAPTER 5

HUMAN RIGHTS NGOs AND THEIR ROLE IN THE PROMOTION AND PROTECTION OF RIGHTS IN AFRICA

NGOs and, more generally, organizations of the civil society, no longer simply have a consumer relationship with the United Nations. They have increasingly assumed the role of promoters of new ideas, they alerted the international community to emerging issues, and they have developed expertise and talent which, in an increasing number of areas, have become vital to the work of the United Nations, both at the policy and operational levels. – Nitin Desai.¹

Introduction

In the face of the limitations that have been identified as plaguing the democratisation process that is continuing in Africa, the present chapter follows in the trail of the last by seeking to analyse the extent to which the problems and obstacles that manifest themselves can be remedied or overcome through the activities of non-governmental organisations (NGOs). In the context of the theory of community emancipation, NGOs form an important component on the development structure. They belong to the category of entity called “groups” (*ekuo*) and their recognition on the structure is an indication of the importance that the theory attaches to the respect that should accord such freedoms as, of association and assembly. The need for such measures is justified by the fact that the attempts to promote human rights and democracy in Africa in the 1990s is informed by a motive that stands in direct opposition to efforts aimed at effective promotion and protection of human rights, especially by human rights NGOs.

It was noted in the last Chapter that the concept of political liberalisation embodied in the globalisation process led to the reform introduced in certain state institutions to promote and protect human rights with the backing of the Constitution of the Republic

¹ United Nations Under-Secretary-General for Policy Coordination and Sustainable Development. Remarks at the Meeting of the Organizational Session of the Open-Ended Working Group of the Economic and Social Council on the Review of Arrangements for Consultation with Non-

of Ghana, 1992. Yet, in spite of the political landscape having the trappings of upholding respect for, and promoting, rights and democracy, the reality is that the government has instituted and retained structures and mechanisms which are challenging and eroding the democratic ambiance for rights exercise.

The role of NGOs is therefore crucial in providing the missing link to rights promotion at the national level. I will look at the definition and evolution of human rights NGOs on the world scene and their influence on African NGO formation, characteristics and activities. I will suggest modifications with the goal of enabling the people to realise the maximum benefit from NGO operations.

I: NGOs in the Promotion and Protection of Human Rights

Before analysing what role local human rights NGOs can play in promoting and protecting human rights, it is pertinent to take a brief historical snapshot of the way human rights NGOs in general have fared in the course of furthering the cause of human rights in Africa, and where African NGOs fit in.

A human rights NGO has been defined by Laurie Wiseberg as

a private association which devotes significant resources to the promotion and protection of human rights, which is independent of both governmental and political groups that seek political power, and which does not itself seek such power.²

On the face of it, the definition is supposed to cover all human rights NGOs. But this definition of NGOs finds applicability mainly to the international NGOs (INGOs) and the few African human rights NGOs which managed to operate in the 1960s in the form of law societies.³ However, compared with the current stage of NGO evolution in Africa, it can be said that if the definition can be made applicable at all to NGOs operating in Africa and other less industrialised states, then the definition is meant merely to distinguish human rights NGOs from political parties, solidarity

Governmental Organizations (Feb 17, 1994). cf. Michael Posner, "The Status of Human Rights NGOs," (1994) Vol. 25 *Columbia Human Rights Law Review*, 269 at 275.

² L. Wiseberg, "Protecting Human Rights Activists and NGOs: What more can be done?" (1991) Vol. 13 *Human Rights Quarterly*, 525 at 529.

movements or government-sponsored or political party-based NGOs (referred to as Government-organised NGOs (GONGOs) and politically-organised (PONGOs), respectively, that use human rights rhetoric for partisan ends.⁴ Henry Steiner has adopted this definition to differentiate between human rights NGOs of the industrialised north and those of the less industrialised south. He writes, in reference to Wiseberg's definition that:

Although committed to civil-political rights, and in this sense taking clear moral and political positions, First World NGOs prefer to characterize themselves as above the play of partisan politics and political parties, and in this sense as apolitical.⁵

It is not clear though, if Wiseberg's definition can be overly criticised for identifying NGOs as simply apolitical. It may be relevant to take into account the risks and dangers that human rights NGO activists are involved in and also the need to maintain their reputation of not being "politically biased." Be that as it may, Wiseberg's definition has been referred to as the "restrictive" approach to a definition of a human rights NGO.⁶ This is contrasted with the "expansive" approach to human rights activism which involves "[examining] the political significance of action for human rights."⁷ This definition implies analysing the political context in which violations take place, eg., whether the government is a military dictatorship or the country is experiencing civil war,⁸ and also taking some political action to resolve the human rights abuse.

While this definition is definitely broader than Wiseberg's, it still does not seem to be expansive enough. It may be further broadened by placing it in a developmental

³ Makua Wa Mutua describes them as "clones." See Wa Mutua, "Domestic Human Rights Organizations in Africa: Problems and Perspectives," (Sept 1994) Vol.XXII/2 *Issue: A Journal of Opinion*, 30 at 31.

⁴ See below for further elaboration on the nature and operation of such organisations.

⁵ H. Steiner, *Diverse Partners: Non-Governmental Organisations in the Human Rights Movement*, (Cambridge: Harvard Law School Human Rights Program and Human Rights Internet, 1991), at 19.

⁶ Lowell Livezey, *Nongovernmental Organizations and the Ideas of Human Rights*, World Order Studies Program Occasional Paper No. 15 (Princeton, NJ: The Centre for International Studies, 1988), at 20. cf: William DeMars, "Tactics of Protection: International Human Rights Organizations in the Ethiopian Conflict, 1980-1986," in Eileen McCarthy-Arnolds, *et al*, eds., *Africa, Human Rights, and the Global System: The Political Economy of Human Rights in a Changing World* (Westport, CT: Greenwood Press, 1994).

⁷ L. Livezey, *ibid*.

⁸ D. Orentlicher, "Bearing Witness: The Art and Science of Human Rights Fact-Finding," (1990) Vol.3 *Harvard Human Rights Journal*, 83.

context. This involves formulating the human rights NGO mandate in such a way as to take account of the role that the quest for economic development plays in the abuse of human rights, and how to monitor such abuses. It should also involve the positive role that human rights can play in promoting *sustainable holistic* development. The latter type of human rights NGO goes beyond monitoring, documenting and reporting about individual violations to investigating the factors or the contexts within which such violations take place. Thus, human rights NGOs of the less industrialised world contend that

[T]he stress [of human rights INGOs] on individual cases, even as those cases are aggregated into statistical data, may blur the big picture, the systemic and structural issues that underlie and in some sense explain violations ... The whole is lost in a bundle of particulars. Satisfaction for saving someone from harm or bringing an offender to justice is surely earned. But victims and victimizers are in plentiful supply, and new cases will soon arise. What must be examined are the reasons for so impressive a supply ... In situations of mass violations ... individual victims may even be counterproductive in that it can deflect attention from systematic abuse.⁹

While this statement is true, it does not apply to a large extent to most African human rights NGOs since the majority are imitations of INGOs, dealing in narrow civil and political rights issues only. Before suggesting an appropriate definition and role for an African human rights NGO, it becomes important, first, to provide a brief snapshot of the evolution of the African human rights NGO movement in the larger context of the history of the development of human rights NGOs worldwide; and, secondly, to analyse some of the main characteristics that are associated with African human rights NGOs.

II: The Evolution of Human Rights NGOs and their Role in Human Rights Norm-Creation

Even though human rights NGO activism was present in traditional African political systems,¹⁰ as a result of the suppression it suffered under colonialism and in the immediate post-colonial era, the concept was not able to influence the development of modern notions of human rights NGO activism in Africa.

⁹ *Ibid* at 23-24.

¹⁰ Refer back to Chapter 1.

Nnamdi Azikiwe's analysis on the need to promote tribalism as a pragmatic tool to the attainment of the nation-state is relevant here. He contended, *inter alia*, that the homogeneity associated with tribal affiliation could be broken through if African governments were to emphasise and guarantee respect for human rights and fundamental freedoms. This would enable people to seek solace in the constitution and the state, not their ethnic groupings:

I deduce from this the following position: that human beings will attach less importance to their racial, linguistic and cultural origins, so long as their individual liberties are insulated from tyranny and their group attachment is insured from want, provided that the environment in which they live is conducive to human happiness.¹¹

Yet, this advice was not heeded by post-independence African leaders. Yet human beings are social beings. So with the transfer of trust from the ethnic group to the nation-state represented by a faceless government, people would still want to relate to their pluralistic lifestyles and form groups on the development structures in their communities, in exercise, *inter alia*, of their right to freedom of association. This would likely have influenced a lot of them to form and join with human rights NGOs to press for more rights and freedoms, and thereby build a human rights culture within the African polity. However, this was not to happen.¹²

While this fate was inflicted on possible African human rights NGO formation, the modern notion of human rights NGO activism was unfolding in the Western world. Led by Amnesty International (AI),¹³ other prominent groups such as the International Commission of Jurists (ICJ)¹⁴ and Human Rights Watch (HRW),¹⁵

¹¹ Nnamdi Azikiwe, "Tribalism: A Pragmatic Instrument for National Unity," in J. Ayo Langley, *Ideologies of Liberation in Black Africa 1856-1970* (London: Rex Collings, 1979) 458 at 468.

¹² As a result, in Ghana for instance, as of June 1997, after completing my field research there were not more than 20 recognised and active human rights NGOs. Yet, the number of youth, improvement and ethnic-based associations that had registered with the GAPVOD (Ghana Association of Private Voluntary Organisations in Development) alone was at least 50. The number is in the 1000s according to the list made available to me at the Registrar-General's Department in April of 1997.

¹³ AI works to promote civil rights, such as the immediate and unconditional release of prisoners of conscience, prompt and fair trials for people detained without charge or trial. It also campaigns for abolition of the death penalty. See, eg., AI, *Amnesty International Handbook* (London: AI Publications, 1992), D. Matas and L. Wiseberg, "At 30 Something, Amnesty Comes of Age," (Winter 1992) *Human Rights Tribune*, 29.

¹⁴ ICJ works to promote the rule of law and the legal protection of human rights throughout the world.

¹⁵ HRW is devoted to monitoring the differences between government claims and actual practices. It also chronicles violations of international humanitarian law and has projects that deal with children's rights, women's rights, arms build-up, freedom of expression, etc.

among others,¹⁶ and influenced by the universalising mission of the Western notion of rights, these Western NGOs focused on certain aspects of civil and political rights whose abuses were more “visible” and soon expanded their activities beyond their borders and into the international scene. This process was to reach its peak at the global level in the late 1960s and 1970s.¹⁷ As a result, they became the model human rights organisations.¹⁸ Human rights INGOs were not ready to support and fund local human rights NGOs operating autonomously from them, as distinct from their own local branches or sections. In the case of AI, for instance, the reason was to protect its members from becoming targets of abuse by their governments. It was also to protect AI’s credibility over their monitoring activities and findings from being tainted with “political bias.”¹⁹ It was not until recently that local AI members were allowed to engage in human rights education and other promotional activities in their own country, either on their own or in conjunction with other local groups. Thus, initially, AI was not in a position to offer moral, let alone financial, support to local human rights groups that would emerge. This brief historical snapshot represents the general situation of human rights activism and the nature of the relationship that existed between local and foreign human rights NGOs before the start of the post-Cold War era.

The ability of human rights INGOs to acquire this model status was influenced largely by the definition and qualification assigned an NGO to enable it to attain consultative status with the United Nations. In the first place, under Chapter X of the UN Charter, article 71 states that consultative status shall be accorded to NGOs on

¹⁶ Others include the Lawyers’ Committee for Human Rights (LCHR), Interights, Article 19, Federation Internationale pour les droits de l’homme (FIDH), Index on Censorship, etc.

¹⁷ A combination of the presence of a viable civil society and groups within this sector that defend civil liberties. They were largely supported by the philanthropy and interests of the non-governmental private business and professional sectors such as foundations, bar associations, corporations, etc.: Mutua, *supra* note 3 at 31.

¹⁸ *Ibid* 30. Also, Jerome Shestack, “Sisyphus Endures: The International Human Rights NGO,” (1978) Vol. 24 *New York Law School Review*, 89,90.

¹⁹ Some of the orientations had and shared during training sessions while a member of the National Executive of Ghana Section, AI. See also D. Orentlicher, *supra* note 8. The question of fear of political bias was most probably heightened by the fact that, as noted earlier, most of the deposed politicians found solace in such pro-democracy organisations that blended human rights activism with politics. It was therefore seen as a wise idea to stay clear of these organisations.

matters falling within the competence of ECOSOC. And to acquire such a status with ECOSOC, an NGO had to fall into one of three categories.²⁰ Among some of the qualifications are that the NGO should be international in character.²¹ Resolution 1269, article 9 thereof, also states that "national organizations shall normally present their views through international non-governmental organizations to which they belong."²² Even where a national organisation was able to acquire consultative status, ECOSOC had first to consult with the relevant member State in consulting such a national organisation, though it could act on its own with INGOs. No African government would easily allow a local NGO whose activities it deemed to be against the government to operate at the international level and expose its government's bad human rights record.²³ It is believed that these "recognition" arrangements were intended to force NGOs which were deemed "anomalous" into the framework of a state-based international organisation.²⁴

Gunning's view in support of this arrangement is that the transnational character of the groups would help ensure that they have mobilised enough support to be considered legitimate and thus avoid the problem of recognising organisations with narrow concerns.²⁵ This view is disputable, though. The question whether or not an interest is narrow will have to be measured by the concerns that ECOSOC is allowed to address within its competence. A strict application of this narrow interest question has had a debilitating impact on the ability of local African human rights NGOs to grow and contribute to the thematic development of human rights which AI, ICJ, HRW, etc have been involved in. Having been suppressed by their home governments, their recognition and encouragement to be given the necessary financial

²⁰ Leon Gordenker, "UN at 50: Institutional Developments," (1995) Vol. XLVII No.2, *International Social Science Journal*, 244.

