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RIGHTS AS TRUMPS IN AFRICAN COMMUNITARIAN ETHICS

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ABSTRACT:

The notion of rights is among the most basic ideas of contemporary political philosophy on the continent and elsewhere. Although rights are common-place in political philosophy it is fair to say that the discussion around it has been nothing short of contested. On the whole, there have been two kinds of questions to which most of the discussion about rights in political philosophy have been answers, namely, (i) what are rights?, and (ii) to what do people have rights? The first has to do with the nature of rights, while the second has to the nature of that to which people may be said to have rights. This research falls neatly within the parlance of the first kind of questions (i.e., the question of what rights are). Specifically, in this research, I am concerned with the question of whether the radical and moderate African communitarian rights theses of Ifeanyi Menkiti and Kwame Gyekye measure up to what rights are commonly understood to be. I argue that if rights are trumps, which override competing societal and communal considerations, then Menkiti's and Gyekye's theories of rights fall short of this fairly standard and typical conception of rights.

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GENERAL INTRODUCTION

Most people would probably agree with the claim that human rights have taken up a central place in social discourse since the end of the Second World War, or more specifically, since the ratification in the United Nations' of the Universal Declaration of Human Rights in 1948. Following the ratification of this document, and a host of other international and regional human rights instruments, rights have come to acquire a link to human dignity, due in part to the belief that rights instruments could forestall the recurrence of the horrors perpetuated against human dignity in WWII. Rights, it seems, were offered as a way to defend defenseless peoples against assaults on their human dignity (Metz 2012:20). Since then, the idea and language of rights have become ubiquitous in many, if not all, democratic societies. Politicians now routinely invoke rights people supposedly have to certain things when they argue for some policy or the other. Civil society organizations also routinely wield rights as a weapon against governments and other civil society groups. Citizens invoke rights in their relationship with their government and with each other. One could argue that rights now provide one of the main frameworks around which most or even all of our social interactions are organized (Dworkin 1977; Waldron 1993).

Now, although human rights are common-place in democratic society, political philosophical discussion around their nature, foundations, character and scope, which has mainly been carried out under the rubric of "rights," is nothing short of contested.[1] On the whole, there have been two kinds of questions to which most of the discussion about rights in political philosophy have been answers, namely, (i) what are rights?, and (ii) to what do people have rights? The first has to do with the nature of rights, while the second has to the nature of that to which people may be said to have rights. To be sure, these two questions are not always as distinct as my statement of them here makes it seem, for sometimes, the answer to the question of what a person has rights to depends on what one takes rights to be, to begin with. Or, on the other hand, one may begin by stating things a person must be seen as having rights to, if they are to be seen

[1] To be sure, "human rights" and "rights", broadly speaking, have different scopes. Human rights, on one hand, are typically linked to specific legislations and international instruments such as the Universal Declaration of Human Rights.

as having rights at all, and then deducing some definition of rights from there. However, it is possible to separate both kinds of questions out, and this research falls neatly within the parlance of the first kind of questions (i.e., the question of what rights are). Specifically, in this research, I am concerned with the question of whether the radical and moderate African communitarian rights theses[2] of Ifeanyi Menkiti and Kwame Gyekye measure up to what rights are commonly understood to be. In a nutshell, I argue that if rights are trumps, which override competing societal and communal considerations (and I argue that they typically are), then Menkiti's and Gyekye's theories of rights fall short of this fairly standard and typical conception of rights.

I lay this research out as follows: I start out, in chapter one, by making an effort to situate the African communitarian rights theses in the context of a more general African response to the idea of human rights proposed by the West in the Universal Declaration of Human RIghts. I note that the African communitarian rights theses are part of, or at least result from, a form of cultural relativist criticism of what I term Western human rights, as I shall explain. In chapter two, I offer a detailed discussion of the radical and moderate communitarian rights theses of Menkiti and Gyekye, respectively, and establish that they both give overwhelming weight to communal considerations, in their respective accounts of the nature of rights, in a manner gestured to by the cultural relativist criticism outlined in the previous chapter, although they do so in different ways. Chapter three surveys some of the main criticisms against the radical and moderate communitarian rights theses that have been raised in recent literature. I specifically consider criticisms raised by Bernard Matolino (2009), J.O Famakinwa (2010), and A.O Oyowe (2013). I argue that all of these criticisms, each in its way, contests the underlying nature of rights proposed by the radical and moderate African communitarian rights theses. They imply (although they do not formulate it explicitly) something fundamentally different about the nature of rights from the radical and moderate communitarian rights theses. In chapter four, I elaborate a theory of rights which is consistent with the idea of rights implied in the critiques put forward Matolino, Famakinwa and Oyowe. To do so, I consider Ronald Dworkin's influential theory of

[2] I use "theses" throughout this work since I treat Menkiti's and Gyekye's communitarian accounts as distinct theories, although there important aspects of their theories which they have in common.

rights as trumps. Finally, in chapter five, I reconsider some of the criticisms leveled against the radical and moderate Afro-communitarian rights theses by Famakinwa and Oyowe discussed in chapter three, in light of this standard theory of what rights are and how they function discussed in chapter four. On this basis, I argue that the radical and moderate African communitarian rights theses, proposed by Menkiti and Gyekye respectively, both fail to satisfy the most basic criterion of this standard conception of rights. Finally I consider some criticisms of my argument in this research.

In what is left of this introduction I will discuss in closer detail how these chapters hang together toward the conclusion that the radical and moderate communitarian theories of rights do not satisfy the basic criterion for rights in the proper sense.

Since I consider this research an endeavor in African philosophy, I begin in chapter one by setting out what I believe to be the backdrop of the engagement with the idea of rights in African philosophy, namely, the African cultural relativist criticism for Western human rights. To be sure, there are other African criticisms of Western human rights, such as those concerned with Africa's developmental prospects and those that deal with appeals to rights by Western powers to justify sustained intervention in the sovereign affairs of African states. But, it appears that the cultural relativist criticism has gained the most currency among all these criticisms in contemporary debates in African ethics. Such criticism of Western human rights has typically followed two trajectories. On the one hand, some cultural relativists argue that the idea of universality with which the idea of human rights has been saddled in Western discourse is based on the idea that human nature is universal. Cultural relativists who reject this line of argument, argue that human rights cannot be universal on this basis, since human nature is not universal. On the other hand, cultural relativists insist that, since values and meanings are typically culturally construed, and human rights are evaluative, human rights must be determined by culturally conditioned presuppositions (Oyowe 2013:331). If either or both of these cultural relativist claims are correct, African cultural relativists surmise, then it must follow that Western human rights may not apply in Africa, since they seem to be based on Western cultural values and ideas about human nature that are applicable in the West but not in Africa (Pollis & Schwab 1979).

