

# **Culture, Governance and African Human Rights in Critical Perspective**

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## **Introduction**

Admittedly, a subject like this is bound to be very difficult. In modern times, African culture is under intense pressure to yield to Western value system. Scholars have made life-long careers stropping culture of its essential values in order to make it irrelevant. It is said, for instance, that good governance and the cardinal principle of respect for human rights are inconsistent to culture especially African culture.

From a totally different angle is yet another problem. Some of the so-called 'traditionalists' engage in wild interpretations and therefore arbitrary applications of culture justifying criticism that culture cannot co-exist with modernity. There are some cultures and traditions that obviously have no role anymore more especially in fast developing society. However, experience shows that rather than culture per se, it is the hand of man and woman that bears the blame. In fact, if interpreted and applied properly, the doctrine itself might be consistent with some of the far more developed value systems.

This article is a modest attempt to engage the African society in respect of some of its core institutions with the hope that in the end, a confluence would be found between yesterday, today and the future of humanity. Most of the institutions Africa uses now are borrowed from other civilizations which in itself is not bad. What makes it questionable, however, is when Africa does not make any effort to borrow from its rich past in all its endeavours. The article shows plenty of negative but also positive aspects of African culture in relation to governance and dignity for there to be a fertile ground for a useful dialogue as to the future of governance and human rights development in Africa.

## **Chieftaincy<sup>2</sup> and Governance in Africa**

The chieftainship is the oldest known possession in Africa after the African society itself. Historically, the institution pre-dates the birth of Jesus Christ. In the minds of ordinary Africans, chieftainship is a real estate. It is very close to the hearts of the African people and central to their lives. Ordinary Africans cannot imagine their society and, therefore, their lives without chiefs. This is not to say the institution is not disliked. There are people among chiefs that have behaved in ways that brought the institution into disrepute. Chiefs are human beings like any other human being and time and again, there are among them

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<sup>2</sup> . For a no nonsense expose on lies about chiefs and about African society in general, see: Chief M. Nangoli, No More :Lies about Africa, 2002

persons of dubious repute who behave contrary to expected standard and ethics governing authorities. However, overall, the chieftainship in Africa has retained its sense of integrity.

Ordinarily, the chieftainship should have died long time ago. This is what foreign forces had set out to do. During slavery and later colonialism, the institution was grossly abused towards sustaining these systems. Chiefs were made to sell their own people into the Arab slave trade and later the Atlantic slave trade. During colonial rule, chiefs were used by colonial authorities as appendages of a diabolical system to treat their own 'children' as disposables. The white man (especially the white man) used the chief to abuse his fellow African in order to achieve the interests of the white man. It must be pointed out however that a number of chiefs resisted this oppression as they did colonialism itself. There are numerous examples of chiefs that offered their lives in order to defend the human freedoms of their people. In Tanzania, for example, several chiefs were executed by colonial authorities because of their opposition to colonial rule while others committed suicide instead of submitting to colonial rule. This did not dissuade Mwalimu Julius Nyerere - that icon of African politics - from rejecting the institution and under his Ujamaa policies arbitrarily declaring it unlawful and unnecessary in his brand of African socialism. It is difficult to imagine he would do this to his own father who happened to one of the chiefs?

It was not surprising therefore that during the colonial period, African nationalists hated some chiefs seeing them as complicity in the diabolical system. This fitted the box. It is exactly what colonialism had set out to achieve. Colonialism had set out to destroy in whole not in parts the institution of chieftainship and through it the customary society itself so as to replace it with the European society and values. However, since not all chiefs submitted to colonial rule, the respect the institution enjoyed among the people remained unaffected. In French Africa, this led to so much resentment in the corridors of French power in France that they decided to abolish the whole institution altogether. Similarly, the Belgians effectively though in some cases not formally did away with the institution of chieftainship in their African colonies on the grounds that it was incompatible with the status of a colony.

The Portuguese tried to do the same in Portuguese Africa but with limited success. Colonial laws prohibiting chieftainship were enacted but repealed on second thought upon realising that they could be useful to the colonialists after all. Under the Portuguese system of *assimilado*, an indigenous African who wanted to be granted 'equal status' with the Portuguese in his own land had to publicly renounce indigenous law and custom, which included denunciation of the chieftaincy before he can become entitled to the protection of "European rights" or human rights. In spite of Portugal being a State party to the European Convention on Human Rights which has an extraterritorial clause<sup>3</sup> enabling it to apply to a territory under the control of a State party, Angolans and Mozambicans did not benefit from the convention protection unless they had gone through the assimilation process and then only in theory. It was so sad Convention rights had to be abridged this way for the sake of colonialism. However, as indicated, chiefs were nonetheless retained after they were found to be useful instruments of colonial power.

In Anglophone Africa, on the other hand, the colonial system unashamedly pretended that it recognised the fundamental role and responsibility of the chiefs. British colonial policy thrived on such lies. It introduced the policy of 'indirect rule' in which it provided that Africans would govern themselves in such menial tasks as the administration of personal law and family law. In other words, the public sphere such as public law,

criminal law, constitutional law, trade and commercial law, etc., would be regulated by imported English law. However, matters of personal and family law such marriages, burials, as well as the law on land administration within the African reservations and trustlands in which Africans were forcibly settled would be based on African cultures and traditions. There was one important rider, however, which made nonsense of this policy – repugnance clause. If it was found that the personal law in question conflicted with English sense of justice, in other words, it was repugnant to English justice, it was declared illegal. In an important sense, personal law was not granted free reign within the African social domain. It had to meet certain minimum requirements satisfactory to foreign rulers.

The ‘repugnance clause’ was not an honest desire to assist the process of civilisation – a Western obsession in Africa. If this was the case, then they would have used the human rights yardstick rather than the emotive term ‘repugnant’. Even after the adoption of the European Convention in 1950 and after many European States including the UK had become party to it, courts continued blissfully to invoke the repugnant clause and not human rights standards. In fact, if this was a genuine concern at all to protect human dignity, they would have started with women by seeing to it that African women were protected from cultures that cruelly subtracted from their dignity but the adoption of the policy of indirect rule in effect leaving the status of women in Africa an issue for families and traditional authority showed where their real desires lay. Repugnance was a smokescreen designed to infuse Western culture and sense of justice in Africa and hence assimilate the African into the European.

As pointed out above, the United Kingdom, like Portugal was signatory to the European Convention of Human Rights even as it denied Africans in their African colonies their rights, save for the timorous crumbs grudgingly granted them under the policy of indirect rule. The 1977 European Court of Human Rights case of *Irish v. United Kingdom*<sup>4</sup> brought this violation to the fore. In this case, the Irish government instituted a complaint alleging that the UK through its policy of torture which included internment of detainees in its colonies and denying them trial amounted to violation of detainees’ rights under the Convention which had application in colonial territories under article 53. The UK was found to be in violation of the Convention though it tried to down play the Irish petition saying it was academic and even attempted to invoke international law to justify its actions.