²¹ Article 4 of Part I of Res. 1269 (XLIV)). Other requirements included the fact that such groups reflect ECOSOC concerns which cover economic, social, cultural, technological, human rights and other related issues; have aims that conform with the UN Charter; have internal democratic procedures, etc.

²² 44 UN ESCOR. Supp. (No.1) *Arrangements for Consultation with Non-Governmental Organizations* (May 23, 1968)) at 21 UN Doc. E/4568 (1968).

²³ See M. Posner, *supra* note 1 at 273.

²⁴ L. Gordenker, *supra* note 20 at 252.

²⁵ Isabelle Gunning, "Modernizing Customary International Law: The Challenge of Human Rights," (1991) Vol. 31 *Virginia Journal of International Law*, 211 at 231.

and moral support by ECOSOC would have helped at least the law society type of human rights NGOs to develop and extend the level of their advocacy and promotional roles beyond the narrow confines of their national boundaries. For example, law societies could have made more positive impact than African political leaders in developing an African perspective on human rights and contributing it to the development of the two International Covenants, alongside their Western counterparts.

As noted, the local human rights NGOs that were able to operate in Africa owe their development mainly to law societies which were able to offer legal aid and nothing more.²⁶ In so doing, these organisations more or less adopted the mandates of foreign organisations such as AI. Thus, the few NGOs that were able to thrive could not stand on their own, first, in terms of developing a concept of rights that speaks to the experiences of the oppressed victims they sought to represent, and founding their mandates and operations on such notion of rights; and, second, with respect to being able to have independent representation before ECOSOC. Human rights NGO activism as we see it today in Africa has therefore been largely influenced by that of human rights NGOs from the industrialised world.²⁷

Human rights INGOs used the position and status acquired at the UN to work within the imperfections of the system²⁸ and exploited that space to improve the mechanisms for human rights norm-creation through the UN system, since “the UN is ‘what there

²⁶ Which were generally not considered a threat to their governments. These include the Legal Aid Committee of the Law faculty, University of Dar-es-Salam, the Legal Advice Centre, the Public Law Institute of Kenya, the Zimbabwe Association of Democratic Jurists, etc. Issa Shivji, *The Concept of Human Rights in Africa* (London: CODESRIA Books, 1989) at 35,36. One can also mention the human rights section of the Ghana Bar Association, etc. and recently the Human Rights Study Centre of the Faculty of Law, University of Ghana, Legon. At its current stage, the latter is yet to offer legal aid and is more of a documentation centre. Also Wa Mutua, *supra* note 17 at 31.

²⁷ Most of these NGOs have come to acquire an international character, even though they started on the national level, hence the label international NGOs (INGOs). AI, Red Cross, etc.

²⁸ For some of the problems, defects and bureaucratic stumbling blocks facing the UN system for the promotion and protection of human rights, see D. Matas, *No More: The Battle Against Violations of Human Rights* (Toronto: Dundurn Press, 1994), 163-185.

is.”²⁹ AI initiated this process in the late 1960s with its anti-torture campaign.³⁰ The process relied on existing norms, working within and invoking all recognised extant principles and highlighting the scope and severity of the abuse. The next step was to raise the issue before, and lobby, governments while also seeking the support and the involvement of other human rights NGOs. The third involved mobilising expertise on the subject and make them available to the UN. The fourth step was to encourage sympathetic governments to pursue a ban. This would first come in the form of a declaration at the UN, but would find its culmination in a convention.³¹ A similar step was taken by NGOs which were involved in the International Campaign to Ban Landmines. However, according to HRW, in this case the NGO coalition decided “to proceed toward a treaty outside the straitjacket of the recent United Nations preference for “consensus,” in which every government is given a veto. Rather than insisting that all governments embrace the new treaty from the start, the plan was to establish a strong international norm and then pull in reluctant governments through moral pressure.”³² This strategy was quite effective in ensuring the success of the campaign. And for the first time in an arms control or humanitarian law treaty process, the NGO coalition was granted official observer status at the Oslo treaty negotiations on banning of landmines.³³

In light of the above, it can be said that NGOs can provide a means of helping to assess, and contribute to the evolution of customary law in the international human rights regime. For example, in a situation where the extent of a given norm is not clear, the activities of NGOs which were involved in the creation of that norm can be consulted to assess whether the extent of state practice amounts to clarification,

²⁹ Remark made by AI representative during an interview with Ann Marie Clark. See Ann Marie Clark, “IGOs, NGOs and the Creation of International Human Rights Norm.” Unpublished paper presented at ACUNS/ASIL Workshop on Governments, IGOs, NGOs and Global Governance, Brown University, Providence, RI (July-August, 1996) at 15.

³⁰ *Ibid.*

³¹ Such as the promulgation of the UN Declaration against Torture in 1975, and subsequently, the Convention Against Torture in 1984.

³² Human Rights Watch, *Human Rights Watch World Report 1998* (New York: Human Rights Watch, 1997) at xiv, xv.

³³ *Ibid* xiv.

endorsement or violation of a given norm.³⁴ The significance of such a step is derived from the fact that it is difficult, if not impossible, to look to state practice to derive a customary human rights law. As Levi put it:

When the practice of states as a very important criterion of the development of customary law is examined, there can be little doubt that the neglect of human rights in many, if not most, states is customary behaviour. In other words, neither the objective criterion of customary law – habitual behavior – nor the subjective criterion – *opinio juris* – has been fulfilled.³⁵

One way out of this problem is to examine the attitude and practice of a collective of NGOs and the role they played in the formulation of a particular declaration or convention on human rights, and their subsequent behaviour in upholding the principles enunciated in these conventions, etc. Their consistent and concordant behaviour, before and after the coming into force of a particular law, can help in the evolution of a human rights norm. This approach will help promote the novel tactic adopted in the enactment of the treaty to ban landmines through avoidance of the consensus approach and applying moral pressure on non-ratifying states to comply. Through the acts of NGOs and ratifying states one could infer the development of a customary practice with regard to that particular rights issue.

The emerging innovative role of human rights NGOs in using inter-governmental organisations (IGO) fora to influence and take over norm-creation in international human rights law is indeed significant, portraying their importance and indispensability, as third parties to proceedings at the international level.³⁶ Clarke argues that the basis for international norms and the creation of new ones lies with the coordinating work of NGOs and sympathetic states.³⁷ The emerging trend in this process is actually involves the inclusion of NGOs and countries of the less industrialised world, something which was missing in Clarke's analysis.

³⁴ Gunning, *supra* note 25 at 230.

³⁵ W. Levi, *Contemporary International Law: A Concise Introduction* (Boulder: Westview, 1991), at 184.

³⁶ Clark, *supra* note 29 at 33.

³⁷ *Ibid.* HRW accounts that: "The awarding of the 1997 Nobel Peace Prize to the international Campaign to Ban Landmines signaled a new era in which non-governmental organizations (NGOs), working closely with sympathetic governments from the developed and developing world, can set the international human rights agenda despite resistance from major powers." HWR, *supra* note 32 at xiv

III: African Human Rights NGOs: Problems and Prospects

The next step in my analysis is to identify some basic characteristics of African human rights NGOs and what they can and should do to promote peculiarly African notions of human rights norms and to incorporate them into the discourse and praxis of human rights in Africa.

African human rights NGOs fall under the expansive approach to the definition of NGOs discussed above. The arrival at a final definition for African human rights NGOs in which is identified their peculiar roles and responsibilities will have to be considered in light of the historical antecedent informing the evolution of human rights NGOs in Africa. It is important to note that it is by no accident that the past 10 years or less has seen the proliferation of NGOs in Africa. They have been helped to come into being by the very external forces that helped and facilitated their suppression in the early 1960s. Therefore, the emergence of an NGO sub-culture in the African political-economy should not be seen as an act of charity on the part of the Western world. NGO emergence sometimes promotes a purpose that does not suit the interest of international human rights law or Africa's development. This agenda is the use of human rights NGOs as a front to open up some measure of democratic space for Western-dominated development NGOs to take over and carry on the development agenda of Western states under the new process of economic globalisation, or "the new international order." With the way having been virtually opened up for another round of effective exploitation, there has been a relaxation of interest in human rights in Africa. Human rights NGOs are, consequently, no longer given the prominence they used to attract during the transitional era to democratisation which began in the early 1990s.

Though the political liberalisation era has brought in its wake a change in the number, structure and mandate of African human rights NGOs as a result of the space offered them under the new international order, the nature of their activities has not changed much because of the type of their relationship with their funding agencies and their home governments.

I identify at least six categories of African human rights NGOs. The majority gives priority to civil and political rights.³⁸ This category can be divided into two groups. The first remains committed to the old-time law society model of rights activism that seeks to offer legal aid to challenge the legality and constitutionality of acts of government institutions and non-state actors as well. These NGOs also engage in promoting legal and constitutional change mainly through academic debate and discussion at workshops, etc.³⁹ They are the conservative or non-structuralist civil and political rights NGOs. A second type, in a more structuralist fashion, questions the legitimacy of regimes whose acts and policies continue to militate against the exercise of civil and political rights. The “structural” change they further is to promote some legal, constitutional and political reforms, but not to disturb the *status quo*, the pre-determined structures that militate against the attainment of development for the popular sectors. They are mostly run by the old time politicians and former civil servants-turned-civil “societants.”⁴⁰ In most instances, their political and human rights criticism of governments remain either blurred, mixed up or disguised.⁴¹

Closely related to the second type is the democratisation NGOs who devote themselves to issues of democratic development: voter education, election monitoring, electoral reform, and in some cases making preferences for voters to choose their candidates. These could qualify as structuralist NGOs were they not just to fight for electoral or nominal democracy as imposed from outside, but more importantly for the attainment of participatory grassroots democracy which embodies

³⁸ See, The Swedish NGO Foundation for Human Rights and International Human Rights Internship Education (IHRIE), *The Status of Human Rights Organisations in Sub-Saharan Africa* (<http://www.umn.edu.humanrts/africa>), Chapter 4 on Characteristics and Problems of Human Rights NGOs.

³⁹ Egs., are the Human Rights Committee of the GBA, Ghana Academy of Arts and Sciences. The Ghana Legal Literacy and Resource Foundation, a new NGO formed by the Ghana Bar “to organise seminars and publish in a format that the lay person can read portions of the constitution and other laws so as to produce a well informed and enlightened populace.”

⁴⁰ Term borrowed from S. Ndegwa, *The Two Faces of Civil Society: NGOs and Politics in Africa* (West Hartford: Kumarian Press, Inc., 1996).

⁴¹ I. Shivji, *supra* note 26 at 61. The above analysis represents the fundamental aspect of the political nature of human rights NGO work in Africa. However, human rights INGOs have assigned different “political reasons” as basis for refusing collaborative work with African human rights NGOs, and overlooking those outlined above.

elements of traditional African political structures and concepts of rights. However, most of them have limited themselves to a non-structuralist role.⁴²

The fourth type of human rights NGO deals with economic, social and cultural rights.⁴³ The activities of such NGOs are not necessarily structuralist since their principal goal is to provide for the socio-economic needs of the deprived.⁴⁴ Strictly speaking, these groups are not committed to issues of socio-economic rights, but to the satisfaction of socio-economic needs. For their work to be recognised as rights-related it must cover some elements of civil and political rights as well. It is also important to note that one cannot draw a clear cut distinction between the economic, social and cultural NGOs and development NGOs.⁴⁵ In fact, some claim to be both.⁴⁶ Their tempered activism is grounded in their objectives: most of them are engaged in NGO work to provide services, rather than to engage in political activism. And judging by the fact that the international donor community does not support NGO radicalism, those involved in this form of NGO activity have thought it wise not to engage in programmes that their beneficiaries frown upon or could frown upon. At the same time, they have to play it safe with their home governments in order not to incur their wrath. In this regard, consider the comments of the director of Undungu,⁴⁷

⁴² Eg., Network of Domestic Election Observers (NEDEO) in Ghana. It monitored the 1996 elections held in Ghana.

⁴³ Examples include The Uganda Gender Resource Centre (devoted to improving the position and lot of women, especially those living in rural communities, in the areas of health, cultural rights and woman empowerment), and l'Association pour le développement des initiatives villageoises (ASSODIV) – a rural-based NGO in Benin which is involved in helping rural communities to achieve integrated development and promote their own initiatives.

⁴⁴ Though dissatisfied with the spate of corruption and mismanagement of resources by politicians they are not ready to enter into the “real political realm” of NGO activism by working for the suppression of tyranny and dictatorship. They have therefore limited themselves to fighting for the economic, social and cultural rights of the people, but not in a structuralist sense.