The upshot of this cultural relativist criticism of Western human rights is that the idea of rights that would be applicable in Africa, if any, would be one that draws on African culture and ideas about human nature prevalent in African thinking. The African communitarian rights theses seem to make much sense viewed as an upshot of the cultural relativist argument. For, if it is correct that an idea of rights needs to draw on African culture to be suitable for Africa, African communitarians, such as Menkiti and Gyekye, clearly offer notions of rights which draw on what they view as an important aspect of African culture, namely, the African cultural proclivity for communality.

The family of theories that make up African communitarianism have typically been divided into radicals and moderates (Gyekye 1997). The African communitarian rights theses map this grouping. The central underlying similarity between both groups is that they both give overwhelming weight to communal considerations in their rights theses. It is, I think, on the basis of this (that is, on the basis that they both give overwhelming weight to communal considerations) that it is proper to refer to them as communitarian accounts. Beyond this, each group approaches the question of rights from a disparate vantage point.

The radicals, the most important of which are John Mbiti, Placide Tempels and Menkiti, begin by arguing that in traditional African thought, the person is ontologically constituted by the community. The thrust of this view is captured in Mbiti's (1969:141) statement, "I am because we are; since we are, therefore I am", but is laid out in broader detail in Menkiti's 1984 essay, "Person and Community in Traditional African Thought." Menkiti argues that personhood is processual. That is to say that personhood is bestowed by the community on individuals who have lived up to the normative standards set down by community. Rights, on this account of personhood, are collectivist in that they are bestowed on those that have been judged deserving of them through their exercise of their duties to community (Menkiti 1984:180; Oyowe 2013:331).

Gyekye, the principle proponent of moderate communitarianism, argues that this radical account does not leave room for individual expression, hence the necessity of offering a more moderate alternative. The rationale for Gyekye's assertion that radical

communitarianism does not leave room for individual expression, is that Menkiti views the person as entirely constituted by community. Gyekye argues, instead, for a notion of personhood which is only partly constituted by community. Above and beyond this, he argues, the person is also constituted by rational autonomy (Gyekye 1997; 2003). Rights in this moderate communitarian approach are seen to belong to individuals inherently and inalienably, on account of their rational autonomy. Rights, in Gyekye's reckoning, safeguard the individual's ability to exhibit her rational autonomy (2003:359). However, Gyekye also argues that a communitarian would not be obsessed with the exercise of individual rights. In other words, a communitarian would not insist that individuals must be allowed room to exercise their individual rights at all times. Since a communitarian would not be obsessed with the exercise of individual rights, Gyekye posits that the community can restrict the exercise of rights if their exercise poses a threat to the community's core values. He also suggests that in a communitarian setting, where duty is given priority over the exercise of individual rights, claims of rights would be redundant, since the things in respect of which persons have rights would already be taken care of in the process of other people performing their duties (Gyekye 2003:365).

Clearly both the radical and the moderate communitarian rights theses of Menkiti and Gyekye give great weight to community and to communal considerations in the bestowal of rights (radical communitarianism) and in the exercise of individual rights (moderate communitarianism). It is precisely against this disproportionate role which they give to community vis-a-vis the ascribing and exercise of rights that the criticisms of communitarianism by Matolino (2009), Famakinwa (2010) and Oyowe (2013) are aimed. I consider these criticisms in chapter three. Each of these thinkers, in one form or another poses the criticism that rights are not typically subordinate to communal considerations as the radical and moderate accounts posit. Rights, they suggest, typically act to shield individuals precisely from those same communal considerations. As I argue, this is a valid criticism. In this sense, the radical and moderate communitarian accounts of rights simply do not offer rights that function in the way rights are typically understood to function. However, I argue that the main problem with this criticism of the radical and moderate account as proposed by Matolino, Famakinwa and Oyowe, is that they do not flesh out a detailed account of how rights are typically

understood to function, on the basis of which they make their criticism. They simply imply one. This, I suggest, limits the reach of their criticism and may ultimately imperil it.

In order to remedy this deficit in Matolino's, Famakinwa's and Oyowe's criticism, I offer an influential theory of rights, Ronald Dworkin's theory of rights as trumps, to serve as the foregrounding of the criticism that the radical and moderate African communitarian accounts of rights do not measure up to a basic criterion of how rights typically thought to function. Dworkin argues that rights function as trumps against social and communal considerations and demands. Dworkin's central claim is the following: "in most cases when we say that someone has a right to do something, we imply that it would be wrong to interfere with his [sic] doing it, or at least that some special grounds are needed for justifying any interference" (1977:188). Dworkin does not use the word "special" here lightly. For him, to say of a person that they have rights is to remove nearly all grounds on which any interference by the community or government would be justifiable. While there are instances in which Dworkin would accept interferences to rights, he insists that nothing short of an existential catastrophe would qualify as such exception. What seems to be quite clear in Dworkin's thinking about rights is that, where rights exist, the community is not justified in upending it. Accounts on which the community can interfere either with the ascription of rights or the exercise of rights, such as the radical and moderate communitarian rights theses, will, on Dworkin's theory, not measure up to the idea of how rights work.

I think argue that most influential accounts of rights are agreed, at least, in respect of rights typically function as trumps against competing communal and societal demands. Among those other influential rights theorists, one might consider the rights theories of Joseph Raz, Joel Feinberg, and Neil McCormick. As I discuss in chapter four, Raz (1986) views rights as interests which people have that are so valuable in themselves that they create duties in others. Feinberg (1970) thinks of rights as valid claims, which allow its holders to make claims of duties from others. McCormick (2007) offers what he terms the benefit theory of rights, according to which people have rights to that which is to their benefit, thereby creating a duty in someone to provide those benefits. He uses this theory to argue for the rights of children. As is obvious, all these accounts of rights

are accept the Hohfeldian rights-duty correlation. According to Hohfeldian (1919) correlation, rights create a duty in others, in respect to that right. This correlation also holds in Dworkin's account of rights. For example, my right to free speech, creates a duty in the government to refrain from interfering with the exercise of that right. So Dworkin's account agrees broadly with other influential accounts as to how rights function. Broadly, rights entitle an individual to something, the enjoyment of which other persons or the community have a duty not to interfere with. It is precisely because something like this correlation (on which all the other theories agree) is missing in the radical and moderate African communitarian theories of rights that they fall short of being proper theories of rights.