Within these limitations, indigenous society continued. At independence, the new African regimes run by native Africans surprisingly perpetrated the contempt imposed by Western systems on indigenous society. Instead of using the opportunity of independence to reinstate the supremacy of indigenous law over and above Western law and society, native African rulers became even more aggressive as shown by Nyerere above in suppressing their own civilization. The perpetuation of alien law and systems in independent Africa has dealt a severe blow to the whole idea of independence in Africa. Constitution after constitution while proclaiming the importance of traditional African values nonetheless subordinated these values to western values in the form of the bill of rights in fact nothing more than a simple act of ‘cutting and pasting’ from the foreign documents to equally ‘foreign’ but domesticated instruments. This is especially the case after democratisation in Africa in the 1990s and the much praised and much eulogised South African post-apartheid Constitution comes as an excellent example. The third generation African constitutions of the post-1990 era subordinated African customary law to the bills of rights. This is explicitly stated in South

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<sup>3</sup>. Article 56 of the European Convention on Human Rights and Fundamental Freedoms, 1950. Portugal was one of the States Parties to complete the declarations required under the article for the extension of the convention to territories which it is ‘responsible’ (irresponsible would be more appropriate) for in international law.

<sup>4</sup>. *Irish v. United Kingdom* 1977 Case No. 53/071

Africa's 1996 Constitution as well as in other 'democratic constitutions' decreed after waves of democratisation in Africa. In contrast, and this is very surprising, customary law particularly customs and traditions enjoyed overwhelming supremacy over Western freedoms and rights in the bills of rights of independent Africa. The independent African constitutions, for instance, drawn by the British for independent British Africa did not mince their words. Though the instruments asserted the principle of non-discrimination, they assertively limited the application of the principle in matters of personal law and related issues. In other words, non-discrimination did not apply in personal, family or ethnic relations as these were considered African domains.

Needless to say this has gravely offended sworn liberals who believe in the supremacy of a bill of rights over and above customary law, which is admittedly a sensible take. Two interesting cases have sprung up from two African countries on this issue with diametrically opposed decisions. In Zimbabwe, a seamstress 51 year-old woman, Fenia Magaya,<sup>5</sup> sued the Attorney General (in effect Shona culture) alleging violation of her right not to be discriminated against in the interpretation and application of Shona law and culture on inheritance and customary land tenure on the grounds of her sex and gender. Earlier, Magaya had requested her Shona elders to grant her the land of her late father, in effect claimed her rights to succeed to her father. One of her 'baby' step-brother contested Magaya's claim saying a grant would violate Shona law on inheritance which is male-based. Though older than him, the brother argued that he had the primary right and not Fenia to the father's land. The elders rejected Fenia's claim on the ground that as a woman, she did not qualify to have a right to the land in her own right. Shona customary law, it was argued, had no provision allowing women an independent right to inherent or access to customarily held land. This perplexing decision if viewed from liberal standpoint was upheld by the Supreme Court of Zimbabwe. The Supreme Court judge who sat on appeal took the view that since non-discrimination in the Zimbabwe constitution was limited in so far as personal and tribal law was concerned, the decision of the Shona elders to deny Ms. Magaya land on the ground of her gender did not constitute discrimination that would invite the intervention of the Court to secure her protection.

Though decidedly illiberal, this case, and its much criticised<sup>6</sup> decision, at least triggered one important development. While it was lost by the appellant, Magaya's case nevertheless can be credited for the introduction by the government of a series of important amendments to the legal framework that perpetrated patriarchy and in particular female disinheritance in Zimbabwe. Among these were amendments to the Administration of Estates Act; section 13 of the Marriages Act; to the Deceased Estates Succession Act; deceased Persons Family Maintenance Act as well as to the repeal of Customary Law (Application) Act.<sup>7</sup> The immediate effect of this was to recognise customary law matrimonies as legally valid for the purposes of administration of estates of deceased spouses and to empower the Master of the High Court to be seized of the power to administer the estate including attending to its disposition in line with basic principles set out in the legislation which are not based on gender or other forbidden status. In this sense, Magaya's loss turned out to be a win for the lot of scores of women who lost out under customary law owing to their sex and gender.

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<sup>5</sup> . Magaya v. Magaya & The Attorney General SC No. 210-98 (Unreported). The decision was delivered by Muchetere J.

<sup>6</sup> . The decision sparked unprecedented outrage among the general public who accused the High Court of being insensitive to women's rights. Local women's rights groups in particular protested the decision leading to the Registrar of the High Court taking the unprecedented step to threaten the activists with imprisonment for court contempt if they persisted with their criticisms.

<sup>7</sup> . See 1997. Administration of Estates Amendment No. 6 Printed by the Government Printer, Harare.

Viewed against the background of liberal thought, this decision is a total travesty of justice let alone of Magaya's human rights. It clearly infringes on the human rights of women to be denied land because of being women. On the other hand, viewed from a non-Western perspective, there is absolutely nothing wrong with applying an indigenous concept such as in this case because according to defenders of African culture, 'pure' African inheritance law only transferred custodianship to the inheritor and not the right of ownership of the deceased's intestate. This means the inheritor only inherits obligations or duties particularly the duty to maintain or look after the issue of the deceased and all those the deceased was responsible for during his or her life. Inheriting obligations and not rights is one element which differentiates typical African ancient society from Western society. In particular, this does not entitle the inheritor to expropriate the intestate to his or her personal use as so often happens in modern greedy society where upon the death intestate of a relative, vultures descend onto his or her property without any thought to surviving children or spouse.

Returning to customary land the issue in Magaya case, the main mitigating factor is that African society is ignorant of discrimination that liberals sing about because it does not subscribe to the idea of 'individual ownership of land'. Consequently, even if one person let's say a male person inherited a customary title to land, in effect he inherits obligations and not rights. The successor is merely succeeding to the custodianship of the estate of the deceased person so that title in that land remains vested in the community and it significantly does not pass to the individual like it does in liberal systems. Whereas in liberal systems, the successor inherits the very title to the land of the deceased and can alienate or sell it and consume the proceeds selfishly in the event depriving other members of the family, the African successor must just keep custody of the property or rights in it for the benefit and interest of the family as a whole. This is the most significant difference between the two systems. If there is any infringement resulting from that application, it will be cured by way of interpretation by indigenous adjudicative and arbitral forums with the right to modern courts or tribunals, as in the Magaya case. If on the other hand, so-called superior courts or tribunals interpret the concept consistent with the elders, that is that. Since the elders have been checked and their action balanced, the matter is *res judicata* but the grieving party in international human rights law today has a further opportunity to seek a remedy elsewhere such as in international forums and these have the necessary jurisdiction and mandate to make the correction if called for.