⁴⁵ Eg., Third World Network (TWN) of Ghana which seeks to promote economic, social and cultural rights but at the same time is a principal carrier of World Bank policies.

⁴⁶ African Centre for Human Development (ACHD) in Ghana.

⁴⁷ Undungu is a church-based local Kenyan NGO that is devoted to street children in Nairobi. Its mandate includes working to enhance the socio-economic status of people in low-income areas through an integrated approach to community development and small-scale business development; to enhance the responsibility and capacity of the people in low-income areas for their own development, etc. Its working philosophy focuses on the individual as the “entry point for helping a community:” “the goal is to make that individual self-reliant and conscious of his or her community. It is through the individual and for the individual that the community can be developed.” S. Ndegwa, *supra* note 40 at 61.

a Kenyan NGO, contained in a letter to a researcher in a communication prior to commencing his field work:

[Regarding] our role in conscientization and/or leadership development it is important to state at the outset that we have to be careful about the image that exists out there, particularly in Government about us. The view that we are a *well meaning, benign, apolitical children's agency suits us very well*. [Emphasis mine].⁴⁸

The fifth group is related to the socio-economic NGOs. The difference between this group and the previous one is that this type focuses on certain disadvantaged groups in the society and is equally active on political and legal rights issues that seek to address the root causes of the underdevelopment of such peoples. Prominent among them are groups seeking to promote women's and children's rights.⁴⁹ The sixth group, in the minority, looks at the ensemble of rights exercise. This group may be more concerned about economic and social rights issues, but believes that the only way to attain respect for the plethora of the citizen's rights is to create a new social order that gives prominence to socio-economic justice and makes the exercise of civil and political rights more meaningful. These are the structuralist human rights NGOs. They conform to the type of political groups that the theory of community emancipation identifies on the development structure. Such NGOs hold the real hope for significant positive change in Africa.⁵⁰

But attaining the goal of participatory grassroots democracy and a human rights culture through human rights NGOs does not seem very bright. It is the radical civil and political rights NGOs that remain the most forceful entities capable of instituting immediate positive change in African countries. However, the nature of their composition, motives and some aspects of their *modus operandi* expose basic weaknesses towards their efficacy as a viable tool for democracy, rights and development. Their major strength is their ability to pressure and embarrass governments and, in certain instances, to force them to succumb. This strength is facilitated by the experience of their leaders in past political activities. A related advantage is that they are already known and have a following, so the press is more

⁴⁸ *Ibid* 65.

⁴⁹ International Federation of Women Lawyers (FIDA), Ghana. Interview with Miss Aku Shika Dadzie, Researcher at FIDA, in Accra, 1996.

ready to report on their activities. Also, they are able to mobilise people to take part in their activities.⁵¹ These advantages, however, have their down sides. They include the fact that the leaders of NGOs often seek to use NGOs as a tool to settle political scores with the incumbents,⁵² and to stake their claims for positions of influence and power.⁵³

Another major problem is that some of these former politicians have sought to use NGOs as a means to re-enter full-time politics or to bargain with the state about the rules of democratisation and privatisation. Thus, in some cases, those who spearheaded certain NGOs and pro-democracy groups in the fight for democracy have abandoned or limited their involvement in such groups and re-engaged in full-fledged politics. Some have even turned round to criticise human rights NGOs operating under their administrations, or have been cited as human rights abusers themselves.⁵⁴ As a result, the groups they formed have collapsed or are in a state of near-collapse.⁵⁵ Another weakness is that most of the existing human rights NGOs and other civil society organisations have only been able to pluralise their own space but not that of grassroots organisations and communities. One can even say further that this space is only being utilised or enjoyed by those rights activists whose activities are known to human rights INGOs and thus are assured of protection in case of arrest or abuse.⁵⁶

⁵⁰ One can mention, eg., the Civil Liberties Organisation (CLO) of Nigeria and

⁵¹ Egs., The Green Belt Movement in Kenya (environmental and women's rights NGO), Human Rights Committee of the Ghana Bar Association (GBA), Ghana Journalists Association (GJA), African Commission of Health and Human Rights Promoters (CAPSDH), Ghana.

⁵² Egs., Green Belt, GBA.

⁵³ Robert Fatton, Jr., *Predatory rule: state & civil society in Africa* (London: Lynne Rienner Publishers, 1992).

⁵⁴ One can mention Frederick Chiluba who came to power through his leadership of the Trades Union Movement in Zambia. However, it is ironic that after his election into office he has declared himself an avowed enemy of human rights NGOs. See eg., "Fallen Angels," (Winter 1992) *Human Rights Tribune*, 12ff; and, Washington Post (Wire Service) "Africa's 'Big Men' Reversing Tide of Democracy," January 1, 1995.

⁵⁵ Eg., the Alliance For Change (AFC) in Ghana, though not a human rights NGO, was very active in adopting pressure tactics on the government through demonstrations. However, all the members did contest for Parliamentary seats in their constituencies. One of them won his seat and this has affected the continued effective organisation of the group.

Again, most of the human rights NGOs operating in Africa remain elitist in focus, academic-oriented and city-based. This characteristic weakness is a reflection of the perception of the types of rights that the founders of human rights NGOs are interested in.⁵⁷ It is also an indication of the great extent to which deprived and oppressed people remain marginalised and the limited extent to which such people have been sensitised and stimulated to confront issues of rights abuse on their own. Another significant factor is that many of the recognised politicians still doing NGO work are those who did not win political office and so continue to head some of these organisations.⁵⁸ Within such organisations one cannot talk of the practice of internal democracy but, rather, internal one-person dictatorship.⁵⁹

Against this background, it must be recognised that African human rights NGOs have a long way to go to become the true flag-bearers for rights, democracy and development in Africa. It is feared that if they do not exploit the space that still remains for them it may close further and shut most of them out. An example is the abortive attempt by the Governments of Kenya⁶⁰ and Ghana to enact NGO bills that would have subjected the mandate and organisation of NGOs to the dictates and whims of the government. For instance, section 3(d) of the Ghanaian Parliamentary Bill read that no organisation was to be registered unless the National Advisory

⁵⁶ The rest of the people they work with largely remain politically inert, uninformed and consequently, uncommitted rights activists whose main concern is a work for pay.

⁵⁷ I. Shivji, *supra* note 26 at 61ff.

⁵⁸ It need be noted that a large number of them, however, remain in full time politics as the opposition. There is a parallel between those in NGOs and those in politics properly-so-called. That is they all just aim at overthrowing the incumbent and winning political power but not to share that power with the oppressed majority.

⁵⁹ Most African human rights NGOs have yet to make the crucial transition from leadership by the "founding father" or "founding mother" to selection of new heads and directions without organizational collapse. The first generation of chairs/presidents remains in control. To a substantial extent, the organizations are personalized ... When they leave for international conferences, the pace of activity slows. See C. Welch, Jr., *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organization* (Philadelphia: University of Pennsylvania Press, 1995), at 293. But to say that the pace of activity only slows down is being quite modest. In most cases the group grinds to a halt. See also B. Ambrose, *Democratization and the Protection of Human Rights in Africa: Problems and Prospects* (Westport: Praeger, 1995), at 20. In discerning such characteristics of human rights NGOs in Africa, one observes a parallel of their activities with opposition political parties described above.

⁶⁰ See Ndegwa, *supra* note 40 at Chapter 3; and Posner, *supra* note 1 at 273ff on, *inter alia*, Egypt.

Council of NGOs was satisfied "that the organisation is willing and able to work in co-operation with any agency of state that the Minister may direct."⁶¹

The African Charter on Human and Peoples' Rights has not helped in protecting and ensuring the flourishing of human rights NGOs either. Its vague reference in article 10 that freedom of association shall be enjoyed by everyone "provided he abides by the law" is antithetical to NGO flourishing. Under this article, if the NGO Bill introduced in the Ghanaian Parliament had been passed it would have passed the litmus test in article 10 of the Charter as well. Another negative attitude of the Charter towards human rights NGOs is that they are not specifically mentioned in the Charter as having the right to make communication before the Commission.⁶² AI raised this question of the ability of especially foreign NGOs to appear before the Commission.⁶³ Under the old Rules of Procedure,⁶⁴ it was only liberation movements who were specifically mentioned as having the right to make representations before the Commission. NGOs were only mentioned with regard to being consulted for information on issues which the Commission thinks is within their area of activity.⁶⁵ Even though NGOs, both foreign and local, have brought forward cases on behalf of victims to the Commission, it is important to note that at its 20th session held in 1997 the Commissioner ruled that permitting representatives of NGOs to make interventions before the Commission was not a "right" but a "privilege" accorded to them by the Commission since neither the Charter nor the Rules of Procedure allow

⁶¹ The "Minister" refers to a minister assigned responsibility for NGOs. See also, the reaction of NGOs at the Second World Conference on Human Rights in Vienna in 1993 to the Vienna Declaration and Programme of Action. M. Posner, *ibid* at 283-284, note 53.

⁶² Article 55 of the Charter provides simply thus: "Before each Session, the Secretary of the Commission shall make a list of the Communications other than those of States parties to the present Charter and transmit them to the Members of the Commission, who shall indicate which communications should be considered by the Commission."

⁶³ AI, "The Organisation of African Unity and Human Rights," *AI Index: IOR 03/04/87* at 9.

⁶⁴ Adopted on 13 February 1988 during the second session of the Commission held in Dakar, Senegal.

⁶⁵ Rule 76.

such access.⁶⁶ It is hoped that the customary practice of “privileged presence” before the Commission which has developed over time will be respected.⁶⁷

In spite of these self-imposed and externally-influenced stumbling blocks that lie in the way of local human NGOs, some of them have done exceedingly well in their activities. The list does not purport to be exhaustive. There are other organisations that could arguably be included as models of some success. However, I wish to limit myself to the following representative sample:

i. Legal Resources Centre (LRC) of Malawi⁶⁸

This organisation came into being in March 1993 as an outgrowth of the Law Society of Malawi and through the instrumentality of Vera Chirwa, a veteran human rights activist and former detainee of the deposed dictator Hastings Banda. While the formation of the LRC confirms my contention that one of the principal reason behind the formation of human rights NGOs is to find an avenue for political action by politicians, it is important to note, that the LRC has played an important role that goes beyond mere political engagement with the powers-that-be. LRC has focused on the education of Malawians about their human rights, legal representation of the low-income groups and conducting legal research. In addition, it has been involved in organising conferences on constitutional and electoral reform. LRC has taken up a number of cases on behalf of victims of police brutality, illegal detention, unlawful deaths, etc.

ii. L'Association Mauritanienne des Droits de l'Homme (AMDH)

The AMDH is made up mainly of university and high school teachers, students, and lawyers. It was established in 1991 with the mandate of promoting and protecting human rights, together with the monitoring of human rights violations. Its activities have centred

⁶⁶ Rachel Murray, “Report on the 1996 Sessions of the African Commission on Human and Peoples’ Rights – 19th and 20th Ordinary Sessions: 26 March –4 April, and 21-31 October 1996,” (1997) Vol.18 No. 1-4 *Human Rights Law Journal*, 16 at 18.

⁶⁷ This privileged status is under threat following the decision by the Commission to lump four NGOs together into a group and give joint interventions for the time allowed for one NGO. This proposition is said to have invoked a feeling of frustration and irritation from the NGOs who reacted by claiming that they were not being appreciated by the Commission and that the change in procedures is meant to limit their involvement. *Ibid* 18.

mainly on three areas of human rights violations which have been rampant in Mauritania: the mass killings of black Mauritanian soldiers, deportation of soldiers and members of the press to the desert, and massive repatriation of Mauritians from Senegal. AMDH was able to launch a press campaign and provoke an international action to denounce the killings and to pressure the government to set up a commission of inquiry.⁶⁹ Also, AMDH has been undertaking human rights fact-finding, investigates complaints, issues press releases, and sponsors press campaigns, etc.

iii. The Civil Liberties Organisation (CLO)⁷⁰

CLO is one of the most recognised human rights NGOs on the continent and one of Nigeria's largest human rights NGOs. It was created in 1987 for the defence and expansion of human rights and civil liberties in Nigeria. The CLO is a membership organization with sixteen state branches outside Lagos. It is divided into project areas which include the following: litigation; police and prison; women's rights; national expansion (membership); annual report; campaign and empowerment, environmental action in oil-producing areas, documentation and research; resource center, African monitoring group, ethics in government.

The CLO investigates human rights abuses and campaigns through litigation, publications and communications with the government on behalf of victims of rights violations. It publishes a quarterly magazine, *Liberty*, and the *Journal of Human Rights Law and Practice*. It has other publications to its credit which cover prison conditions in Nigeria and police brutality, military decrees, government impunity, the death penalty and annual reports on the human rights situation in Nigeria. It has an active legal aid project and also undertakes human rights education. Such has been the success of the CLO and other human rights NGOs in Nigeria that their reports, among others, have been described⁷¹ as being of high quality and recommended as a model for other organizations

⁶⁸ Information obtained from The Swedish NGO Foundation and IHRIE, *supra* note 38.

⁶⁹ Unfortunately, however, those found responsible remain unpunished due to a government amnesty that was passed to protect the culprits.

⁷⁰ Information obtained from interview with representatives of the CLO on a visit to Montreal, Canada in 1997 and through its annual report, CLO, *Annual Report 1995. A CLO Report on the State of Human Rights in Nigeria* (Lagos: CLO, 1996).