With Dworkin's rights as trumps as the foreground, the strength of Famakinwa's and Oyowe's criticism of the radical and moderate communitarian account of rights become more obvious. Furthermore, it also becomes clear that the accounts of rights offered by the radical and moderate communitarians have implications that would be, at best, unpalatable from the point of view of rights. To show how this may be the case, I first argue that Menkiti's theory interprets rights within a system of reward for adherence to societal and communal norms. Rights are bestowed as a reward for good behavior. In my view, rights on this Menkitian account could turn out to entrench indignities. The thinking behind this argument is as follows: different people and communities have vastly varying, even opposing, reward-systems. Two opposing reward-systems cannot equally guarantee the respect of rights and human dignity. A reward-system that spanks a child for good behavior does not guarantee that child's dignity as much as a reward-system that praises the same child. So, if Menkiti's account is based on the community's reward-system, it seems quite plausible that his rights system may sometimes, when the community's reward-system is not consistent with human dignity, undermine the very dignity for which the ascription of rights is important. The assumption, of course, is that rights safeguard us from violations of human dignity (Metz 2012). Second, I argue that the idea of rights present in Gyekye's moderate account is redundant in that his system would play out in much the same way as a benevolent dictatorship would play out, although the idea of individual rights are typically foreign to benevolent dictatorships (Gilson & Miljaupt 2010). For it is not inconceivable that

whenever it suits the benevolent dictator's idea of what a good society is she could allow her citizens to make some of the choices for their lives. I suspect that Gyekye's rights system and the benevolent dictator's regime will play out in more or less the same way in reality. Both will be systems in which (i) the "common good", however that is defined, is the overwhelming consideration in the community/society; and (ii) individuals occasionally do have the opportunity to exercise some decision-making power in their own lives (I take the exercise of decision-making power as the typical form the exercise of rights take).

Two objections may be raised against my method and objective in this research (i.e. showing that the radical and moderate Afro-communitarian rights theses do not measure up to the way rights are typically understood to function), which, it is worth noting, I have discounted in the course of this dissertation for the following reasons. First, one might object that my choice of Dworkin's theory of rights as trumps seems random or unjustified. Even worse, one may suggest that I picked Dworkin strategically because his account of rights offers a stark contrast against the radical and moderate African communitarian rights theses I discuss. I would that my choice of Dworkin's theory or rights as trumps is justified for two main reasons: First, Dworkin's account seems to map quite closely, the way "rights" are understood in everyday private and public conversations. Second, as I argued above, no mainstream theory of rights disagrees with Dworkin's account on the central point on which the Afro-communitarian accounts fall short, namely, on the point of the way rights typically function. While they disagree on what rights people are taken to have, and in what measure, all the influential theories considered seem agreed that where one is understood to hold a right, it is wrong for them to be interfered with in the very exercise of that right, insofar as they are rights at all. An further advantage to using Dworkin's account is that he offers a minimalist account, which presumes as little as possible, to allow for a wide variety of interpretations. He offers the least restrictive account, which is most likely to allow for a variety of cultural interpretations.

A second major objection one may raise against my argument is that by playing off a Western account of rights (Dworkin's theory of rights as trumps) against the Afro-communitarian rights accounts, with the aim of arguing that the latter fall short because they do not agree with the former, I am suggesting that the Western accounts are superior to the African accounts and hence are the standard to be emulated. I doubt that this has to be so. To begin with, there is something wrong with the presumption that an African account may not be devised which coheres with African culture, but is also consistent with the way the term "rights" is typically understood (i.e. to safeguard individual entitlements against any and all competing claims). I have cited a number of African philosophers who implicitly agree with this critical point I have raised against the two most influential Afro-communitarian accounts of rights in literature on African ethics. This is by no means to dismiss any and all African accounts of rights.

Finally, before embarking upon the work of this research, it is important to motivate for the interplay between the terms "human rights" and "rights" which one is bound to notice in this research. In chapter one, I primarily utilize the term "human rights." From chapter two to five, I primarily employ the term "rights." How I employ either term has to do with what I do in each of these sets of chapters. The term "human rights" is typically used in legal literature to refer to "those rights which are inherent to the human being" which are "legally guaranteed by human rights law…they are expressed in treaties, customary international law, bodies of principles and other sources of law" (United Nations 2008:2-3). Human rights are usually linked to some international, regions and local human rights laws. On the other hand, the term "rights" has had more prominence in the political philosophical literature, and typically has a scope much wider than any specific law. So, where human rights have to do with entitlements which persons have on account of their human nature, guaranteed by some human rights statute, political philosophers of rights ask fundamental questions about the proper nature, basis, source, foundations, scope, and even sometimes, the propriety, of such entitlements. The main difference between the discourses which employ either term is in their scope. Humans rights designate something much more practical and has relations to the social and political world in which we actually live, whereas rights involve much more general

and speculative work. Both, nonetheless, deal with entitlements persons are thought to have to certain things, such as life, free-speech, freedom or association, etc.

This distinction between “human rights” and “rights” maps the way I employ both terms in this research. Since my effort in chapter one is to ground the African communitarian rights theories in the reception which the Universal Declaration of Human Rights and other early international human rights instruments received in African political thought, it seems clear why I primarily use the term “human rights” there. The African cultural universalist criticism of western human rights I discuss in chapter one, is aimed not against some general discussion about rights, but at the specific tenets laid out in the Universal Declaration of Human Rights. However, although the Afro-communitarian rights theories makes much sense viewed as a consequence of that African cultural relativist criticism, they primarily engage with the question in the broad way in which political philosophy has engaged with it. My further engagement with and criticism of the Afro-communitarian theories of rights in chapters three, four and five, therefore, deal with rights, and not human rights. So, since this is research aims to be a work in African political philosophy, and also aims to be a criticism of the Afro-communitarian theories of rights, it deals with rights, not human rights *per se.*

To be sure, some of the thinkers from whom I draw in this research are not as clear in their employment of the terms “human rights” and “rights” as my brief discussion of the distinction between them suggests. For example, Oyowe’s discussion in his 2014 article, “An African Conception of Human Rights? Comments on the Challenges of Relativism,” with which I engage in chapter three, uses the term “human rights” while engaging in the philosophical discussion which I have said properly belongs to the rights parlance. However, because I do not think that this confusion of terms is enough reason to disregard the important insights contained in Oyowe’s article (and any others who confuse their usage of both terms) I have used them in this research in the hope that the reader sees that their discussion is properly about rights (with which I am interested), and not necessarily about human rights.