On the other hand, the Tanzanian High Court has broken ground. In the case of Ephrahim v. Pastory and Another,<sup>8</sup> a woman sold customarily held land to a non-member of her ethnic group. The complainant in this case had acquired the land by way of inheritance (unlike the Magaya case above) in accordance with Tanzania customary law, usage and tradition. However, the same Tanzanian customary law does not provide for women as women to sell land. Women in Tanzania customary law lack the personal status and capacity to sell customary land as this concept was alien to general African customary law. However, the Tanzanian High Court upheld the right of the appellant to sell her rights in customary land. The basis of this decision was that the Tanzanian bill of rights enshrined in the constitution explicitly upholds the individuality and capacity of all humans and since women fell under this category of creatures, women. Similarly, international law applicable to Tanzania affords the same dignity on women as on men. These two conflicting decisions present an interesting challenge to the evolving African society.

Lastly, it must be stressed that chiefs play an important role in developing the values of the community. Even without waiting for courts to intervene, chiefs in countries where they exist, can play a positive role in advancing the development of community values. In English speaking Africa, today, only Tanzania and

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<sup>8</sup> . High Court of Tanzania at Mebeya, Miscellaneous Economic Criminal Application No. 11 of 1990 (Unreported).

Kenya have no chiefs. President Mwalimu Nyerere of Tanzania abolished the chieftainship in order to promote his brand of socialism.<sup>9</sup> At least one chief challenged President Nyerere's decision at the High Court, without success. In Kenya, President Jomo Kenyatta abolished the chieftainship immediately upon the attainment of independence on the ground that chiefs were corrupted by colonialism. However, after abolishing the ancestral chiefs, Kenyatta reinstated the idea of chiefs though not ancestral chiefs. A chief in Kenya is a public servant formally employed in the civil service and not an ancestral chief. He (apparently there are no women chiefs) is a public officer like any other on the ladder of public service.

In other ex-British colonies, chiefs are there. They are also there in other African countries or were reinstated after colonial rule. In Mozambique, for example, the chieftainship stubbornly defied Marxist-Leninist ideologue late President Samora Machel who was intent on doing away with it. Having survived the birth pangs of a riotous political order, the institution has arrogantly continued to flourish. Angola never even tried to rid the institution apart from the usual act of 'confusing' individual chiefs with self-serving political alliances.

As the overall custodian of customs and traditions, chiefs play an important role in the life of ordinary persons. Quite often, chiefs protect the human rights of their people through their various activities. For instance, anyone in the community or outside who has no means of livelihood turns to the chief for protection and support and it is an enforceable duty on the part of the host chief to render the protection sought. This used to be the case in the past but also at present in some chiefdoms. The breakdown of the African society after its incorporation in Western society is making it impossible for chiefs to attend to their traditional functions and responsibilities. Like their people, most chiefs have lost the capacity necessary to protect their communities.

On the other hand, and this is equally a fact, chiefs are quite often accused of violating the human rights of their people through the application of outdated customs and traditions of which they are countless. Often though, it is not even custom to blame but inconsistent interpretation and application of the customs and traditions. Usually, it is not the law or custom that is wrong but the interpreter and applicant of that law or custom which results in grievous breach. After all, customs and even laws are generally flexible as to accommodate even worst scenario situations. It is in most cases simply up to the custodians to find accommodation in the law or custom to provide for a claimed right. In the next section, we shall look at customary society and by extension chiefs in international law so that we see how the two can interface or not.

### **Indigenous Conceptions & Practices of Governance**

Nelson Mandela,<sup>10</sup> recalling his personal experiences as a young man growing up in his village and observing the regent and his court deliberating issues affecting the Thembu nation described the manner in which the elders practised their government as "democracy in its purest form". He said:

"everyone who wanted to speak did so.....there may have been hierarchy of importance among the speakers, but everyone was heard: chief and subject, warrior and medicine man, shopkeeper and farmer,

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<sup>9</sup> . Julius K. Nyerere, UJAMAA. Essays on Socialism, 1968. In these essays which Nyerere published as a prelude to Ujammazation of Tanzania, while observing that 'in traditional African life the people were equal', he called for 'equality in status of all members of the community' (p. 173) as well as 'adaptation in traditional social rganization' (pa. 181).

<sup>10</sup> . Nelson Mandela, Long Walk to Freedom. The Autobiography of Nelson Mandela, 1994 (Abacus 1995), Pp.

landowner and labourer. People spoke without interruption and the meetings lasted for many hours. The foundation of self-government was that all men were free to voice their opinions and were equal in their value as citizens.....”<sup>11</sup>

This same theme was earlier espoused by no other than the doyen of Kenyan liberation politics and founder of independent state of Kenya, Jomo Kenyatta.<sup>12</sup> Speaking about the Gikuyu system of government prior to the advent of the Europeans, Kenyatta said it (Gikuyu system) was based on true democratic principles. Among these he related as universal tribal membership based on maturity and not property; the right to take active part in government; equality of individuals to the full membership of the tribe; status of king and nobleman abolished; vestment of government in the hands of tribal councils known as *kiama* chosen from all members of the community who have reached the age of adulthood; universal right of all men and women in the community to get married; etc.<sup>13</sup>

From this manifest important principles forming the concept of governance in pre-colonial Africa. Prior to European settlement, African governance was based on sacrosanct principles of inclusiveness, equality of all without regard to status, freedom of expression and opinion, participation of people in decision-making based on respect of one another (the chief or king never decided without the assistance of his subjects), etc. During these group discussions, persuasion was the rule by which decisions were reached. There was no provision for imposition of decisions. Everyone was entitled to take direct part in decision-making and in dispensation of justice.

There was one serious problem, however. Mandela makes this very disturbing observation: “Women I am afraid were deemed second-class citizens”. In other words, women in Mandela country were not entitled to attend the community court at which decisions were made. Only men did so that when we say as he himself says “everyone who wanted to speak did so”, we mean it in very limited sense of men without women. On the other hand, this is not a problem in Kenyatta’s Gikuyu country. In Gikuyu, now Kikuyu, women played male rulers as rulers and even heads of homesteads. Women in Gikuyu culture bore the responsibility to build family houses in most cultures solely reserved for men. This distinction proves at least one point i.e. the relativity of cultures. It is often not possible when in cultures to speak in absolutes as if one culture suits all societies. Culture is the most problematic thing to speak in universal terms. We see here, for instance, that while Thembu women in Xhosa culture lack the right to take direct part in decision-making, the operative word being *direct*, and hence several of their other civil and political rights, this is something that is taken for granted in Gikuyu culture in Kenya. We have deliberately used the word ‘direct’ for the sake of completeness. While women in certain African cultures may not take a direct part in public affairs including decision-making processes, it has been shown, for example, in Rwanda culture that men often relied on women’s advice and views for their opinions and interventions.<sup>14</sup> This way, views of women are stamped on community decisions even if only indirectly.