⁷¹ Swedish NGO Foundation and IHRIE, *supra* note 38.

in the Africa region for the purposes of fact-finding, documentation of abuses, use of domestic and international human rights standards, and even typesetting and binding.

iv. The Committee for the Defence of Human Rights (CDHR) of Nigeria⁷²

Formed in 1989 in response to the detention of trade unionist Femi Aborishade, the CDHR, has evolved into a viable human rights organization. Its mandate covers the promotion, defence and sustenance of fundamental human rights; the establishment of a system of prompt and efficient aid for needy victims of human rights abuses; and collaborating with other organizations committed to participatory democracy and social justice.

The organization has successfully litigated cases on behalf of victims of rights violation by both the government and non-state actors. It has also organised campaigns against detention without trial, extra-judicial killings and structural adjustment programs. CDHR produces a quarterly newsletter and an annual report on human rights violations in Nigeria.

Together with the CLO and other NGOs such as the Committee for the Defence of Human Rights and Constitutional Rights Project, these organisations have played no mean role in ensuring the return to democracy in Nigeria in early 1999.

iv. Kituo Cha Sheria (Swahili for Legal Advice Centre, Kenya)⁷³

Kituo was established in 1973 to provide legal services to the indigent and heighten awareness of the law through publication of legal education materials and organising meetings, seminars and workshops. Kituo also works towards enhancing the democratic process and rule of law in Kenya. Legal services provided by Kituo have included representation of the poor in the courts and provision of legal advice on, *inter alia*, family law, land disputes, employment and labour disputes, landlord and tenant issues, criminal offences, accident claims, rape cases, women's rights issues, etc. Kituo organises

⁷² *Ibid.*

⁷³ *Ibid.*

paralegal training programmes in rural areas in order to provide access to and knowledge of the law in those communities. Kituo has also encouraged the establishment of human rights clubs in schools to promote student awareness.

v. The African Commission of Health and Human Rights Promoters (CAPSDH)⁷⁴

CAPSDH is a pan-African body which has its Francophone headquarters in Brazzaville, Congo and its Anglophone office in Accra, Ghana. CAPSDH is committed to rehabilitating victims of human rights abuse and reintegrating them into the society. It also fights for improvement in human rights conditions. The Ghanaian section is one of the most active. It has undertaken several important projects such as organising conferences and workshops, offering refuge to refugees fleeing civil war in Liberia and Sierra Leone, rehabilitating victims of human rights under the PNDC government in Ghana, publishing annual reports and coordinating efforts to form an umbrella organisation for human rights NGOs in Ghana.

vi. The Coalition Against Slavery in Mauritania and Sudan (CASMAS)⁷⁵

CASMAS has been involved in campaigns to end the enslavement of black Africans by Arab Moors and North African Arabs who buy, sell and breed them as slaves. It has been able to raise awareness of this problem and has redeemed some of the slaves by actually buying them and setting them free, rehabilitating them or helping them to rejoin their families. What it has not been able to do, though, is to pressure or lobby the governments of Sudan and Mauritania to legislate an end to this barbaric practice.

In spite of these notable achievements by some select human rights NGOs, still much need to be done. Some of the problems and needs that have been identified are: lack of national coordination and collaboration,⁷⁶ gender imbalance,⁷⁷ undemocratic organisation

⁷⁴ Information on file with the author.

⁷⁵ [Http://www.casmas.org](http://www.casmas.org).

⁷⁶ This problem has been occasioned by the poor communication system in most African countries. Another factor is the unhealthy rivalry and competition for funding which has created the general attitude among many African NGOs that "we united we fall, divided we stand."

⁷⁷ The invasion of the African NGO world by the men due to the political context that promoted their formation. A few exceptions are the LRC of Malawi and the Green Belt Movement of Kenya that were founded by women. In most situations, women's involvement in NGO work are limited to exclusively

structures,⁷⁸ urban-rural split,⁷⁹ problem with fact-finding, investigating and monitoring,⁸⁰ etc.⁸¹

IV: A New Role for Human Rights NGOs in Africa

While the half-effort made to effect democratic change in Africa has in some respects led to greater respect for human rights, it is my view that, in significant ways, it has done some harm to the cause of rights promotion and protection. Seeming democratisation has helped offer legitimacy to illegitimate African governments by reference to two sign-posts. The first is the incorporation of formal human rights provisions into their constitutions and allowing for periodic elections. The second is the ability of African governments to transform their means of oppression into more sophisticated and more subtle forms that are able to avoid detection by the methodology of human rights monitoring and documentation already in place. This situation has fostered the continuance of a culture of repression. People continue to relate to each other in the old ways. Intolerance persists while the oppressed still behave as victims, remaining "passive, cynical, [and] pessimistic."⁸² Another problem that arises is the continuation of personnel. As outlined above, all that changed in most African states has been the shedding of military clothes and titles, but not the brutal tactics of repression. The repressive apparatuses and legislation remain largely in place.⁸³ As a result, the pre-existing norms regarding oppression have become institutionalised even where the incumbents have been thrown out of power.⁸⁴ Matas puts it more succinctly:

If democracy returns the majority may be enfranchised. But in a transitional regime, they are not in a position to reacquire all that was taken away from them, to reverse the expropriations, the divestitures, the ill gotten gains of repression. Transitional regimes protect what has

women's organisations which are mainly development-oriented and therefore deemed to be outside the realm of politics.

⁷⁸ This issue is related to the political factor: "civil societants" and former politicians using NGOs to get back into politics and therefore setting their own agendas that will take them to the top, so to speak.

⁷⁹ A factor that has led to concentration of NGO activities in the cities.

⁸⁰ Due to lack of access to resources for research, etc.

⁸¹ See, Swedish NGO Foundation and IHRJE, *supra* note 38, Chapters 4 and 5. Also, Stephen Toope, "Preparing for the 1997-98 Kenyan Elections: The Role of Civil Society." 25 September, 1996 (Unpublished. Copy on file with author).

⁸² Matas, *supra* note 28 at 43.

⁸³ Refer back to the role of the BNI, etc in Ghana in Chapter 4.

⁸⁴ This is the case, for instance in Zambia under Frederick Chiluba.

become the vested interests. The majority may be able to prevail at the ballot box, but may remain powerless in other ways.⁸⁵

The remark by Matas reveals the political context in which abuses take place. But most statistical analyses of rights abuse are not done in a political context.⁸⁶ One reason given is that this will help avoid the question of "political bias." Thus, Orentlicher argues that "NGOs may risk diminishing their credibility if they combine their reporting activities with an activist stance on a current policy debate or address the political context surrounding the abuses they chronicle."⁸⁷

One cannot divorce politics from human rights. The two are intertwined. The central difficulty involved in protecting and promoting human rights is the different and complex functions assigned human rights as a political concept.⁸⁸ One other critical issue, which of course may be inferred in the examples Fawcett gives but which I suggest ought to be more prominently highlighted, is the question of development. For, as this work has consistently established, the major stumbling block to effective rights enjoyment is development, even though, as I have also sought to prove, human rights is integral to facilitate and promote development.

The significance of human rights fact-finding is that the data gathered is used, *inter alia*, for monitoring, advocacy, educational and other purposes⁸⁹ consistent with the mandate of the particular human rights NGO⁹⁰ or other body.⁹¹ However, where such

⁸⁵ Matas, *supra* note 28 at 45.

⁸⁶ Stohl *et al*, "State Violations of Human Rights: Issues and Problems of Measurement," (1993) Vol.15 *Human Rights Quarterly*, 592.

⁸⁷ D. Orentlicher, *supra* note 8 at 87.

⁸⁸ Some of these political factors include: as a standard of acceptability of regimes; as a vehicle for self-determination of peoples or the activism of revolutionary groups; as a ground for justifying foreign policy, predetermined by objectives having little to do in fact with human rights; as a reason for intervening in the affairs of other countries. See J.E.S Fawcett, "Human Rights in International Relations," in Roger Morgan, *The Study of International Affairs* (London: Oxford University Press, 1972), 17 at 17.

⁸⁹ Under the negative political conditionality regime, Western governments gathered data from human rights NGOs and other sources to enable them determine which states to deny aid to. Eg., Charles Humana, *World Human Rights Guide* (New York: PCIA Press, 1994).

⁹⁰ Richard Claude and Thomas Jabine, "Editors' Introduction" to presentations at Symposium on Statistical Issues in the Field of Human Rights," (1993) Vol.15 *Human Rights Quarterly* 551, at 556.

⁹¹ Such as the United States Department of State, Bureau of Democracy, Human Rights and Labor which issues annual country reports on the human rights situation in the world.

data concentrates on the quantitative,⁹² instead of the qualitative aspect of analysis, the data is not able to express the actual experiences of the violations that take place on the ground.⁹³ In this way, the relevance of the information gathered is reduced.

Some of the major political issues that Stohl *et al* have been able to identify as limiting effective human rights monitoring include the situation where the behavioural terror process becomes part of the political structure, "and as a structure, it is no longer observable as a behavioural event;"⁹⁴ the issue of "mixed motivations;"⁹⁵ the problem of limiting fact-finding to governments only and most often overlooking abuses of non-state actors such as rebels;⁹⁶ and the issue of assessing abuses by reference to what researchers and fact-finders refer to as arbitrary

⁹² Some of the works on quantitative measurement of human rights data which have been criticised include, Taylor and Jodice's *World Handbook* (eg., C. Taylor and D. Jodice, *World Handbook of Political and Social Indicators III: Political Protest and Governmental Change*, Vol.2 (New Haven: Yale University Press, 1983) and, to a limited extent, Gastil's *Freedom House* (eg., R.D. Gastil, *Freedom in the World: Political Rights and Civil Liberties, 1980* (Boston: G.K. Hall and Co., Freedom House Books, 1980). For a critique of measurements of human rights, see, eg., H. Scoble and L. Wiseberg, "Problems of Comparative Research on Human Rights," in Ved Nanda *et al*, eds., *Global Human Rights Public Policies, Comparative Measures, and NGO Strategies* (Boulder: Westview Press, 1981), 147; *ibid*; B. G. Ramcharan, "Evaluating Human Rights Performance: Some Relevant Criteria," (1981) Vol.7 No.1 *Human Rights Internet Reporter*, 12; Andrew D. McNitt, "Some Thoughts on the Systematic Measurement of the Abuse of Human Rights," in D. Cingranelli, *Human Rights: Theory and Measurement* (New York: St. Martin's Press, 1988), 89. Russell Barsh, "Measuring Human Rights: Problems of Methodology and Purpose," (1993) Vol.15 *Human Rights Quarterly*, 86.

⁹³ B. G. Ramcharan ed., *International Law and Fact-Finding in the Field of Human Rights* (The Hague: Martinus Nijhoff Publications, 1982).

⁹⁴ Stohl *et al*, *supra* note 86 at 595. In the case of Ghana, this is with reference to the BNI which has no legal basis for its existence but has never been questioned by human rights NGOs, both foreign and local. Yet, some glimpses of its activities are recognised in the Constitution. While most of the activities are in conformity with classical intelligence work, the problem is with the means of fulfilling these mandates and on whom. One of the former BNI operatives interviewed said he joined the organisation out of good faith because he wrongfully assumed that with the return to democratic rule, the BNI would be used for purely normal intelligence work. It was not until he noticed the spate of abuses going on that he decided to quit at the threat to his life.

⁹⁵ *Ibid*. Where the rights abuse evolves to such an extent that the agents of abuse begins to develop their own personal objectives. These objectives would deviate from that of their superiors who originally placed them in that position. In the case of Ghana, under the NDC administration, the commandos belonging to the BNI establishment have been carrying on some forms of abuse which are not sanctioned by their superiors. They use that to settle personal scores, for personal aggrandizement, to satisfy friends, etc. They can even be used to do debt collection. In such a case, the methodology of human rights INGOs are not able to, or do not recognise such forms of abuse as worthy of note. But placed in a political context, the government of the day can be held responsible for putting the commandos there in the first place and giving unfettered powers and being afraid to discipline them for fear of breaking their rank and provoking a revolt.

⁹⁶ *Ibid*. Such situations exist in trouble spots in Africa such as Sierra Leone, Rwanda, Burundi and Sudan.

or illegal acts by abusive regimes to distinguish “human rights violations” from the “legitimate use of force.”⁹⁷

Against the background of this extrapolation, Stohl *et al* delineate three dimensions that they believe should be of general relevance to human rights measurements in order to avoid quantitative bias, thereby avoiding its pitfalls. These are scope, range and intensity. Before discussing these, it is important to note that it is the concentration of most human rights INGOs on quantitative analysis which has prevented them from detecting and documenting the sophisticated and professional forms of abuse that African governments now engage in. The US State Department has been equally criticised for ignoring context. On two consecutive occasions, it has been criticised by the Lawyers’ Committee for Human Rights regarding its reporting on the human rights situation in Kenya thus:

[I]t takes a laundry-list approach to the recitation of abuses instead of providing an overarching framework within which to analyze and understand these disconnected facts.⁹⁸

The first dimension that Stohl *et al* mentions is scope.⁹⁹ Scope has to do with the level of state violation by asking what type of harm is done to the victims.¹⁰⁰ This is related to the qualitative nature of rights abuse. But it needs to be combined with the other two dimensions, intensity and range, to be able to discern a clearer picture of possible continuing abuse.¹⁰¹ However, it is worthy of note a significant defect in this analysis which is reflected in the Western-liberal notion of rights as a whole. The harm here is limited to direct harm and also harm that is caused by doing something to the victim. However, when dealing with abuse of *socio-economic* civil rights, the harm may also involve not doing something – not opening up space for people to be involved in deciding on issues that affect their everyday development, that is, the

⁹⁷ *Ibid* 596. A typical example is the claw-back clauses in the African Charter.