CHAPTER ONE: AN AFRICAN CULTURAL RELATIVIST CRITIQUE OF WESTERN HUMAN RIGHTS

1.1 INTRODUCTION

The aim of this chapter is to consider an important set of criticisms of Western human rights raised by African cultural relativist thinkers, as well as situate the African communitarian rights theses I will address over the course of this dissertation within the context of rights discourse in Africa. African cultural relativists argue that Western human rights are not applicable in Africa, since Western human rights are supposedly based on a cultural foundation of individualism, and African cultures are communally organized. African communitarian thinkers, treading these same lines, offer philosophical accounts of rights based on this supposed proclivity for community among Africans.

In fulfilling the aim of this chapter, therefore, it is important to discuss this African cultural relativist critique of Western human rights in some detail. First, I analyze the meaning of the phrase "Western human rights," which African cultural relativism subjects to criticism; next, I consider, in detail, the cultural relativist argument brought against Western human rights by African thinkers; then, I consider some possible responses to the African cultural relativist critique; finally I motivate the claim that the African communitarian rights theses follow from the cultural relativist criticism of Western human rights under discussion in this chapter.

1.2 A TYPICAL WESTERN CONCEPTION OF HUMAN RIGHTS

Human rights have a long history in the West. According to Brian Tierney's (2004) analysis, its earliest discussion may be found in the 14th century works of William of Ockham, who, Tierney observes, introduces the notion of subjective rights. Tierney writes, "Ockham's nominalist philosophy, holding that only individual entities had real existence, naturally led on to an individualistic political theory...Ockham was therefore the father of subjective rights" (2004:4). However, the current political iteration of the Western notion of human rights may, according to Pollis & Schwab (1979:1), may be

historically traced back to the revolutionary thoughts that helped foment the French and American revolutions, and that were laid out in documents that helped entrench the results of these revolutions. What 18th century Europe and America experienced, at the height of both upheavals, was an upending of the old system of organizing society which was feudalistic and oligarchic. According to the ideas which drove those revolutions, political society needed to become responsive to the individuals who make it up, and not simply to the elites who ruled it (Pollis & Schwab 1979:2). This change was “grounded in a new view of the nature of man, and the relationship of each individual to others and to society” (Pollis & Schwab 1979:2). The individual became the centre of gravity in society. Society was there solely to answer to the needs of individuals who compose it. In this framework of thought, rights were thought of as entitlements belonging to individuals, with which no one was justified in tempering (Baet 2001:7012). Rights were also meant to safeguard the individual from wanton attack by other people and the government. So, if rights are meant to defend the individual from abuse by others, it became the duty of political society to guarantee and defend the rights of all individuals. The American and French revolutions brought with them a dispensation in which government had as its underlying aim, the duty to defend the rights of all individual citizens (Pollis & Schwab 1979).

This centering of the individual in social and political discourse and life should inform our understanding of the documents which the French and American produced. The American Revolution was kick-started in 1776 by the production of the Declaration of Independence. The success of French Revolution saw the production of the Declaration of the Rights of Man and the Citizen in 1789. The text of each of these documents makes this centering of the individual vivid. The American Declaration of independence starts by solemnly declaring that

> we hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life liberty and the pursuit of happiness. That to secure these rights governments are instituted among men, deriving their just powers from the consent

> of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundations on such principles, and organizing its powers in such form, as to them shall seem most likely to affect their safety and happiness.

This text epitomizes the change of political paradigms, from a system in which the elite, royals, rulers and landlords held sway, to one in which the individual became the centre of the political universe (Pollis & Schwab 1979:2). It became known as a self-evident truth, one needing little or no defense, that certain rights of the individual were sacrosanct. The individual, being entitled to pursue her liberty and happiness unimpeded (that is, having the "right" to seek ends she has determined by herself, without fear of interference), became the centre piece of political thought. Within this political framework, governments took up a new role. Rather than being something to which people subject themselves in order to protect their collective interests, as Hobbes thought of it, government was understood as something individuals may decide to overhaul if, or when, it ceases to secure their basic rights. This way of thinking of government, and of society in general, also informs the thinking behind the French revolution.

The Declaration of the rights of Man and the Citizen, which was a product of the French revolution (1789), begins thus:

> The representatives of the people, organized as a National Assembly, believing that the ignorance, neglect or contempt of the rights of man are the sole cause of public calamities and the corruption of governments, have determined to set forth in a solemn declaration the natural, unalienable and sacred rights of man, in order that this declaration, being constantly before all the members of the social body, shall remind them continually of their rights and duties; in order that the acts of the legislative power, as well as those of the executive power, may be compared at any

> moment with the objects and purposes of all political institutions and may thus be more respected, and, lastly, in order that the grievances of the citizens, based hereafter upon simple and incontestable principles, shall tend to the happiness of all.

The American Declaration of Independence, and the Declaration of the Rights of Man and the Citizen, represent the first attempts in the West to base an entire system of society and law on the individual rights of all people (Baets 2001:7012-3). It is primarily in respect of this focus on the individual's rights that both documents differed from everything that had come before (Pollis & Schwabs 1979:2). According to Pollis & Schwab (1979:2), "these radical concepts understood man [sic] as an autonomous being possessed of rights in nature, rights that were not dependent upon a sovereign grant of legislative statute."

Baets (2001:7012) claims that Locke's Natural Rights theory underlies the new approach to individual rights laid out in the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen. Locke proposed his theory of Natural Rights nearly a century earlier than either document in an important work in 1689-1690, titled *Two Treatises of Government.* Some discussion and understanding of this work is needed to understand the philosophical background to these two important precursors to modern human rights frameworks such as the Universal Declaration of Human Rights (1949).