An interesting feature of African society is the concept of justice. In African philosophy of law, justice is substantive rather than procedural. In these gatherings men and women in other cultures men only assemble primarily to ensure substantial justice. Unlike Western justice which if not inquisitive is acquisitive, African

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<sup>11</sup> . Ibid, p. 24

<sup>12</sup> . Jomo Kenyatta, Facing Mount Kenya, 1938, p. 186

<sup>13</sup> . Ibid, Pp. 188-189

<sup>14</sup> . Michelo Hansungule, Governance, Human Rights and Traditional Authority in Africa, 2004, UNZA Press, Lusaka, Zambia, Pp. 45-46

justice is arbitral and in its character restorative rather than adjudicative and fault-finding. African justice and Western justice are usually at cross purposes with each other. While the African notion of justice like that of its Western counterpart is based on the fictitious 'reasonable man'<sup>15</sup>, the two nevertheless yield to different purposes. It is not unusual in African justice for the arbitral forum to find both the two parties at fault and therefore apportioning blame equally unlike the 'winner' 'loser' or 'guilty and not guilty' verdicts in Western justice. African justice is distributive and not punitive. At the core of this is the attainment of restorative justice. While a decision may be made based on a balance of probabilities in civil matters or on assessment of evidence which to the authority satisfies the principle of proof beyond reasonable doubt as in western justice, the aim in Africa is to strike the stakes aimed at achieving social equilibrium. Just as there was no 'loser' and 'winner' in the justice system, no one 'lost' or 'won' in politics.

The communitarian concept associated with the African philosophy of law characterises African politics, justice, economy, etc. instead of emphasising the self or the automated individual, African philosophy espouses the virtues of selflessness characterising the group spirit. This is manifested, for example, by the notion of group or community ownership in land. While the radical title to land is vested in the community which holds it as custodian on behalf of its individual members, individuals have mere rights of use which even though perpetual in their duration nevertheless do not amount to absolute titles of the Western land owner either holding a fee simple or fee tail with all its consequences on alienation and exclusion.

Politically, the communitarian character would at first glance to be preventative of individual dissent, which is a basic right. Indeed, the emphasis on the group or the community giving rise to communitarian doctrine could subsume the individual in the interests of the group and therefore constitute a minus for the individual liberties. Care, therefore, is called for so that a proper balance is struck between the two contending interests. This does not mean that in the community or group, dissent is not tolerated. Quite the contrary, plenty of dissent and open criticism are not only entertained but even deliberately fomented. For example, most African cultures entertain notions of 'expert critic' who is charged with openly telling the king, queen or chief his or her failings including very personal things – all these in full hearing of the subjects. In December 2002, South African President Thabo Mbeki was faced with such critic when he responded to an invitation by Southern African Development Community (SADC) kings and chiefs to open their workshop on Johannesburg, South Africa.

In the presence of the author,<sup>16</sup> the President was 'blocked' by a traditional 'praise-singer' (who is not really 'singer' but a formally acknowledged critic of state) from going to the podium and instead had to listen to a long litany of praises and criticisms of his conduct as president of South Africa from the singer which 'song' ranged from the president's personal character to issues of state. All this time, Mbeki was quiet and would dare do nothing as an act is bound to seriously anger the largely traditionalist African audience he had accepted to flag off. There are several ways and different manner of dissenting within the African culture some of it even more outspoken and effective than under Western-style mechanisms of political parties. History tells us, for instance, that many clans of Shaka Zulu's Empire broke away from his tyrannical rule and headed elsewhere to establish new nations and live in peace and security. What does this mean? Isn't it the right of self-determination in the making? Similarly, the ones who killed Shaka happened to be his blood

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<sup>15</sup> . Max Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia*, 1955, see in particular pages 82-162 on Cross Examination and the Assessment of Evidence: the Norm of Reasonable Man

<sup>16</sup> . This was at a workshop of traditional leaders drawn from Southern African Development Community (SADC) states meeting on 9-14 December, 2002, Essellen Park, Johannesburg, South Africa.

brothers – Dingane and Mhlangana<sup>17</sup> – which again goes to show that differences persist within the groupings.

Nevertheless, traditionally, politics is communal and so is economy. There is no sign of the selfish individual land owner intent on excluding others from the resources and ‘playing’ with the land owners consider to be sacred on the market in auctions. This communitarian character easily manifests itself in several different ways including the age-old institution of social responsibility towards the needs of elderly people which attaches to individual able-bodied members as a binding duty. Inversely, elders are under the same duty towards children particularly the more vulnerable children such as ‘orphans’. Technically, African society did not know of the existence of orphans or orphanages as well as old peoples’ homes as the extended family system would have enough room to accommodate all such people and see to their needs on the basis of similar treatment with other family members.

In justice, we have seen how the same transpires as a fundamental right of the individual member to participate in deliberations concerning the affairs of the community and this right is entrenched in society constitution so that no one as a matter of fact can be excluded. We have already said that in those cultures where women are not made part of the deciders, and therefore which need substantial change of content especially in order to find accommodation for current critical gender needs, men would often ‘steal’ ideas from their womenfolk.

Decision making whether it be in politics or the more solemn justice functions called for the application of certain principles which reflected the African philosophy of justice. For instance, a person, in order to sit in an arbitral or adjudicative body, s/he must demonstrate certain minimum qualities of leadership including truth telling (honest), unblemished reputation, outstanding character, fair-mindedness, far-sightedness, of objective character, larger heart with controlled temperament (cool head), etc. A village head, for instance, is a man or woman (more often a man) of character that naturally command respect and deference, just a village head! In Kenyarwanda, the native language for the Rwandese people, s/he is called “Nyangamugayo” while in neighbouring and ethnically related Burundi is called Abashingantahe i.e. honest people. It is miles away what we see of leadership in Africa today where all sorts of Jomo Kenyatta’s ‘rascals’ and complete scoundrels corrupt the electorate in blemished elections to arbitrarily usurp the institutions of power!

### **Critically engaging the African Society**

While a chronological account of all of Africa’s cruel cultures and traditions may be way out of possibility, an attempt can at least be made. If this were possible, it would no doubt be the best method of studying the African society based on empirical evidence of some of the living examples of some beliefs and practices which make it impossible for the individual in Africa particularly woman to as alleged function like any other human being. With this caveat, the following recount is but just a snapshot view of some of the worrying features of traditional society which have often been cited in aid of calls for the African renaissance qua renaissance.