⁹⁸ See Lawyers’ Committee for Human Rights, *Critique: Review of the U.S. Department of State’s Country Reports on Human Rights Practices 1996* (New York: Lawyers’ Committee for Human Rights, 1997), 151. See also the report for 1995.

⁹⁹ See similar analysis on the three-dimensional issue to rights measurement and surrounding issues in Christopher Mitchel *et al*, “State Terrorism: Issues of Concept and Measurement,” in Michael Stohl and George Lopez, eds., *Government Violence and Repression: An Agenda for Research* (New York: Greenwood Press, 1986), 1.

¹⁰⁰ *Ibid* 14.

¹⁰¹ Stohl *et al*, *supra* note 86 at 599.

closure of democratic space. Such harm could be intangible and cannot be measured by quantitative, as well as the qualitative analysis that Stohl *et al* espouse. It needs to be measured within the developmental context. That is, how much the denial of the *socio-economic* rights of the people in the rural community has affected their ability to take part in the exercise of *socio-economic* civil rights which translates itself into, *inter alia*, mobilisation, organisation, decision-making over what projects to undertake, how they should be undertaken, etc to meet the needs of a community or people, evaluation of the project, reaping, sharing and protecting the gains. These involve the exercise of freedoms of thought, opinion, expression, association, assembly, etc at the grassroots level to enable the people to take part in their own development. Adopting this methodology of rights investigation will help expose the nature and enormity of abuses being committed, not only by governments, but by development NGOs. Many of these organisations have hidden behind the nebulous and politically-loaded notions such as “participation” and “participatory development” to dictate to, and “insert” communities into their projects. The inability, lack of interest in, or readiness to involve communities in the projects from the beginning to end, involve the abuse of their rights to freedoms of expression, association, assembly, etc. It is therefore necessary that human rights NGOs monitor this aspect of human rights abuse and make development NGOs, and for that matter, their sponsors who in turn dictate the mandate and operations of development NGOs, responsible for these abuses.

While treating the issue of development NGOs, another form of indirect abuse they engage in or which they tacitly condone, is that they typically do not question what has occasioned the level of poverty that the people they want to help find themselves in. They too often treat effects, not causes – resulting in almost inevitable failure. This approach denies the people the opportunity to know and express the abuses they have been subjected to which directly are related to the poverty they find themselves in that the development NGOs supposedly want to help them out of. Apart from these failings, some development NGOs also engage in some form of direct physical

abuse on those they are supposed to help, especially when they have to meet deadlines, to pressure the people to put in more time to finish a project on time.

The narrow definition of "scope" also means that the indicators that human rights scholars use to measure human rights are tailored to detect and measure "repression," or to answer the question "which states are the most repressive?"¹⁰² Thus, Barsh contends that the criteria were selected in an effort to get at this notion of "repressiveness," rather than positive concepts of freedom, which are more subjective and may never be fully realized even in industrialized countries.¹⁰³ The approach is similar to the problem that development NGOs experience in assessing only the vulnerabilities of relief victims and other communities that they think need their help, but not the capacities of such people.

The linking of the scope with the intensity and range criteria helps expose the positive sides of Stohl *et al*'s analysis as well. According to them, intensity is linked to the frequency of occurrence of each of the various types of state violations during a given period of time.¹⁰⁴ Intensity addresses the issue of quantity: how frequently particular abusive activities are utilised.¹⁰⁵ Concerning range, they contend that it is related to the portion of society from which the target group or those abused are drawn.¹⁰⁶ The relevance of this process is that

[B]y explicitly measuring each, moreover, it should be easier to chart variations in human rights abuses, as well as the different tactics regimes employ. Further, by disaggregating the concept in this manner we provide clearer opportunities for introducing needed judgments regarding the political peculiarities of individual cases, and thus better insuring valid measurement.¹⁰⁷

In relation to the human rights situation in Ghana, which on this score is typical of most African countries, the intensity of abuse has reduced, while scope and range is on the increase. Scope has been extended to cover cases of rape, denial of press freedom in the form of cutting the quota on printing material, threats and actual

¹⁰² R. Barsh, *supra* note 92 at 115.

¹⁰³ *Ibid* 115-116.

¹⁰⁴ Stohl *et al*, *supra* note 86 at 601.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid* 603; Mitchell *et al*, *supra* note 99 at 16.

prosecution of cases against journalists for libel, denial of contract jobs to members of the opposition, and vandalism and stealing of property belonging to members of the opposition. The range has also shifted from the top hierarchy of the opposition to the middle level personnel of the opposition forces who are a link between the grassroots members of the opposition and the hierarchy. The abuse taking place at the grassroots level is mainly in the form of *socio-economic* civil rights abuses mainly through the instrumentality of development NGOs. But another factor which is overlooked by Stohl *et al* is the extension or replacement of the agents of abuse, what is referred to as “surrogate” groups.¹⁰⁸ This has the effect of deflecting attention from the traditional organisation of abuse.

These forms of abuse are best detected and documented by local human rights NGOs. Through collaborative work with town/village/ethnic/improvement associations,¹⁰⁹ most of whom are in direct contact with the range of abuse, it will be possible to improve the current level of human rights fact-finding and promote responsibility among African governments and development NGOs. Local human rights NGOs can be more effective if they pull their resources together to mount effective education campaigns, organise grassroots membership and intensive fund-raising drives. They can best do this if they liaise with the various town/village/tribal improvement associations and, with time, urge the formation of human rights branches in such associations. These associations have become the place of withdrawal from the oppressive/predatory policies and practices of the state. Therefore, where human rights NGOs are able to send the human rights message to them and it is embraced, an important step will have been taken in linking the rights struggle to the grassroots.

It is within this context that the collaborative roles between African human rights NGOs and their international counterparts need to be exploited to expand the democratic space that has been offered by the new political conditionality regime

¹⁰⁷ Stohl *et al*, *supra* note 86 at 602-603.

¹⁰⁸ The Swedish NGO Foundation and IHRIE, *supra* note 38 at 3.

¹⁰⁹ These compose the traditional remnants on the development structure.

before the space and parameters begin to shrink and ultimately close up again.¹¹⁰ Due to the fact that the current stage of democratisation in Africa was programmed and choreographed by Western capitalist states and imposed on Africa, appropriate steps to the establishment of participatory grassroots democracy were not taken. And in the face of the conservative, non-structuralist role being played by the opposition parties and even some human rights NGOs, it becomes necessary to re-orient existing human rights NGOs and create new ones that will align themselves with the oppressed people and other forces of “civil society” to motivate and mobilise them to do away with lingering and creeping dictatorship. African human rights NGOs need to guide the people to choose new and capable political leaders who are likely to protect their rights and interests and ensure *sustainable holistic* development and fair distribution of resources. But they should leave the choice of who to vote for to the people and they themselves should not turn into political parties to contest for political office. It is important for them to maintain their NGO status for the people will still need them to police the government they may indirectly help them to choose. Thus, African NGOs should be seen operating as interest groups, their clients being the oppressed, the marginalised and the abused. Their role should be to reinstate the development structures of their communities and bring back in the marginalised entities onto these structures.

Against this background, and the analysis pursued through this dissertation, a human rights NGO in the African context should be defined and restructured on these lines: as an organisation that forms a vital component of civil society and which devotes its resources to helping marginalised entities on the dependence structure to be politically-conscious so as to be in a position to articulate, organise and assert claims and protect their rights from further abuse. Its ultimate goal should be to help protect the democratic space and pave the way for individuals and groups to realise their potentials and talents, thereby contributing to development. This proposed role for African human rights NGOs helps to cover the political side of human rights work without being partisan, as well as pin-pointing the role of human rights NGOs in

¹¹⁰ See Chapter 5.

helping to dismantle the structures that militate against the development of the people. It also shows the vanguard role that human rights NGOs must play in any meaningful process of democratisation in Africa. In light of this proposition, the hope for the realisation of participatory democracy lies with human rights NGOs to break through the limited space and parameters they have been confined to, and influence civil society at the grassroots.

Finally, it is worth noting that the ultimate solution to the human rights struggle lies in its internalisation or localisation, not its internationalisation. It is for this reason that the work of the human rights INGOs must be supplemented by local human rights NGOs, and thus for the two to work more closely together than ever before. One important collaborative effort in this regard is the useful information local human rights NGOs offer the Lawyers' Committee for Human Rights (LCHR) in order to successfully review and critique the US State Department country reports. However, my contention is that while tapping information from local NGOs helps to at least demystify the "political bias" tag, it is still not enough. INGOs will have to do more, eg., by helping to protect and further expand the "space" of "civil society" at the grassroots and help local groups to defend the space against recapture by the state.

CHAPTER 6

OVERVIEW AND CONCLUSION

Nothing sensible or pertinent can be said about human rights if one ignores this daily, universal fact of revolt ... [O]nly by remaining silent about this commonly experienced fact, or by considerably reducing its implications, is it possible to make human rights an invention of Western culture. -- P. Hountondji¹

Introduction

Three distinct approaches to the consideration of human rights in the last decade have been identified by Michael Stohl *et al.*² These are: first, the use of human rights as “a legitimate, if not critical, social science concept for inquiry in comparative and international affairs.”³ This approach ranges from the philosophical analysis of rights to comparative research which portrays the regional and cultural character of rights across the globe. I refer to this as the philosophical-comparative approach. The second examines the legal and institutional dimensions of human rights in the context of the scholarly and judicial traditions of international law. A special focus of this approach is “the development of effective human rights strategies and organizational machinery at the international level for holding governments accountable for their actions.”⁴ This is labelled the legal-institutional approach. The third approach identified by Stohl *et al* involves the attempt by social scientists to evaluate the impact of the use of so-called “negative,” and now, supposedly “positive” conditionality clauses to punish and reward human rights abuse and promotion by recipient states.⁵ I call this the fact-finding/aid-conditionality approach.

¹ Pauline Hountondji, “The master’s voice – the problem of human rights in Africa,” in P. Ricoeur, ed., *Philosophical foundations of human rights* (Paris: UNESCO, 1986) 319 at 320.

² Stohl *et al*, “State Violations of Human Rights: Issues and Problems of Measurement,” (1993) Vol.15 *Human Rights Quarterly*, 592.

³ *Ibid* 592.

⁴ *Ibid* 592, 593.

⁵ *Ibid* 593. But this third approach is defective. It does not mention human rights fact-finding by human rights NGOs whose principal purpose for monitoring rights violations is not with the purpose of using the information to determine aid apportionment. Of course, reports of human rights NGOs have been used for such purposes and in some cases, some Western governments have specifically asked

The present dissertation has sought to encompass all three approaches. The first two chapters, especially, dealt with the philosophical-comparative approach and the relationship to traditional notions of rights. The fact-finding/aid conditionality approach is reflected in Chapters 3 and 4. Chapter 5 devoted itself to the second approach against the background analysis of the other two. It involved examining how human rights NGOs can effectively promote human rights in Africa states.

According to Stohl *et al*:

Despite this considerable and diverse attention [regarding the three approaches], however, little concrete progress has been made in our understanding of human rights, especially in positing the relationships among human rights and particular social, economic, and political structures and processes. In short, it is still impossible to state with any assurance what variables lead to improvements or retrogressions in a state's human rights behavior, or to predict when such changes will occur.⁶

In the context of the third approach, which is the focus of analysis in their article, the question posed by Stohl *et al* is broad enough to resolve the narrowly focused quantitative approach to human rights monitoring. But the fact-finding/aid-conditionality approach, at best, limits itself to finding the causes of right abuse, not how to find solutions to the stumbling blocks identified.

It is, perhaps ironically, the philosophical-comparative approach which is most solution-oriented. Yet the solution it seeks to suggest to make human rights an effective concept to promote human dignity, to create space for fulfillment of human potential and talent, and to promote development, is defective. The philosophical-comparative approach portrays human rights as an inviolable concept that is inherent in human beings and should appeal to the hearts and minds of government officials to respect them, and for the citizenry to claim them if governments renege on their "natural" commitments to respect rights. This approach has adopted an expanded means to improve human rights: by concentrating on whether human rights should be seen as a universal or cultural-relative concept. But I contend that both the universal and cultural-relative paradigms have failed to promote human rights. The universal

NGOs to do such research for them. It is for this reason that I prefer to label the third approach as the fact-finding/aid-conditionality approach.

⁶ *Ibid* 593.

approach fails because it does not recognise that human rights is culture-based and that the regionalisation of rights concepts proposed by the UN was not meant to lower human rights standards. The attitude of the universalists stems from the overconfident perspective they hold that human rights is only a Western concept, or that the Western concept of rights is the best, the highest standard to which all other cultures should aspire. The failure of the universalist approach is that it has sought to impose certain concepts of rights on other cultures which are foreign, or are not yet ripe, for exercise in various cultures. This attitude has also offered governments and scholars of the less industrialised world the space and freedom to define the cultural-relativist approach to rights promotion and protection as a setting up of standards lower to that of the Western type. This, in turn, explains the failure of the cultural-relativist approach.