According to Ashcraft (1994:226), understanding Locke's Natural rights theory requires that we begin from the conclusion Locke reaches in his famous work, *Two Treatises of Government,* and then ask how he arrived at that conclusion. Locke's conclusion is that "it is lawful for the people…to resist their king" (quoted in Ashcraft 1994:226). How does Locke come to that conclusion? Locke's account of natural rights begins with what he views as man in the "state of nature." The state of nature is the pre-society state in which man [sic] exists originally, adhering only to the law of nature (Leo Strauss 1953:202). All men [sic] in this state are equal and free (Letsepe 2011:129). The only

law they respected, or at any rate, were forced to respect, was the law of nature (Leo Strauss 1954:202; Ashcraft 1994:228).

The law of nature, according to Locke, is “identical with "the law of reason," which is knowable by the light of nature; that is, without the help of positive revelation" (Leo Strauss 1954:202). The law of nature allows humans by virtue of their reason to seek out what is in the interest of their continuance; it was “the sacred and unalterable law of self-preservation” (Ashcraft 1994:214). According to Locke, the natural law generates a natural right to self-preservation (and other allied rights). For Locke, the natural right to pursue that which is in one’s benefit (so long as it did not interfere with another person’s interests) is basic, and the state and its institutions are only necessary as a means to safeguard this right. In other words, humanity “surrenders to the State only the right to enforce natural rights, but not the rights themselves” (Letsepe 2011:129). This means that the people were justified in resisting their king or leader in the event that such king or leader puts in place laws that supplant these basic, natural rights. By this reasoning, citizens are within their rights to topple an unjust system that oppresses and maltreats them. This understanding of Locke’s natural rights theory allows us to make sense of Article 3 of the French Declaration of the Rights of Man and the Citizen which states that “the protection of the natural rights of man is the *raison d’être* of every political association” (van Dun 2001:4).The links between the natural rights theory of Locke and the American Declaration of Independence and the French Declaration of the rights of Man and the Citizen are quite evident.

For a long time, the argument has been made that these broad (and, according to some, vague) allusions to natural rights in Locke, the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen, are not only unsatisfactory, but also unsuitable, for the ratification of legal codes which can be enforced (Waldron 1987). They were thought to be too vague, and begged many more questions than they were able to answer. For example, where the American Declaration proclaims that all men are created equal, it may be asked whether this included all black men, who at the time the Declaration was written were thought to be legitimate slaves. If the term “men” did not include black men, why should it not? Moreover, recent political

philosophical works on the question of rights (Dworkin's rights as trumps comes to mind) have broken with the tradition of natural rights, arguing that, although rights belong to all individuals, they need not be understood to derive from the human nature of individuals as such (Waldron 1984:3). For example, Dworkin (2011) argues that rights derive rather from the responsibility which all members of society have toward each other (more will be said about this in chapter four). That human rights belong to all who are human, however, has remained a critical point of convergence for many who believe in human rights today.[3] As a result, many understand the Universal Declaration of Human Rights (UDHR), which Donnelly (2007:2) has called "the foundational international legal instrument," as a universalist document that covers all living human beings, without exception. In other words, the UDHR is taken to be universalistic.

Over time, several global and regional human rights instruments have been ratified along the lines of the Universal Declaration of Human Rights. Among these are, the International Covenant on Civil and Political Rights (ICCPR) 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979, the African Charter on Human and Peoples' Rights (ACHPR) 1981, and the Convention on the Rights of the Child (CRC) 1989.

What seems clear from the above discussion is that human rights discourse has had a fundamentally universal character since at least the ratification of the Universal Declaration of Human Rights. All over the world, respect for human rights has become a primary criterion of legitimacy (Waldron 1993). But there are possible problems with the universality of human rights. The rest of this chapter will consider an important criticism of the universality of human rights, namely, cultural relativism, which argues that Western human rights do not have applicability in the rest of the world, because they are based on and depend peculiarly upon Western cultural presuppositions. I will consider the African iteration of this criticism in more detail. Some African thinkers have argued that Western human rights are not applicable in Africa because of fundamental

[3]Of course there have also been many dissenting voices, one of which has been offered under the rubric of cultural relativism, which is the subject of the next section.

differences between African culture and the Western cultures upon which they believe the UDHR is based.

1.3 THE AFRICAN CULTURAL RELATIVIST ARGUMENT

There are a number of criticisms leveled against Western human rights by African thinkers. There are some thinkers who argue that Western human rights are no more than a tool for Western ideological hegemony (Cooper & Stoler 1997; Ibhahow 2002). This kind of criticism is informed by general criticisms of neocolonialism. The charge that Western human rights are a tool for ideological hegemony belongs to the political/ideological critique of what African thinkers view as Western domination of what is supposed to be a democratically constituted "international" community (Cooper & Stoler 1997). Some of these thinkers view globalization as another such tool of ideological hegemony (Mazunder 2008).There are also African thinkers who have observed that Africa's developmental prospects may be hindered, or at least adversely influenced, by the emphasis on political and individual rights in Western conceptions of human rights (Olowu 2009). The pursuit of individual human rights, these thinkers argue, has the potential to undercut the economic strivings of African states. Finally, there are African theorists who argue that since, in their view, Western human rights are based on Western culture, they are inapplicable in Africa due to differences in culture. At a more granular level, some African thinkers have argued that the idea of human nature which underwrites the notion of human rights in the West is not a universal one. Ghai (2000:1097) for example, posits that the notion of human nature which underlies Western human rights is "not an abstraction because humans are defined by their relations to others…." I will focus on this last criticism in this section, that is, the African cultural relativist criticism of western human rights, since this appears to be the criticism with which most African communitarian thinkers on human rights have concerned themselves (Oyowe 2014).

African cultural relativists argue, against Western conceptions of human rights, that they are focused too narrowly on individual rights, reflecting the individualistic character of Western culture. African culture, they argue, is communalistic, and in their view, this

communalism ought to inform any set of human rights tenets applied on the continent. A discussion of African communitarian theories of rights which cater to this African proclivity for communality will be presented in chapter two. First, however, I will outline in some detail, a typical African cultural relativist argument against the individualist bias of Western conceptions of human rights of the sort which underwrites these later accounts.

Mary Robinson, former UN High Commissioner for Human Rights, wrote in 1993:

> We must go back to listening. More thought and effort must be given to enriching the human rights discourse by explicit reference to other non-Western religions and cultural traditions. By tracing the linkages between constitutional values on the one hand and the concepts, ideas, and institutions which are central to [various] traditions, the base of support for fundamental rights can be expanded and the claim to universality vindicated.