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<sup>17</sup> . Peter Becker, *Rule of Fear. The Bloody Story of Dingane, King of the Zulu*, 1964

Table A

<ul style="list-style-type: none"> <li>■ Wife beating</li> <li>■ Female genital mutilation (FGM)<sup>18</sup></li> <li>■ Prenatal, early and forced marriages</li> <li>■ Male circumcision<sup>19</sup></li> <li>■ Widow inheritance or Ukungena<sup>20</sup> (in South African Nguni languages)</li> <li>■ Polygamy<sup>21</sup></li> <li>■ Dowry/bride price<sup>22</sup></li> <li>■ Female confinement upon attainment of puberty</li> <li>■ Spouse cleansing</li> <li>■ Property grabbing<sup>23</sup></li> <li>■ Virginity testing<sup>24</sup></li> <li>■ Wife sharing<sup>25</sup></li> <li>■ Funeral rituals such as prolonged mourning, hair shaving, prolonged black gowning, forced drinking of water used to wash body of the dead spouse, etc</li> <li>■ Trokosi<sup>26</sup> - forced marriage of girl-child to traditional Priests mostly practised in parts of Ghana</li> <li>■ Discrimination of women in public life which is a general challenge in all modern/traditional societies</li> <li>■ Gender-based restrictive land tenure practices as described in Zimbabwe Magaya case</li> <li>■ Female infanticide though rare nevertheless still evident in some traditional societies</li> <li>■ Womb borrowing, equally rare today but not completely eliminated; allows barren woman can ask another woman to sleep with her husband to give him a child hence the former keeps the marriage and avoids divorce because value of woman in these societies is seen only in terms of her ability to procreate.</li> <li>■ Patriarchy practice which subsumes woman in man resulting in the latter having no identity of her own whether in private or public life</li> <li>■ Gender-based discrimination such as practices in which only women bear the pain of being named witches, etc.</li> </ul>
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<sup>18</sup> . See a book from Tanzania on the tribulations of trying to enforce a criminal law on FGM: The Legal Process, can it save girls from FGM? A Case of three Masaai girls in Morogoro, A Report on the Enforcement of the FGM Law, 2004. Also, see a classic on FGM: Fauziya Kassindja, Do they Hear you when you Cry, 1998.

<sup>19</sup> . Nelson Mandela, note 8, Pp. 15-22; Chief nangoli, note 2, Pp. 57-63

<sup>20</sup> . See B.A. Marwick, The Swazi. An Ethnographic Account of the Natives of the Swaziland Protectorate, 1941, especially at pp. 139-140

<sup>21</sup> . Charting the Maze, Women in pursuit of Justice in Swaziland, in women and Law in Southern Africa Research and Education Trust (WiLSA), 2000; B.A. Marwick, Ibid, see for polygamy on pp. 38-43; Chief M. Nangoli, note 2

<sup>22</sup> . See Willian Rayner, The Tribe and its Successors, 1962, Pp. 54-60

<sup>23</sup> . Marwick, mote 14

<sup>24</sup> . Ibid

<sup>25</sup> . Willian Eainer, supra, Pp. 54-64

The listing of these ‘troublesome’ practices, beliefs or both is arbitrary and follows no particular preference. Obviously, no attempt has been made and in fact no useful purpose would be served from pursuing any particular preference. Similarly, and it is important to repeat this particular point, this is just scratching the surface of so-called deep-seated cultures and traditions most of which in any case are impossible to see or understand especially under modern ‘gadget-based Westernised cultures’ The reader is forewarned not to treat the handful of practices listed above as no more than randomly selected examples.

However, and in keeping with the needs of objectivity, this should be counteracted with equal attention to the positive aspects of this very society so that as we discuss the negatives, we will bear it mind that to everything bad there is some good. Earlier models of change in Africa that sought to throw both the ‘baby and the bathwater’ were clearly misconceived and inherently wrong and hence we are still at it more than five hundred years after colonisation still engaging the same issues.

Some of the more positive customs, cultures and traditional practices we are duty-bound to bring forth would include:

Table B

- The institution of extended family, though no longer extending owing to modern circumstances, has been pride of African society for centuries
- Ubuntu or the principle of humanity which emphasises that my humanity is in your humanity and vice versa; viewed from this perspective, I cannot kill you because I would be killing myself in you hence abhors murder
- Duty of parents to raise children, e.g. grandparents’ duty to raise grandchildren as they were raised and this is passed on like relay game from generation to generation.
- Duty of 'children' to maintain 'parents' (parents defined broadly in the extended family) if need be. Children have duties to their parents in the widest possible African sense and parents towards their children
- Duty to exercise hospitality to all based on humanity
- Duty of self-respect and to exercise respect to others particularly elders
- Justice based on African civilisation which is inherently inclusive, participatory, transparent, reformative not punishment inclined, consensus seeking not adversarial or inquisitorial
- Community ownership and access by all of land rights to usage and enjoyment and not necessarily to alienate, exclude, etc, etc.

<sup>26</sup> . Training Manual, Women’s Assistance & Business Association (WABA) 2004, Accra, Ghana: 2004 Report: Ghana Commission on Human Rights and Administrative Justice (CHERAJ), Accra, Ghana.

With the above in mind, an extended but limited discussion on some of these highlighted beliefs and practices is called for. Clearly, some of these customs and traditions call for explanation. But first, a rule of thumb or cardinal principle to recall already at this juncture is the self-evident truth that not all African cultures practice all these customs. Some cultures do practice them while others do not. Consequently, any claim suggesting universality of customs or traditions would be inconsistent to African culture. Some customs like Trokosi, for instance, are limited to certain countries, in this case Ghana, and only in certain parts of that country – the Ho region in the south of the country and some parts of neighbouring Togo. When a family member is accused of being a witch and of having bewitched someone who as a result died, the family of the alleged witch must atone the spirits of the dead person which is done by literary surrendering a virgin girl to the High Priest who determined the guilty of the member. The poor girl (and only girls suffer the pain of exchange) is lost to the Priest for good to serve him as companion in all respects. Currently in those regions of Ghana that practice the dreaded artifact, several old priests are hosting these unfortunate young girls and women as ‘their wives’ or on similar terms.