The philosophical-comparative approach provides the foundation for the legal-institutional approach. Therefore, as a result of the problems besetting the former, the legal-institutional approach has also proven ineffective in large measure, leading to untold misery and hardship to millions of people who feel disappointed by the international mechanisms. This is the background to the analysis of the recommendations to improve human rights by seeking to incorporate the perspective of other cultures into the international system. It also represents the mission of the theory of community emancipation.

I: Overview

As noted at the outset, the present dissertation has a multi-faceted goal. It seeks to locate the principal cause for abuse of human rights in the failures of development. But the work also establishes that the principal reason for the emergence of the concept of rights from the Akan perspective is development. I advocate the adoption of a *positive* relationship between human rights and development, a relationship that would allow human rights to be used as a tool for the attainment of *sustainable holistic* development in Africa and to suggest how this goal can be attained. This project represents the Akan contribution to the African, and ultimately, the

international human rights regime. And since it was established that the Akan worldview is flexible to accommodate other worldviews, recognising and incorporating the Akan and other African perspectives on rights will make it easier for African people to find the international human rights system more meaningful and acceptable.

In attempting to arrive at this goal, I traversed a circuitous route which involved the formulation of a theory – the theory of community emancipation.⁷ This theory is a historico-normative approach to analysing the relationship between needs, capacities, duties and rights in the Akan context and how these concepts work together to evolve a notion of development that is culture- and gender-sensitive, holistic in focus, and sustainable – economically, physically and socially.

First, the theory was presented to defend the existence of an African concept of philosophy which has embedded in it various African cultures' notions of human rights, civil society, democracy and development. The focus, however, was placed on the Akan society of Ghana. This is the society with which I am familiar and which served as the locus for my field work. I went on to analyse the factors that have informed the development of these concepts, especially that of human rights, which act as the structure for the rest. Of the two schools of African philosophy which were delineated, the *contemporarist* and *holistic*, the latter was adopted as a positive representation of African philosophy. It represents the ability of African peoples to reflect on or conceptualise their experiences and struggles for freedom and dignity. It is within this context that rights exercise is located. The discussion was pursued against a background analysis of how European philosophers' ethnocentric perspective on African people and their culture helped to lay a foundation for their colleagues in the field of anthropology to continue in a biased analysis of Africa. In a related context, the theory of community emancipation is used to discuss and attempt to settle the debate over the existence of

⁷ See Appendices A and B for a diagrammatic representation of the theory. This theory is a development from the one formulated for my LL.M thesis. See K. Appiagyei-Atua, *Rediscovering the Rights-Development Relationship through the Theory of Community Understanding; The Experiences*

African notions of rights by arguing for an Akan notion of rights and suggesting that similar analysis may be offered to develop notions of rights that are related to cultures which share similar traditional African political systems. The theory's main focus is: first, what should properly constitute the elements of an Akan notion of rights; and, second, the factors that have informed and shaped these constituent elements.

Even though I avoid the nomenclature "cultural relativism,"⁸ I contend that human rights is culture-based and culture-specific. For that matter, Africa has distinct notions of rights. Recognising the differences from Western notions is key to making rights exercise more relevant to the ordinary person. It also helps to make human rights a concept that individuals can identify with and use as an effective tool to confront oppression and attain development. This culture-based component of human rights is to be used to supplement the international mechanisms already in place, but not to excuse abuse of rights. Therefore, my cultural argument is designed to increase the burden on African governments to accord greater respect to rights. While the theory of community emancipation dwells significantly on the cultural component, it shifts from this uni-dimensional paradigm and brings in two other equally important but neglected factors, the historico-colonial and developmental. The cultural factor is located in Africa's pre-colonial past, the historico-colonial, in Africa's colonial past, and the developmental, in Africa's post-colonial and contemporary times. The historico-colonial dimension deals with the negative effect of colonialism on the rights and development of traditional African political systems, and the disruption of the natural metamorphosis of political communities from the *communal* and *political* to the *advanced political* stages. The developmental aspect therefore is to justify the rediscovery of African notions of rights to enable African peoples to use rights as a tool to attain their arrested development.

At least three opportunities have presented themselves to Africans to espouse a true and positive formulation of African notions of rights. But they have all been

of Ghana and Canada (LL.M Dissertation, Dalhousie University Law School, Halifax, 1994), esp. Chapter 1.

squandered to serve parochial interests. The first opportunity presented itself at the UN, from the early 1970s, when Africa and other less industrialised states had the upper hand to elaborate and contribute to the formulation of international human rights law. African leaders sought to excuse a commitment to formulating a comprehensive notion of rights for the continent's people by relying on political, economic and cultural factors to limit their contribution. The second opportunity was presented to African scholars in the early 1980s to make up for what the political leaders failed to espouse and defend. But in attempting to address the problem, African scholarship narrowed down the debate on an African notions of rights and centred largely on the cultural aspect. Even within this context, undue emphasis was placed on a scholar's particular cultural background which was then used to make unfounded generalisations about African culture.⁹ The third opportunity was in the elaboration of the African Charter on Human and Peoples' Rights.

In analysing the cultural aspect of the debate, it came to light that the Akan and the Western liberal notions of rights, compared with each other, show some major differences in certain key respects. One can therefore conclude that it is likely that African notions of rights in general possess important characteristics different from the Western concepts. These may include: the philosophical basis informing the origin of rights, the rationale behind their emergence, the segmentation of rights into various generations, and the nomenclature attached to human rights. Due to the relationship that exists between human rights and civil society, one is also likely to discern some differences between the concept of civil society as developed in Western Europe and traditional African political communities. The historico-colonial element is examined in the context of the impact of colonisation of African territory and the pillage and plunder of the continent's resources to promote European capitalism on Africa's natural metamorphosis and development. This experience justifies the claim for African

⁸ This is due to some fundamental flaws associated with the theory of cultural-relativism itself. Also, there is a difficulty with regard to its application, apart from the way and manner it has been abused by governments the world over, especially African governments.

⁹ This approach represents a spill-over of the methodology of African socialism whereby particular African nationalist leaders used their tribal background to argue for an African concept of one-

notions of rights but not in the manner put forward by its self-serving political, and even intellectual, leaders. The development argument utilised to argue for the recognition of an Akan notion of rights is premised on two grounds: first, unlike Western notions of rights which consider the relevance of human rights simply on the grounds that it is something that is inherent in human nature that must be enjoyed by human beings *qua* beings, the Akan notion of rights focuses upon the significance of the exercise of rights to unlock and harness the potentials and talents of individuals and communities. The second issue with respect to development is that Western development policy framers for Africa, and African leaders alike, have portrayed human rights as a stumbling block to development. This is a representation of the *negative* relationship approach to development. But the theory of community emancipation rather supports the *positive* relationship approach which contends that human rights hold the key to development.

I have noted, however, that mainly *negative*, and at best, *passive* understandings of the relationship between human rights and development have shaped the agenda of Western capitalist donors since the time of independence. The *negative* relationship postulates that development can be attained in the absence of the exercise of human rights by the ordinary people (the popular sectors) who in fact produce the economic wealth of a nation (measured as GNP). The *negative* relationship further assumes that it is through the process of development that human rights will naturally begin to flourish. In other words, human rights are a by-product of a rising standard of living. This approach suggests that people must forgo their human rights, at least temporarily, in order for development to gather speed. So civil and political rights are impossible luxuries because they destabilise a fragile developing state economy. Only at some future developed stage will full exercise of rights be justified and permitted. The *passive* relationship approach ignores questions of human rights until the eruption of war or communal violence, or the sinking of the population into a state of profound demoralisation (demoralisation being perhaps the only alternative to resistance or violence in the face of ruthless, top-down capitalist development). Only

partyism which even from their own tribal background were in most cases wrong, exaggerated, misinterpreted or misapplied. Refer to Chapter 2.

when the smooth progress of escalating exploitation is disrupted by these events do political leaders and their financiers make pious appeals for a respect for human rights. A respect for human rights is then necessary to appease the demands of a population that has been denied them. *Negative* and *passive* relationships between human rights and development therefore place development over and above the individual human person, apart from those who tread the economic and political corridors of power.¹⁰ The ordinary producer is seen as “human capital,” “just another part of the production process, without reference to inherent rights or dignity,” and forced to produce goods for the world economy.¹¹

The theory of community emancipation asserts that assuming a *negative* relationship between human rights and development results in the inability of the popular sectors to maintain high levels of production over time. This is because the lack of recognition of their rights prevents them from exercising their rights *to be* – *foundational* or *enabling* rights – and consequently prevents them from exercising their subsequent right *to do*. The exercise of these rights involves full and unhindered participation in the process of development: including the right to work, and the right to favourable working conditions. To safeguard these one also requires the right to form trade unions or farmers’ cooperatives; to ensure that these rights can operate, the rights to freedom of association and assembly, to freedom of thought, opinion and expression are also demanded. It is clear that if the population is to be the engine for development, these rights are not luxuries or things that can follow on promised improvements in the standards of living: they are the very conditions for successful development. The final aspect of rights are the rights *to have* which manifest themselves principally in property rights. The rights *to do* and *to have* encompass decision-making, identification of needs and types of projects to meet those needs, implementation, evaluation, sharing the benefits of development and protecting the

¹⁰ See Appendix B.

¹¹ ICHRDD, “Human Rights: APEC’s Missing Agenda” (Fall 1997) at 12. However, the force that the author has in mind here is the threat of physical force. However, the theory of community emancipation suggests another type of force beyond the type already identified, that is the non-physical type. This type of force is inflicted on the individual when he or she is made to engage in production

benefits. Assuming a *negative* relation between rights and development ultimately leads to the population being seen as a negative factor in development. The denial of fundamental rights enables the popular sectors to make positive contributions to development for a short period only, followed by, at best, a *passive* contribution, before being seen as an inconvenient obstacle to a “development” that benefits only foreign corporations and a select African elite.

The above analysis is used to assess the Western development policies, which have been implemented in Africa with the active collaboration of African leaders. The policies¹² are reflected in the first Development Decade,¹³ the second Development Decade,¹⁴ the third Development Decade,¹⁵ and the Post-Cold War or Globalisation phase.¹⁶ The latest stage is hailed as the triumph of the final merger between human rights and development, indicating an adoption of the *positive* relationship between rights and development. One reason offered in support of this claim is the fact that the political conditionality clause has been made positive where support and aid are given to recipient governments as a reward or incentive to undertake democratic reforms. This is supposed to involve participation at the national level. At the local level, grassroots participation is said to be promoted through civil society, represented mainly by development and human rights NGOs.

However, I argue that the *negative-passive* relationship between rights and development remains predominant. Although it is not in dispute that there have been some improvements, it has not crossed the *passive* line into the *positive*. This situation is influenced by the mandate assigned the two principal elements of civil

without being allowed to go through the three stages of rights exercises that would enable him or her to be fully developed and thereby be in a position to take part in development in a meaningful manner.

¹² Refer to Appendix G.

¹³ From 1960-1970. It is referred to as the growth-oriented approach which involved the implementation of the modernisation theory and an improvised form of Keynesianism.

¹⁴ Referred to as the “basic-needs” approach. But this approach was cut midstream to enable a return to the growth-oriented approach that was implemented hand-in-hand with the “negative” political conditional regime.

¹⁵ Also labelled the “lost” decade. It involved the introduction of the SAP which was implemented in two phases – the “classical” SAPs (1980-1985) and neo-SAPs (1985-1990).

¹⁶ From 1990 to date.

society set up to carry out the globalisation agenda – human rights and development NGOs. On their part, human rights NGOs have been assigned a limited, trail-blazing role to let those political reforms which are essential to facilitate economic liberalisation take place. The type of rights that the political reformers promote and protect are what are identified as *political* civil rights and political rights proper. But these rights concentrate on protecting private property against the state, not on protecting the popular sector against abuse by non-state actors. The “good governance” agenda makes up for the lack of attention to economic, social and cultural rights¹⁷ by employing development NGOs to promote an international system of social welfare. The design is to curb *negative* and *passive* contributions and thereby facilitate the promotion of an unsustainable *positive* contribution to development. The philosophy, mandate and operations of development NGOs have largely had a negative impact on rights promotion and protection for the people they are supposed to help. For example, development NGOs do not question the circumstances that led to the creation of the distressed conditions in which they live. This is influenced by the distinction that the Western notion of rights typically make between civil-political rights and economic, social and cultural rights.