What Robinson expresses in this excerpt, more than anything else, is an acknowledgement of one of the earliest, and perhaps most enduring criticisms of Western human rights by African scholars. The criticism is that Western human rights are not applicable in Africa because they require a system of social organization, and are underpinned by a cultural milieu, that is wholly contrary to and, in fact, incompatible with, anything which obtains in Africa. African cultures are patriarchal, paternalistic, and communalistic, while, these thinkers seem to believe, Western culture presumes equality between men and women in society, with respect to their entitlement to certain inalienable rights and, to this extent, each individual's private sphere is to be respected to the utmost (Kiye 2015:76).[4] At its core, the claim of African cultural relativism assumes the following: international human rights are based on individualistic Western culture and should not be applied in Africa, given their inconsistency with Africa's

[4] It is important to keep in mind, as a side note, that a cursory examination of the appropriate sociological literature shows that Western culture is nowhere near as non-patriarchal, non-paternalistic and non-communal as African cultural relativists seem to think. It suffices, however, to know that African cultural relativists seem to believe that Western culture is non-patriarchal, non-paternalistic and non-communal, or more so, at any rate, than African cultures.

specifically communal cultures. What follows considers some further aspects of this thinking.

In what is the African cultural relativist argument against the universality of Western human rights constituted? Broadly, African cultural relativists on the question of human rights argue that it is mistaken for one to apply moral judgments reached on the basis of Western or non-African cultural norms, in an African setting (Oyowe 2014:330).The foundations for African cultural relativism may be found in the works of Western sociologists and anthropologists such as Herskovits (1947) and Steward (1948), who were concerned to offer general anti-universalist criticisms of Western notions of human rights.

Perhaps the best known such criticism comes from the American anthropologist, Melville Herskovits, who rejected the applicability of the Universal Declaration of Human Rights (UDHR) to all of the world's people. He argues, "the rights of Man in the Twentieth Century cannot be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people" (1947:543). For Herskovits, the inapplicability of the UDHR to all peoples is a result of its roots in, and prescription of, values which derive from Western culture. Different cultures make different assumptions about human nature, social organization, the place and role of humans in the cosmos, etc. The moral norms of each culture depend on these assumptions. To apply one culture's normative prescriptions to another culture, according to Herskovits, is to impose arbitrarily one culture's assumptions on another. Some, such as Julian Steward, have gone as far as calling the attempt to apply the tenets of the UDHR to other non-Western peoples a form of "imperialism" which "we are prepared to take a stand against" (1948:351). According to Preis (1996), this attitude toward the UDHR has become widespread, either as a cause or an effect, of the perceived dubiousness of the universality of the tenets prescribed by the UDHR or of demonstrable bias in global interventions on their behalf (1996:288). African cultural relativists have largely proceeded along similar lines when they argue that African notions of person, the social order and the place humans occupy within the cosmic order, are sufficiently different

from those which underlie Western human rights prescriptions to render these inapplicable in the African context (Oyowe 2014:331).

Now, one may wonder, what exactly does it mean for Western human rights to be inapplicable to African culture? Or, in more general terms, what does it entail to say that the tenets of one culture are not applicable to another culture? The thrust of this question is that it cannot be a portent critique simply to claim the tenets of Western human rights are "incompatible" with African cultures until we are clear about what it might mean for an idea such as one of human rights to be incompatible with, or inapplicable to, the culture of a people.

Charles Lindholm (1990:4) proposes a simple criterion for discerning what it means for one culture's tenets to be incompatible with those of another; in particular, he asks what it might mean for Western human rights tenets to be devoid of applicability in other settings. He suggests that we "inquire into the kinds and degrees of support for human rights standards and for their implementation in 'culture(s)' – be it 'micro-cultures' of villages or tribes, or 'subcultures' of professions and social classes, or 'national cultures,' or 'regional cultures.'" In other words, he claims, a tenet is applicable to a culture only if there is some kind and degree of support for such a tenet within the already established tenets of that culture. In like manner, there is no support for a tenet within a culture if the established tenets of that culture contradict and oppose the new tenet. Lindholm terms this the "commonsensical approach." What the commonsensical approach suggests is that where support for human rights tenets cannot be found in relevant established tenets of African cultures, it may be appropriate to claim that such human rights tenets are incompatible with the tenets of African cultures.

This approach makes sense, especially in areas of African culture guided by clear-cut norms. For example, most African cultures consider it bad for people to kill one another, or to cause one another suffering. This suggests that the human right to life and corresponding rights to not be subjected to "cruel and unusual punishment," among others, will find direct support in African cultures. Conversely, many African cultures do not think individuals are valuable in and of themselves; they are only valuable qua

members of their community (Ghai 2000:1097). A human rights tenet according to which individuals are inherently valuable, say, the right to freely choose one's spouse, will not only fail to find support in African culture, it may be met with direct opposition. In many African cultures, one's spouse is chosen for them. However, where the contrast between African culture and Western culture is not so clear-cut, in which one may not be certain as to how both cultures' norms compare against each other, the commonsensical approach may falter somewhat. I will not go into great detail with this potential problem with the commonsensical approach. As the discussion of African cultures and the contrasts which hold between them and those of the West shows, the problem of areas in which the contrasts between the cultures are not clear-cut does not seem to arise with the sociological examples offered in the literature. The sociological examples that will be pointed to here, as examples of African cultural relativism, seem to attend to areas where African cultural tenets are clearly incompatible with tenets which inform Western human rights.

Much of my discussion of African cultural relativism will therefore, follow the trajectory of the commonsensical approach, that is, each of the thinkers considered will be arguing, using sociological evidence, that Western human rights tenets fail to find support in African culture. In the discussion that follows, I will purposefully avoid a dominant philosophical discussion in the literature about the communitarian basis of African culture[5] as that will be the focus of the next chapter. I will rather concentrate on specific conflicts between specific African cultures and specific Western human rights stipulations which have been identified in the literature. The conflicts identified, one will notice, are conflicts in culture. It is imperative to make certain that the conflicts discussed are examples of cultural relativism, and not merely those of botched implementation. To find these conflicts, I will rely on African sociological and anthropological research. One distinctive advantage of drawing on sociological evidence to make the argument is that, rather than speculate about whether or not African cultures do (or do not) support Western human rights, we can simply consider situations that arise in these real-life cases.