In South Africa, virginity testing is very widespread in some ethnically defined communities as a precondition before determining the suitability of the bride or groom to marry. A test which comes out positively i.e. when elderly women who conduct the test usually with their bare hands at the sexual organs of the girl satisfy themselves that she had not yet had sexual intercourse, her morals and of course of those of her family rise in the eyes of the community but with them also raise the value of dowry due to her family on marriage, in most poor families today, significant source of disposable income. Recently, South African authorities have tried but with limited success to confront the practice of course with forbidding and punitive legislation provoking even more open defiance from king Zwelatin, acclaimed descendant of king Shaka of the exceptionally proud Zulu people.

Many cultures in Southern Africa practice sexual cleansing to surviving spouse (s) believed to be necessary to rid her or him (especially her) of the ghost of the deceased spouse. In some communities, this involves literary having sexual intercourse between the deceased’s spouse and a selected male member of the deceased’s family often while the funeral of the deceased spouse is still on. The belief behind this practice was that it was the only way of ‘chasing’ the deceased’s ghost away from the surviving spouse the days immediately following their death. Therefore, the deceased’s ghost would ‘run away’ from the bad ‘wife’, for example, upon ‘seeing’ the surviving spouse in a sexual encounter with a very close family member which according to custom is taboo. In Kenya, however, it is not only a family member entitled to cleanse the surviving spouse but certain men recognised by communities to be entitled to conduct the cleansing. Such men are seen moving from village to village to offer their ‘services’ to the nearest bidder. On the other hand, in Ghana, a custom exists in some communities for the surviving widow to engage in a cleansing act with any man they happen to meet whether or not a kin of the deceased spouse. Today, however, due to the prevalence of HIV/AIDS and modernisation, other ways of cleansing have developed mostly discouraging direct body contact. In other words, though the concept has been retained in some cases intact, its practice is rapidly changing.

Wife inheritance has been widely practised in many cultures more particularly in Africa. Initially, it was a fundamental human right of a widow to be inherited by one of her deceased husband’s surviving relatives for purposes of protection.<sup>27</sup> Of course women today do not need men for social protection, for instance, but

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<sup>27</sup> . See the moving story of Grandmother Narwimba (Malawi/Zambia community) in Marcia Wright. *Women in Peril: Life Stories of Four Captives*. 1984. Lusaka.

need education and jobs. However, that time when the concept arose, wife inheritance was a very effective means of protection but also of guaranteeing the right to family and ultimately in the preservation of the group. Today, it might sound very strange just as many things would but practising societies at the time and in some communities today treated and upheld it as a duty on the surviving kin to which the spouse had an enforceable right. Normally, the one on whom it falls to inherit the estate automatically became entitled to the surviving spouse equally treated as part of the estate. Duties include also the duty to raise the children of the deceased kin and in treating them as his own without exception and the children entitled on equal footing with the inheritor's own blood children to his protection.

Alongside wife inheritance is equally colonially dreaded institution of polygamy. Polygamy spread and became widespread through such practices as wife inheritance but also sheer greedy of man and woman's incapacity to provide for herself. To date, polygamy is still widely practised in many parts of Africa but mostly for totally different reasons although protection is still one of them. Partly, due to the dominating power of man over woman, this institution persists which is amazing given concerted efforts by missionaries and the colonial state to abolish it. In some countries, a polygamous man suffered a higher tax calculated according to each house of a homestead a man was responsible which would multiply significantly as more women a man was married to. In Uganda, we learn<sup>28</sup> that colonialism banned polygamous men from employment in colonial public service all in a bid to discourage the practice while in the rest of Africa, churches often banned such men and women that practised it from worshiping in the Church. All these efforts, however, came to nothing perhaps pointing to wrong methodology.

Property grabbing is yet another practice that is most certainly widespread. Due to failed economies and increased levels of poverty affecting many communities, people are abusing tradition to deprive the children and widow of the deceased's estate. In typical matrilineal communities, widows and children of a deceased are never allowed to inherit the property of the deceased spouse/father. It is mistakenly believed in these communities that children belong to the mother's line and hence are entitled to inherit from their mother's male relatives. Widows on the other hand are simply not treated as 'family' in either matrilineal and patrilineal units irrespective of how long the spouses may have been married. One of the reasons for this which is captured elsewhere above is that as the widow would be inherited by one of the male relatives and as the inheritor or successor does not enjoy absolute personal dominion on the inherited property but is merely custodian, widow and child inheritance does not come in. With the hope to protect the vulnerable members of the family in growing Western-based family models, states have lately intervened with a range of statutory-based protections often dictating the formulas to be applied in sharing the deceased's intestacy. The biggest problem, however, is that though called for, legal interventions nevertheless suffer from one particular failing, namely, are timorous in the face of religious cum cultural beliefs. Law is hardly an effective instrument to change a belief on which a practice is based.

In Nigeria and various West African countries, spouses, again especially widows, are forced to drink the water used to wash the body of the deceased spouse to prove their innocence in his death. This is due to witchcraft beliefs, which almost always are pitted against the poor widow as being responsible for the death of her husband and since men generally die earlier than women, the extent of the problem is apparent. If the

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<sup>28</sup> . James Kahigiriza, *Bridging the Gap. Struggling Against Sectarianism and Violence in Ankole and Uganda*, 2001, Pp. 5-6. In this book, the author illustrates how his polygamous father had to divorce one of his two wives which unfortunately befell on the author's mother in order for his father to comply with the colonial requirement that no public officer may have more than one wife.

widow does not get sick or affected by the water she is 'acquitted' of the suspicion, rehabilitated and 'given back her human rights' to be treated once again as human. It is dreadful to imagine the opposite.

In patriarchal Africa, women are still largely valued for what they can do to the community. For example, the reproductive function of the woman is greatly valued much more than what she is, a human being. The more children a woman can produce, especially male children, the more respect she is entitled from the community. Even though men also can be barren and have been known to have been scandalised for their inability to enlarge the community, women are the most victims. If a woman cannot produce, a 'womb' can be 'rented' by the family of the poor man from one of the relatives of the barren woman to produce a child for the childless couple and avoid a divorce. In Malawi,<sup>29</sup> a male relative of a barren man is arranged to secretly have sex with the wife of his kin to serve this purpose.

The above are just some of the customs and practices, which today raise the ire of the human rights community world-wide. While shedding some light on the now widely criticised and highly condemned practice of FGM, Jomo Kenyatta<sup>30</sup> has warned against being excited with the negative aspects of some African customs. Significantly, he asked for patience in order to persuade understanding of the psychological justifications behind these customs and traditions as the best way of dealing with them. As indicated, earlier efforts by colonialists and missionaries to rid Africa of some of these customs proved futile.