Also, development NGOs do not respect the *socio-economic* rights of the people which involve the exercise of freedoms of expression, association, and assembly, at the local or micro level. *Socio-economic* civil rights are supposed to lay the foundation for rights-holders to be more politically conscious and to influence politics at the national level. The exercise of the *political* aspect of civil rights and political rights proper is supposed to insulate, protect and facilitate the exercise of *socio-economic* civil rights. Therefore, the lack of emphasis on civil and political rights has failed to provide a rights foundation or approach to development by development NGOs. The type of “development” that has evolved out of the globalisation process

¹⁷ Through cuts to social programmes such as health, education, sports, cultural activities, etc in order to sanitise the financial position of less industrialised states.

is only growth-oriented. The UNDP variously refers to it as “jobless growth,”¹⁸ “ruthless growth,”¹⁹ “rootless growth,”²⁰ “futureless growth,”²¹ and “voiceless growth.” These types of growth challenge the contention that globalisation is geared towards a *positive* relationship between rights and development. The UNDP Report defines voiceless growth as the type of growth

In which growth in the economy has not been accompanied by an extension of democracy or empowerment. Political repression and authoritarian controls have silenced alternative voices and stifled demands for greater social and economic participation. Policy-makers once debated whether they should choose economic growth or extensive participation, assuming that these were mutually exclusive. That debate is dead. People do not want one or the other – they want both. But too many people are still denied even the most basic forms of democracy, and many of the world’s people are in the grip of repressive regimes. Voiceless growth can also be growth that gives women only a minor role in an economy’s management and direction. As *Human Development Report 1995* showed, human development, if not engendered, is endangered.²²

The place of human rights in the process of *controlled* democratisation or political liberalisation that has been applied to Africa is examined with a special focus on Ghana. In examining the human rights provisions in the Ghanaian Constitution, especially the enforcement mechanisms put in place to ensure the promotion and protection of these rights, it is observed that the extent to which the actual practices of the government support the protection and promotion of rights is minimal and ineffective. Yet, the fact-finding methodologies of human rights are not able to detect and report the abuses which now take place in more sophisticated forms.

It is trite that international law and international human rights law are largely influenced by Western concepts. And if one recognises major differences in rights concepts between the Western and Akan approaches as delineated above, I contend that these differences reveal major weaknesses in the international/Western-liberal notion of rights as applied in the African context. The existing international human

¹⁸ Where the overall economy grows but does not expand the opportunities for employment. UNDP, *Human Development Report 1996* (at 2. Eg., in Ghana between 1986 and 1991, GDP grew by 4.8% but employment dropped by 13%.

¹⁹ Where the fruits of economic growth mostly benefit the rich, leaving millions of people struggling in ever-deepening poverty.

²⁰ Which causes people’s cultural identity to wither by more powerful and dominant cultures whose power has been increased with growth, or through deliberate government policies to impose uniformity in the pursuit of nation-building.

²¹ In which the present generation squanders resources needed for future generations. The damage and destruction is driven by demand in rich countries, inadequate conservation in the developing countries and the pressure of poor people pushed onto marginal lands in poor countries.

rights regime has been made the poorer by the limited space accorded human rights from non-Western perspectives. But another important point to note is that non-Western states have failed to take advantage even of the limited space open to them to contribute positively to international human rights theorising and legislation.

Against this background, attempting to promote a new perspective on human rights in Africa is ultimately intended to contribute to enriching the discourse of international human rights law. This involves, *inter alia*, making a brief historical excursion into how the making of international human rights, through the instrumentality of the UN, did not adequately represent the interests of African peoples. Also, how Africans misused or under-utilised the opportunities they had. I ask the key question how international law can be restructured to give room for greater respect for human rights in Africa. In seeking to address this issue, I was inspired by the emerging trend in international law theorising which involves an interrogation of the existing forms of international law theory.²³ The interrogative aspect of this work aims at provoking a tension between new and older approaches to international law in order to transcend the limiting and disempowering characteristics of the latter and to create in its stead a more representational, more empowering and more effective international human rights regime. Much of this responsibility is assigned to human rights NGOs in terms of contributing more to human rights standard-setting and also modifying their methodologies of monitoring rights abuse and respect.

II: A Concluding Note

Antonio Gramsci has argued that civil society has two roles to play: either to ally itself with the establishment by becoming hegemonic instruments that manufacture, maintain and control the means of suppression of the people, or to exploit the space given it to engage in a revolution that would upset the establishment.²⁴

²² *Ibid.*

²³ See Douglas Johnston, "Strains in the Theory of International Law," (1990) Vol. 19 *Canadian Council on International Law: Proceedings of the Annual Conference*, 196 at 196.

It is up to African human rights NGOs to exploit and expand the limited space offered them under the post-Cold War Order. They have an important role to play in indigenising the discourse and praxis of human rights. The need for effective human rights NGOs is stronger now than ever before. The question of legitimacy which plagues most African human rights NGOs is also crucial; NGOs could, but usually do not, play a vital role as representatives of the people at the grassroots. This concern was poignantly expressed by Makau Wa Mutua during a conference on human rights protection in Africa.²⁵ He contended that African human rights NGOs still lack legitimacy, by representing an urban elite and not being sufficiently grounded in rural areas, and also being attached to their Northern sponsors. This attachment, in his view, results in conveying Northern values which “reflect ethno-centric relations between the State and the individual, inspired by liberalism – in order to better advocate African aspirations. To reach ideological independence, financial independence is also needed.”²⁶ Wa Mutua contends further:

There is no future for the human rights movement in Africa unless it can secure domestic ideological, financial and moral support from interest constituencies. It is crucial that the movement be part of the people; its leadership and aspirations must reflect the needs and perspectives of ordinary citizens ... The movement should not be complacent, as it is today, with external support.²⁷

It is crucial for human rights NGOs as a whole to team up and wage together the struggle of overcoming their own weaknesses and to be better representatives of the people. African NGOs should develop the thematic approach towards rights promotion and protection in Africa on issues that have been identified as peculiarly African. The question of impunity²⁸ and the developmental context in which rights abuse takes place should be issues of special concern. Human rights NGOs should initiate discussion on how they can be recognised as quasi-legal personalities in international law to enable them to appear before the International Court of Justice

²⁴ A. Gramsci, *Selections from the Prison Notes*, Q. Hoare and G. N. Smith, trans. (London: Lawrence and Wishart, 1971).

²⁵ The AFLA Conference on the Legal Profession and the Protection of Human Rights in Africa, held in Maastricht, 27-29 November 1997. It involved participants from the academic circle, the judiciary, national human rights commissions, NGOs and human rights activists on the continent.

²⁶ Conference Report presented by Sophie le Rue. Source: [Http://www.unimaas.nl/~ala](http://www.unimaas.nl/~ala).

²⁷ *Ibid.*

(ICJ) and other fora which remain the preserve of states. It is also up to human rights INGOs to join with other INGOs in the fight to bring corporations to respect their human rights responsibilities. For example, they should assess to what extent the Multilateral Agreement on Investment (MAI)²⁹ and other trade agreements which the World Trade Organisation (WTO) may promote contravene article 53 of the Vienna Law of Treaties.³⁰

The attainment of the *positive* rights-development model would involve the following processes. Encouraging and conscientising the people to appreciate that human rights is not a foreign cultural artifact or a colonial legacy, but something that is also inherent in traditional African political and philosophical thoughts. Also, human rights should be propagated not as something that needs to be enjoyed for its own sake but that, apart from being an inherent constituent part of humanity, is the tool that is to be utilised to attain development. Without human rights, development is not complete and cannot be attained. This way, human rights will be more relevant and made accessible to the people.

After laying the human rights foundation, rights *to be* can be effectively exercised to open avenues that will enable the exercise of rights *to do* and, consequently, rights *to have*. Rights, in this way, can be used as an effective tool to confront the powers-that-be at the local level to demand change and involvement in participation which

²⁸ A peculiarly African aspect of this issue is that, unlike the Latin American situation, most of the past abuses were committed by the very governments who remain in power. So the issue here is how governments in power can prosecute themselves.

²⁹ The MAI represents a new global corporate constitution that is to allow MNCs to acquire legal status on the same level as the contracting parties, that is the nations states of the OECD. MNCs will, *inter alia*, have the right to sue governments in foreign courts for breach of MAI provisions "which causes [or is likely to cause] loss or damage to the investor or his investment. MAI Draft Provisions at 53. Governments can also be referred to a secret court in Geneva under World Trade Organisation (WTO) rules where decisions to be made by the court can go as far as repealing portions of a host country's investment law. This is the height of anti-democracy which represents attempts to engage in massive transfer of the remaining rights of citizens to investors. This new constitution, however, is certainly not designed to ensure that the rights and freedoms of the world's people are upheld by democratically elected governments. On the contrary, it is a charter of rights and freedoms for corporations only – a charter to be guaranteed by national governments in the interests of profitable transnational investment and competition.

³⁰ This provision states that any treaty which breaches the principle of *jus cogens* (including human rights) shall be pronounced null and void.

would enable the people to develop alternative models of development which are not linked to the oppressive and unjust international economic order.

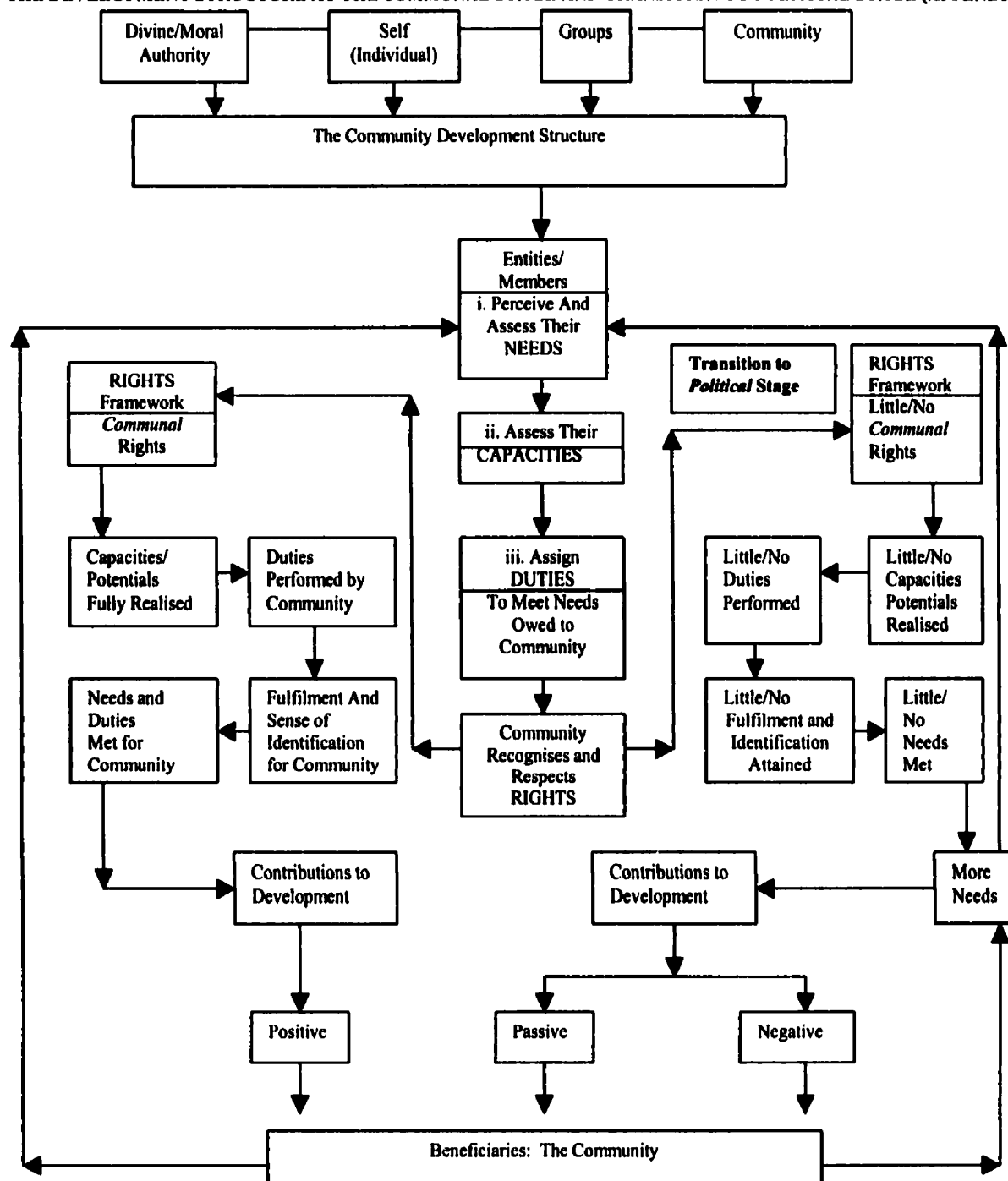
African philosophy has an important role to play in this process. The relationship between it and human rights lies in the fact that both are linked to the liberation of the mind. The successful exercise of human rights starts from the ability to think and develop opinions, and then to express them. African philosophy's deconstructive and reconstructive mission also involves "decolonising" the mind of African peoples. This involves a dismantling of the disempowering propagandist view expressed by African nationalists, consciously or unconsciously, directly or indirectly, that the African traditional political system did not have its own concept of rights. The propagandist view is an inheritance of the colonial legacy which must be eliminated from the African mentality so that the consciousness can give room to the idea that human rights is part of the African person as well as his or her culture.

In assessing whether a notion of rights is Akan or Yoruba³¹ or Ndebele,³² or for that matter "African," one should not employ Western standards, nor a particular cultural-relativist view. One should simply adopt the following three combined criteria: does the concept genuinely reflect the aspirations and input of the oppressed people; is it actually grounded in the lived experiences of the people; and, is a practical application of the concept likely to contribute towards the attainment of *sustainable holistic* development for the people? If these attributes are present, the idea has a liberating (and developmental) potential for all Africans, of whatever ethnic or tribal origin.