[5]Cobbah 1987:320

An interesting study by Mikano Emmanuel Kiye (2015), entitled "Conflict between Customary Law and Human Rights in Cameroon: the Role of the Courts in Fostering an Equitable Gendered Society", is instructive for a discussion of particular elements of Africa's cultures that are incompatible with, and therefore do not provide support to, Western human rights. The distinctive advantage of Kiye's study is, among other things, that it covers a place (Cameroon, Central Africa) in which African cultures remain active and inform customary practices and where Western human rights tenets[6] have been introduced as part of municipal law (2015:76). As a result, "one of the most persistent, and perhaps intractable problems is the difficulty of unifying the legal process" (Kiye 2015:76).[7]

One important arena in which this conflict is felt, according to Kiye, is the area of social organization. Traditional Cameroonian society is organized, Kiye finds, in a patriarchal form. Cameroonian customary law has a "discriminatory structure: it is patriarchal in nature and is perceived as a way of looking at the world from the vantage position of men in traditional African, and mostly, non-Western societies" (Kiye 2015:76). Patriarchy is an essential part of the very nature of customary law in Cameroon, in Kiye's view. To understand how much of a pervasive force patriarchal customary law is in Cameroonian society, Kiye gives some account of what customary law means to most Cameroonians. Kiye (2015:76) states that "customary law consists of custom, local usage and belief of the community… most of these customs are said to have been handed down from time immemorial and from generation to generation, so that everyone in the community knows them, or is deemed to know them" (2015:78). Cameroonians take customary law as a way to retain faithful in their heritage, and to the wishes of their forebears and as, simply put, the way the world functions. So when we say that Cameroonian culture is patriarchal what we are saying is that most members of

[6]Kiye (2015:75) lists the Western Human rights instruments that Cameroon has attempted to integrate into its laws as including "the Universal Declaration of Human Rights (UDHR) 1948, the International Covenant on Civil and Political Rights (ICCPR) 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979, the African Charter on Human and Peoples' Rights (ACHPR) 1981, and the Convention on the Rights of the Child (CRC) 1989."

[7] It is easy to confuse questions about whether one culture differs from another, with questions about whether one culture's tenets are better than those of another culture. But, what is of interest to me here is simply the former, namely, the simple differences between two cultures.

Cameroonian society believe patriarchy to be the primary order of life among them (and probably cannot imagine an alternative order), and that it has been so for millennia. But, Kiye finds, while customary law in Cameroonian traditional society seems to be organized in such a way as to favour men in some areas, such as “inheritance and succession,” it also appears to be a “source of empowerment to single parents, concubines, and illegitimate children” (2015:77). For example, customary law demands that a man take financial responsibility for his children, whether he remains married to their mother or not. This saves single mothers and ‘illegitimate’ children from the financial burden that they may otherwise suffer.

Despite such advantages for some Cameroonians, such gendered distinction in customary law in Cameroon contravenes the underlying supposition of Western human rights instruments, which demands that adults be treated equally in all respects, as pertains to respect for their basic human rights. For example, Kiye notes that Cameroonian customary law favours men in terms of “inheritance and succession” (Kiye 2015:77). It is not immediately clear why men would qualify for the inheritance of property, but not women. In Cameroonian customary law, men are automatically considered the head of the household, with the power to dictate the lives of all other members of the household and community, including legal presentation. In other words, Cameroonian customary norms conflicts with the UDHR’s position in Article 6 that “everyone has the right to recognition everywhere as a person before the law.” Women and children in Cameroonian customary law, claims Kiye, are persons only insofar as they are connected to a man (Kiye 2015:77).

Nhlapo (2012) also offers considerations of this same sort, as regards what he terms African family law. In his view, the family stands at the centre of traditional African life. It is the source of all the tools through which the individual interacts with the world by which she is surrounded. Therefore, “African customary law of the family is the outward and visible sign of a very deep and all-pervasive conception of the world and the meaning of life” (Nhlapo 2012:10). At the centre of this sublime institution of family is the process of marriage. How African people celebrate their marriages has, over time, become an integral element of their identity. But within the complex mixture of practices

which make up the marriage ritual of Africans, critics, Nhlapo supposes, will find much to criticize from a human rights perspective, particularly in terms of the right to equality.

> There are “boys only” and “girls only” activities and “women only” and “men only” ceremonies. The critic will also find plenty of inequality; indeed, fundamentally the whole relationship is predicated on the pre-eminent position of the bride’s family as the holders of the “prize” and the groom’s family as seekers of that prize. It does not take much imagination to realise that this centrepiece of African culture, family law, which will be defended fiercely in case of attack, is also the most vulnerable to challenges from a human rights standpoint (2012:11).

To be sure, it is not clear how or whether the existence of “male only” and “women only” aspects of the marriage celebration can exclusively ground the inconsistency of African culture with human rights. What Nhlapo hopes to gesture toward, nonetheless, concerns differences in the attitudes of African culture toward women and men which are not consistent with presumptions of equality in Western human rights law. It likely does not take much for the critical observer to notice broad lines of distinction and incompatibility which exist between these African customary family law and human rights tenets. In Nhlapo’s view:

> The most common tension in this area is between the fundamentally patriarchal nature of marriage and family law in traditional African society and a whole range of individual rights that may now be claimed by women under the promise of modern Constitutions. These rights include the rights to equality, freedom of movement, expression, association; the right to education, access to courts and freedom and security of the person – even the right to life itself (2012:11).

In at least this limited number of sociological and anthropological examples, Western human right tenets have been found to conflict with African customs.

To be sure, regional human rights documents such as the African Charter on Human and People's Rights (the Banjul Charter) have aimed to remedy these conflicts. In many cases, they have done so by stipulating the pursuance of human rights alongside African cultural norms. But this does not seem to have solved the problem. According to Oyowe, charters such as the Banjul accord, rather than reducing the conflict, bring to the fore, in a more pronounced way, the irreconcilability of African culture and a number of basic human rights tenets. In Oyowe's (2014:344) view, "nowhere else has this tension been more visible than in the African Charter on Human and Peoples' Rights. This regional instrument was intended to articulate the core tenets of human rights doctrine while remaining faithful to the traditions of the peoples of Africa. Some tensions are evident, however. For example, the Charter's provision that rights and freedoms are guaranteed 'without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status' is at odds with the African concept of human nature" (Oyowe 2014:345). According to Oyowe, the African concept of human nature has been understood to be collectivist and communal, and a communalist system would not overlook such distinctions, as this Charter insists. take the rights of individuals to individualistic activities seriously. In Nhlapo's (1989:13) view, in embracing both the Western value of equal rights and the African family structure, the Banjul Charter seems to embrace two opposing values simultaneously, since the African family structure maps a general Arican cultural proclivity for patriarchy and communalism.