On the good side, the perpetuation of the extended family even though under difficult and hostile environment is a positive aspect of African life. The African family is one of the outstanding civilisations Africa has ever had. Individuals that are not able to stand on their own are protected by the family and through it, have access to their rights. Similarly, individual duties such as the duty of the child to defer to the elders could promote understanding among people and therefore promote human dignity. It is not as often misconstrued that such duties would always violate fundamental freedoms if exercised. Again, Kenyatta<sup>31</sup> has gone to great lengths to allay these fears, for example, by showing that the duty of the child to respect an adult is in fact limited and therefore not an absolute one as ignorant commentators would have us believe. Only deserving adults are entitled to it so that what Kenyatta calls 'rascals' cannot possibly claim it. A useful analogy would be freedom of expression. Just as freedom of expression in modern law is a limited right, African law similarly recognises a duty of the claimant of the right to be respected such as by a child to earn this respect. Disrespecting adults can only expect to receive no less than what they sew.

### **African Culture in Modern Society**

In the rubric of international versus municipal law, culture and custom lies in the latter. Due to its relative nature, culture is identified with the domain of municipal law. However, in these days of international solidarity, there is a growing demand to internationalise cultures especially because culture determines the identity of the human being.

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<sup>29</sup> . Women and Law in Southern Africa Research and Foundation Trust (WiLSA), (eds) Seodi White, Kamanga, Kachika, Chiweza, Chidyaonga, *Dispossessing the Widow. Gender Based Violence in Malawi, 2002; In Search of Justice, Women and the Administration of Justice in Malawi (Women and Law in Southern Africa trust) 2000*

<sup>30</sup> . Jomo Kenyatta. *Facing Mount Kenya*. 1978. Nairobi.

<sup>31</sup> . *Ibid.* p. 13

We have already noted that culture, during colonialism, was despised and dreaded by colonial policy. In French and Portuguese colonial policy, the idea was to wipe out African customs altogether so as to turn the African into a European. Laws were passed to declare certain practices and traditions illegal and their practice an offence. This of course lamentably failed. On the other hand, though the English colonial policy also dreaded African customs and tried to get rid of them, the English colonial policy of indirect rule somewhat protected some of the cultures. Oppressed African people were granted a certain measure of respite to continue practising their cultures and traditions within their communities provided this did not conflict with the English sense of what was wrong and right. In other words, a permanent proviso was set against cultures in general. Through the doctrine of 'repugnance', African cultures and tradition were required to pass the crucial test first before they could be pronounced valid. If a custom or tradition was found to be repugnant to natural justice, equity, or law, it was invalid and may not be practised. This way, many customs which could not measure up to the English test of what was morally good were discarded.

In English speaking Africa, the independence constitutions more or less continued this doctrine. Each of these constitutions had a clause on non-discrimination. In this clause, customary law of the race or tribe and personal law enjoy protection. In Kenya, for example, this is provided for in Section 82 of the bill of rights which, though it prohibits discrimination on a number of specified grounds, this does not affect the customary practices and traditions sanctified by racial or tribal law. It is the same case in the independent constitutions of former English colonies. The idea was to perpetuate the principle of indirect rule in the post-colonial phase so that even if individual freedoms would be guaranteed, this would be alongside customary law and tradition.

A different interpretation however is that the non-discrimination clause in these bills of rights could be read compatibly with the bill of rights. The non-discrimination clause can easily be construed to be *lex generalis* while the equality clause *lex specialis*. It can, in this case, be argued that discrimination will be subjected to the equality treatment wherever there is a conflict, it being a special principle.

The leeway that the English colonial policy gave to African culture should however not be overemphasised. Colonial policy generally was negative to African traditional society. Part of the strategy for colonisation was to subjugate Africans in order to control them. Therefore, it would not be entirely correct to praise the English policy of indirect rule as if it really stood for African cultural emancipation. However, compared to the French and Portuguese policies, the British policy was so timid that it perpetuated the continued existence of the ancient principles of law.

The so-called democratic African constitutions have brought bad tidings for African cultures. Many of them have introduced very radical provisions especially targeting cultures and traditions wishing them away.

The 1996 South African constitution has adequately addressed the status of customary law in the instrument and its relation to the bill of rights. Section 39 (2) states:

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.....The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."<sup>32</sup>

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<sup>32</sup> . The Constitution of the Republic of South Africa, Act 108 of 1996.

The above provision is perhaps a desperate attempt to codify the common law doctrine of repugnance, the standard measurement of human rights in colonial Africa. What is interesting though is that the Constitution says that fundamental human rights recognised in African customary law as in common law shall be valid but only if they are consistent with the bill of rights - a limitation that is bound to subordinate them to Western conception. What does it mean, for example, where the African family rights clash with the modern family notion implied in the philosophy underling the bill of rights?

### **Culture in the context of International Law**

As indicated already, the right to culture is one of the fundamental human rights guaranteed and recognised in international bill of rights. In one sense, culture is an accessory right, similar to the right to equality. However, in another, it is a human right by itself. For example, it is an accessory right which can be implied from the right to family or the right to non-discrimination. However, Article 27 of the Universal Declaration of Human Rights<sup>33</sup> (UDHR) protects the right of everyone to "freely participate in the cultural life of the community, to enjoy the arts and to share in the scientific advancement and its benefits". Similarly, Article 15 of the Economic, Social and Cultural Rights Covenant<sup>34</sup> recognises the right of everyone "to take part in cultural life..." Finally, Article 27 of the Covenant<sup>35</sup> on Civil and Political Rights stipulates that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to those minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, profess and practise their own religion, or to use their own language."

Interestingly, though these instruments protect the right to culture, one cannot fail to notice the coincidence that in each case, the standard comes or is enshrined last. This, it has been suggested,<sup>36</sup> is not just a draftsman's human lapse. It is because in the mindset of policy makers, the right to culture is treated an inferior human right compared to other human rights. The difficulty of determining an explicit definition of culture is one of the reasons behind this lack of enthusiasm in international discourse to embrace culture as a standard enthusiastically. Consequently, the standard on culture is protected almost as an afterthought.

But it is not so in at least one international treaty - the African Charter<sup>37</sup> on Human and Peoples' Rights, 1981. More than any other treaty, the African Charter is predictably very categorical on culture. Right from the preamble in which it states: "Taking into consideration the virtues of their historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights", the treaty has been drawn with culture in mind. Article 17 (3) provides for the promotion and protection of morals and traditional values recognised by the community as a duty of the State. Consequently, the African concept of duties and responsibilities inherent in the African society based on the human rights principle of "duty-right reciprocity" has extensively been elaborated in Articles 27 to 29 of the Charter. Under Article 27, all the human rights and freedoms encapsulated in the Charter have been limited not only to the rights and freedoms of others but also to collective security and even more to "morality and common interest". The invocation of morality is a determined effort to promote African

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<sup>33</sup> . Universal Declaration of Human Rights. 1948. Council of Europe Press

<sup>34</sup> International Covenant on Economic, Social and Cultural Rights. 1966. Council of Europe Press

<sup>35</sup> . International Covenant on Civil and Political Rights. 1966. Council of Europe Press.