³¹ One of the major ethnic groups in South-Western Nigeria.

³² A prominent ethnic group in Zimbabwe.

THE DEVELOPMENT STRUCTURE AT THE COMMUNAL STAGE AND TRANSITION TO POLITICAL STAGE (APPENDIX A)



(Appendix B)
STAGES OF RIGHTS EVOLUTION AND EXERCISE

<i>Communal Stage</i>	<i>Political Stage</i>	<i>Advanced Political Stage</i>
<ul style="list-style-type: none"> i. to enable the individual attain his/her <i>being</i>; ii. to realise the potentials and talents the individual is endowed with; iii. to meet socio-economic needs. 	<ul style="list-style-type: none"> i. to enable the individual attain his/her <i>being</i>; ii. to realise the potentials and talents the individual is endowed with; iii. to meet socio-economic needs; iv. to meet political needs – eg., claim for recognition of new rights, fight against oppression by state and non-state actors. 	<ul style="list-style-type: none"> i. to enable the deprived individual to attain his/her <i>being</i> initially denied through oppression, etc.; ii. to realise the potentials and talents endowed with; iii. to meet socio-economic needs; iv. to meet political needs – eg., claim for recognition of new rights, fight against oppression by state and non-state actors.

TYPES OF RIGHTS EXERCISED AT EACH STAGE OF COMMUNITY METAMORPHOSIS [2] (Appendix C)

	[TRADITIONAL AKAN]	[WESTERN]
1. Pre-Community		
2. Community		
3. Post-Community		

Communal Stage

Rights to be – Foundational Rights

- i. right to love and affection;**
- ii. right to education – informal;**
- iii. right to a family, lineage/clan;**
- iv. right to health;**
- v. right to recreation;**
- vi. right to marriage.**

Rights to do— Participatory Rights

- i. right to conscience;**
- ii. right to opinion;**
- iii. right to thought;**
- iv. right to religion;**
- v. right to expression;**
- vi. right to movement;**
- vii. right to association;**
- viii. right to assembly.**

Rights to have – Proprietary Rights

- i. right to property– individual, communal**

Political Stage

Rights to be – Foundational Rights (Socio-Cultural Rights)

- i. right to love and affection;**
- ii. right to education – formal and informal;**
- iii. right to family, lineage/clan;**
- iv. right to health;**
- v. right to recreation;**
- vi. right to marriage.**

Rights to do – Participatory Rights *(Socio-economic/Political Civil Rights)*

- i. right to freedom of conscience;**
 - ii. right to freedom of opinion;**
 - iii. right to freedom of thought;**
 - iv. right to freedom of religion;**
 - v. right to freedom of expression;**
 - vi. right to freedom of movement;**
 - vii. right to freedom of association;**
 - viii. right to freedom of assembly**
- (Political Rights)**

ix. right to vote, etc.

Rights to have—Proprietary Rights (Economic Right)

- i. right to property—individual, communal**

[WESTERN]

Advanced Political Stage

**“Rights to do”/“Rights to have”
(Civil and Political Rights)**

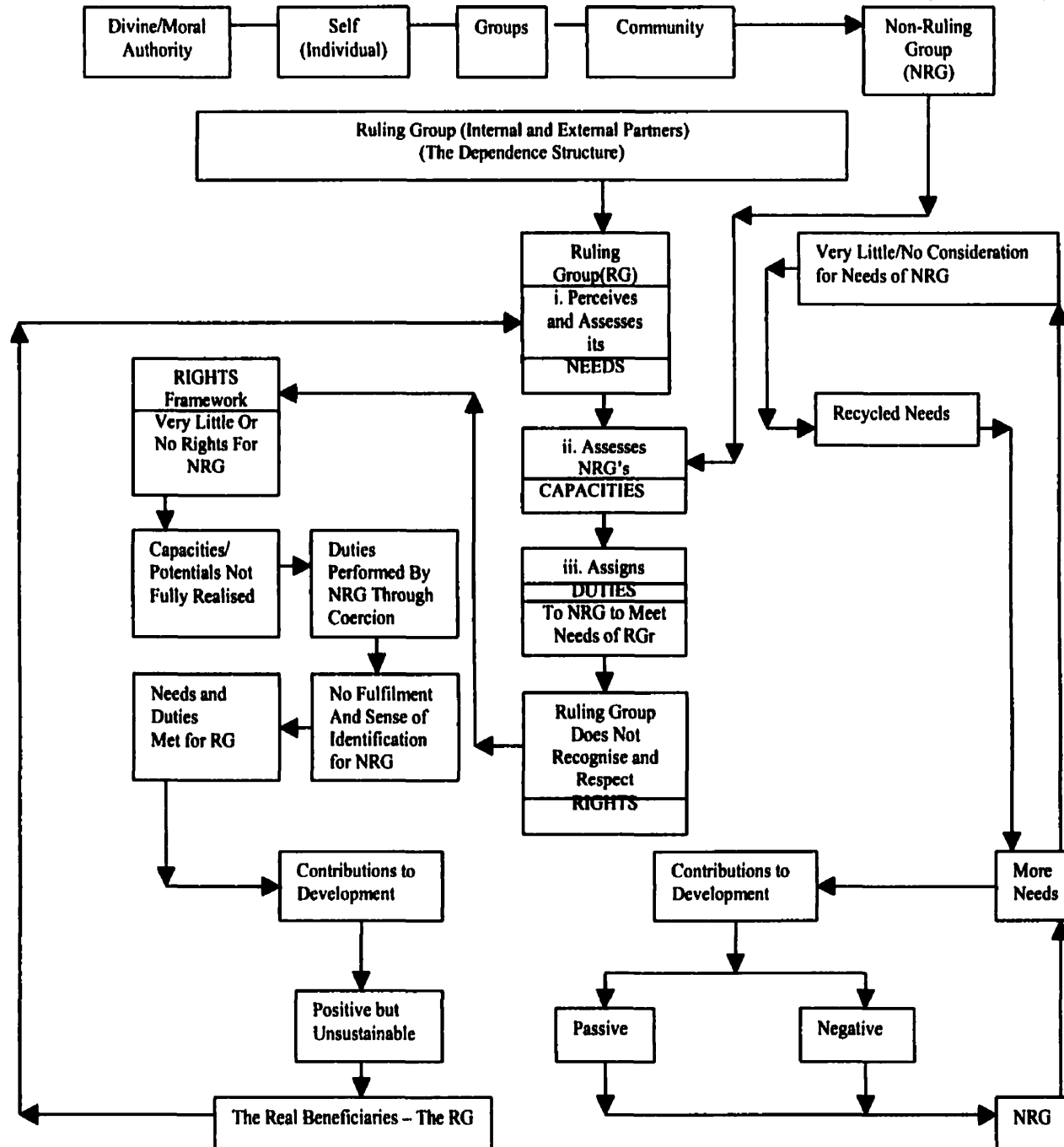
- i. right to freedom of conscience;
- ii. right to freedom of opinion;
- iii. right to freedom of thought;
- iv. right to freedom of religion;
- v. right to freedom of expression;
- vi. right to freedom of movement;
- vii. right to freedom of association;
- viii. right to freedom of assembly;
- ix. right to vote, etc.
- x. right to property (individual only)

“Rights to be”

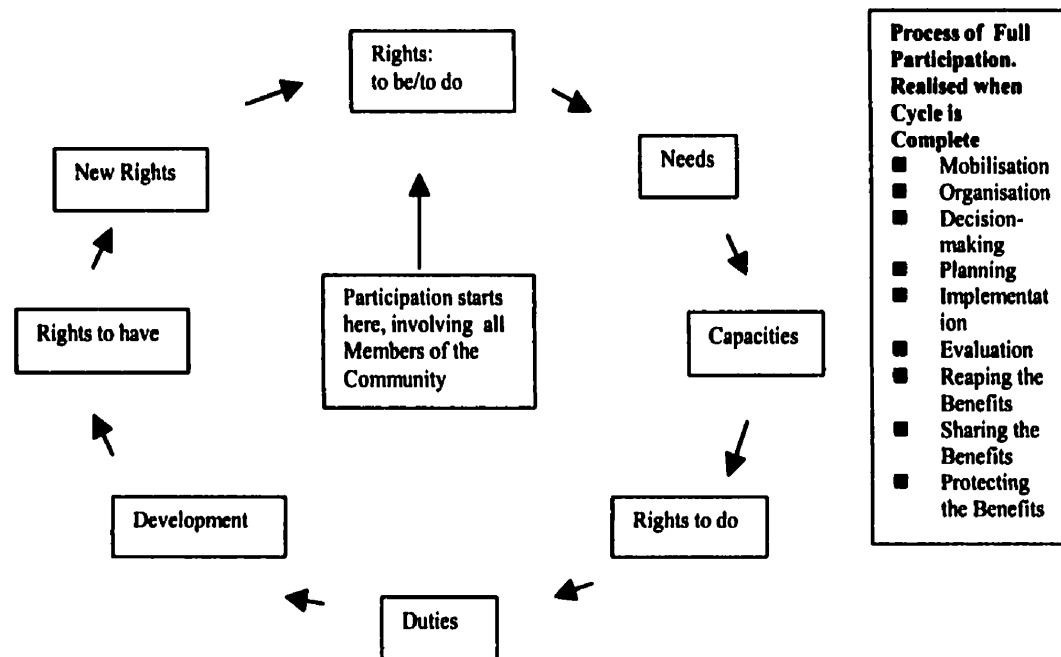
**(Economic, Social and Cultural Rights,
Children's Rights, etc)**

- i. right to love and affection;**
- ii. right to education – formal and informal;**
- iii. right to family, lineage/clan;**
- iv. right to health;**
- v. right to recreation;**
- vi. right to marriage.**

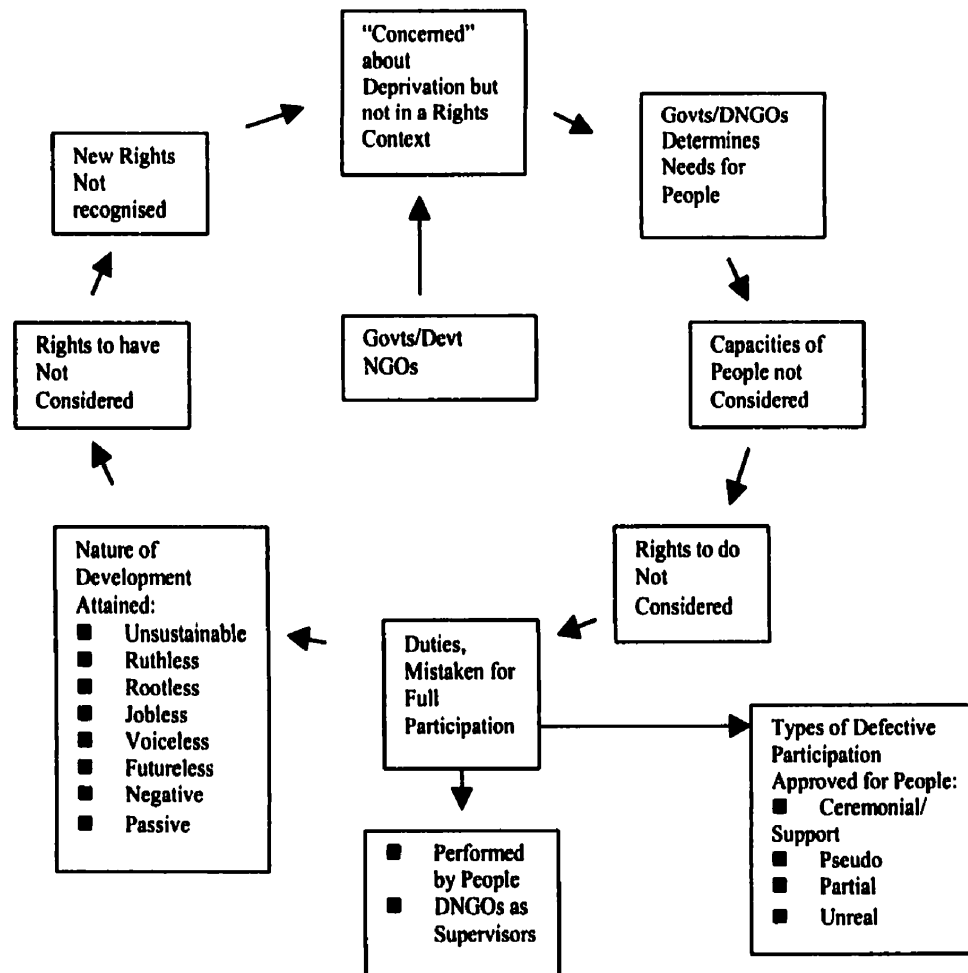
THE DEVELOPMENT-TURNED DEPENDENCE STRUCTURE AT THE HUMANITARIAN STAGE (APPENDIX D)



THE PROCESS OF FULL PARTICIPATION INVOLVING THE EXERCISE OF *SOCIO-ECONOMIC* CIVIL RIGHTS AT THE *COMMUNAL* STAGE (APPENDIX E)



**ESTABLISHING THE NEGATIVE/PASSIVE RELATIONSHIP BETWEEN RIGHTS AND DEVELOPMENT, AND THE
PROCESS OF DEFECTIVE PARTICIPATION (APPENDIX F)**



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