<sup>36</sup> . Asbjorn Eide, Cultural Rights as Individual Human Rights, in (eds) Asbjorn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights*, 2001, Pp. 289-302

<sup>37</sup> . African Charter on Human and Peoples' Rights, 1981. Council of Europe Press.

values over and superimpose them above Western in Africa alien human rights. Individual duties especially extended family duties a person in an African set up renders such as the duty to maintain his or her parents, to raise children including grandchildren in the case of grandparents in the extended family unit are especially emphasised. There are no 'old peoples' homes in Africa understandably because the African family system takes care of this or ought to in normal times. Coming to values, Article 29 explicitly states that only 'positive African cultural values' deserve to be preserved and strengthened and that the individual has a duty to relate to others in a spirit of tolerance, dialogue and consultation, a recollection made in Rwandas's post-genocide Gacaca<sup>38</sup> organic law.

In various national laws and systems in Africa, culture and tradition have not been outlawed. We have, for example, already alluded to the South African Constitution which yields to customary law.<sup>39</sup> However, Section 39 of the Constitution requires this law as well as common law and legislation in general to be interpreted by courts and tribunals in a way that promotes the spirit, purport and objects of the Bills of Rights. In other words, the Constitution puts the Bill of Rights above the customary law which pits custom versus modern.

In other constitutions, notably British Commonwealth, the non-discrimination clause exempts personal laws, family law, tribal laws and hence culture from protection against discrimination. We have already alluded to the Zimbabwe non-discrimination clause and the Magaya case. Another is article 23 of the Zambian Constitution, which is *mutatis mutandis* similar to the Zimbabwe clause but also to non-discrimination clauses in all African Commonwealth constitutions. A reiteration is called for to make clear the point. According to this clause, discrimination which may take place in the context of tribal law, family law and personal law would not be construed to amount to discrimination. This, however, has provoked the ire of the United Nations. The Human Rights Committee in terms of the Covenant on Civil and Political Rights has expressed concern, during consideration of Zambia state party periodical report, over the exception clause saying it undermines the obligatory character of the principle enshrined in articles 3 and 26 of the Covenant of which Zambia is a party.<sup>40</sup>

The relegation of culture to the margins of international human rights instruments has naturally provoked reaction. Some scholars have contended that this is because culture is a remnant category.<sup>41</sup> In the Universal Declaration of Human Rights, culture is guaranteed as a human right in Article 27. Similarly, Article 15 of the international Covenant on Economic, Social and Cultural Rights equally recognises culture as a human right. The International Covenant on Civil and Political Rights does the same in Article 27 though only for minorities. In all the three instances, culture is tucked at the corner towards the end of the instrument, which betrays the mindset of the drafters and how they regard this right.

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<sup>38</sup> . Following the 1994 genocide, Rwanda has been busy trying to rebuild its shattered society. A new constitution ( 2003 ) has been adopted and enacted into force. Several supporting laws have been introduced including Organic Law No. 07/04/2004 Determining the Organization Functioning and Jurisdiction of Courts; Organic Law No. 17 2004 of 20/6/2004 on Organization, Powers and Functioning of the Mediation Committee, etc. Gacaca Law (gacaca means 'grass' in local kinyarwanda) has been introduced to try prisoners accused of participation but not the planning and authoring of genocide. These cover accused people in categories 2 to 3 which the authors and planners i.e. the big fish are subject of trials in classical justice system or at the United Nation's Criminal Tribunal for Rwanda which is based on Arusha, Tanzania.

<sup>39</sup> . The Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>40</sup> . CCPR/C/5R.1487 to SR.1489 held on 26 & 27 March 1996 and adopted at the 1498<sup>th</sup> meeting (56<sup>th</sup> Session). Held on 3<sup>rd</sup> April 1996.

<sup>41</sup> .

Although there is no reliable jurisprudence on this issue, we can nonetheless attempt an interpretation. The instructive wording of the provisions of Article 27 of the Universal Declaration specifically mentions the operative word 'freely', which opposes forcing beneficiaries of the culture to practice it against their will. This is the ideology behind the notion of culture in international bill of rights - the freedom of the individual to do or not to do something. However, this is quite contrary to the African approach as reflected in the African Charter on Human and Peoples Rights, already referred to. First of all, article 27 of the Charter, as seen above, clearly limits the entire range of human and peoples' rights recognised to 'morality', a very difficult stance. Morality is a grey area and in a largely unwritten Africa, it is even more difficult to determine when one is on board or overboard regarding morality. One possible interpretation is that morality as construed in African society should override the rights and freedoms granted which could trigger a death kernel. Similarly, Article 17 (3) states: " the promotion and protection of morals and traditional values recognised by the community shall be the duty of the state". These two clauses seem to have given culture a field day over and above human rights. Were it not for the magic word "positive" enshrined in article 29 of the same, culture would have freely reigned. It says: "Every individual shall also have the duty .....to preserve and strengthen *positive* African cultural values in his relations in his relations with other members of society...." (emphasis added). This is the African equivalent of the 'repugnant clause'. Through this caveat, African cultures to be preserved and promoted have been vetted. Only those that that are deemed to be positive will be tolerated which also means the morality test against which the rights shall be assessed is that which will pass the '*positive*' threshold. However, the difficult remains, untouched. What is positive and what is not will be determined by the Banjul jurisprudence, which unfortunately has not had opportunity to do so.

### Conclusion

Perhaps the biggest lesson from above is that African culture is not altogether irrelevant in societal efforts today. It is true as indicated that enough has been done to modify especially those cultural practices and traditions that tend to negate human dignity and that a lot more needs to be done.

Most colonial approaches to the 'problem' of the African people are 'their' traditions and cultures is that it came with 'quick-fix' solutions. Jomo Kenyatta has wisely advised against the temptation to generalise but about the importance of first understanding and appreciating the values behind some of the offensive practices and why people do and insist on doing them. In this advice is the answer to the question: what should be done?

As an ancient civilization, some of the African institutions and practices are obviously outmoded. It can't be ancient without some of its aspects being outmoded. Simultaneously, there are several institutions and practices that continue to be even more relevant today than before. One such institution is the chieftaincy or traditional leadership. Having been abused and having abused itself throughout the history of humankind, the institution is now lying on the backside unable to tell what role it should play. Yet, in some of those countries still practising it, chieftaincy remains a symbol of unity, peace and development. The challenge is how to retrieve some of Africa's more positive elements to enrich the current concepts of governance and human rights so that the African is better protected and served.