It does appear, therefore, that at least in some cases[8], African customary norms find themselves at significant odds with Western human rights norms. This, I think, is the crux of the African relativist criticism of Western human rights, namely, that some of their basic tenets do not find support in African culture, which means that they cannot all be universal. There have been some responses which reject such cultural relativist conclusions about the incompatibility of Western human rights with African culture. What follows is a discussion of some of those responses.

[8]To be sure, as I pointed to earlier, the right to life, and the right to be spared cruel and unusual punishments are human rights tenets that may find support in African cultures. African cultures value life highly, and view the depravation of another of his/her life as one of the ultimate offenses against community (Murove 2009). So there are certainly some exceptions to the inapplicability of Western human rights in African culture.

1.4 RESPONSES TO AFRICAN CULTURAL RELATIVISM

African political and legal literature is rife with responses to the challenge posed by cultural relativism to the universality of Western human rights, but two responses seem to stand out, namely the equivalency response and the reconciliation response. The two responses stand out because they offer ways to salvage the universal applicability of Western human rights.[9]

First, African philosophers have attempted to dissect African culture in search of elements of it that may be considered relative equivalents of Western human rights. The supposition, it appears, is that there must be aspects of African cultures which do more or less the same job for Africans that Western human rights do for Westerners. One way to go about making this argument is to posit, like Deng (2004:499) does, that while international human rights are markedly Western, based on Judeo/Christian tenets, the values they imply are shared with all cultures, including African culture. In other words, "the more profound roots of the claim to universality lie in the fact that human rights reflect the universal quest for human dignity… all cultures recognize the inherent dignity of the human person and postulate various norms and procedures for its pursuit" (Deng 2004:499,500). These norms and procedures do not have to be the same as the tenets ratified in the international human rights instruments. In An-Naim's (1990) view, these norms derive their legitimacy primarily from the norms and institutions of particular cultures. Thinkers who attempt to respond to the challenge of relativism in this way typically then go on to consider how some particular African cultures set about recognizing the inherent dignities of their people.

Deng, for example, discusses the notion of human dignity among the Dinka of Sudan. He quotes at length the thoughts of a Dinka chief who, seeing how inhumanely Arab-Muslim people of Northern Sudan treat people in Southern Sudan, invokes the inherent dignity of human person:

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[9]There are also non-African attempts to salvage the universality of western human rights. Jack Donnelly (1982) argues for what he terms the "relative universality thesis." This section concentrates on the two main such attempts by African thinkers.

> If you see a man walking on his two legs, do not despise him, he is a human being. Bring him close to you and treat him like a human being. That is how you will secure your own life. But if you push him onto the ground and do not give him what he needs, things will spoil and even your big share, which you guard with care, will be destroyed (1980:172).

Wiredu also talks about the notion of human dignity among the Akans of Ghana in more or less the same terms. According to the Akan, “everyone is the offspring of God; no one is the offspring of the earth” (Wiredu 1990:224). In the mind of most African people, to be begotten of God, is to be deserving of respect and dignity.

The approach of finding aspects of African culture that can be treated as equivalents of Western human rights values (which I will call the equivalency approach) is plagued by two serious problems. The first is that it seems to confuse the notion of human rights with the notion of human dignity (Donnelly 1982:307). According to Donnelly, human rights are “rights, not benefits, duties, privileges, or some other perhaps related practice. Rights, in turn, are special entitlements of persons” (1982:304). Rights are things which are supposed to guarantee and protect the inherent dignity and respect humans are entitled to. Human rights are not themselves human dignity; they are things which aid in the guaranteeing of dignity. While African (and other) cultures are known to have developed notions of human dignity, none of them seems to have a notion of human rights (Donnelly 1982:307). What this suggests is that pointing to notions of human dignity in African cultures, as a response to the view that African cultures do not have accounts of human rights, is to miss the point altogether. The point is not that African cultures do not have notions of human dignity, but that they do not seem to have notions of human rights. That is, they do not seem to offer a viable way to safeguard human dignity. However, a proponent of the equivalency approach may retort that if a culture has a notion of human dignity, and human rights are meant to guarantee human dignity, that culture does, in principle, support human rights, since dignity is itself the basis of certain inevitable entitlements. In other words, that culture, though it may not explicitly recognize rights, is not culturally opposed to such recognition, since it respects

human dignity. If a culture recognizes human dignity, that culture will do what it takes to protect it, including recognizing rights which follow from such dignity. That they don't grant rights today, is not to say that they are opposed to granting it tomorrow, if the need for such a dignity-guaranteeing mechanism arises in earnest.

The allure of this response is blunted if different cultures' understandings of "human dignity" are found to be fundamentally inconsistent. The notion of human dignity does not have any specific definition, and is always defined in culturally specific or relative ways (An-Naim 1990). The term "human dignity" itself, it appears, cannot escape the reach of cultural relativism.[10] This means that what is taken to constitute human dignity in one culture may differ from and conflict with what is accepted to constitute it in another culture. Even if we accept that acknowledgment of the possession of the notion of human dignity by African cultures implies acknowledgment of something like human rights (i.e., some human dignity-protecting mechanism), the problem still remains that what is meant by dignity in some African cultures (and whatever dignity-protecting mechanism it has generated) may prove inconsistent with Western human rights tenets. For example, the Igbo people of Nigeria practice Levirate marriages, in which a "family member inherits a married woman whose husband is dead" (Bamgbose 2002:13).To its defenders, it is a way to place the woman and her children within a protective family situation. It is also defended as a way to protect the woman's honour and dignity (Bamgbose 2002:13). However, Amnesty International has decried the continued practice of Levirate marriages as a violation of the human dignity of the women involved, describing it as "degrading and harmful" (Amnesty International 2005:31). What is interesting is that both groups appeal to the woman's "dignity" in defense of each of their claims. While the Igbos seem to understand a woman's dignity as constituting in her living within a family situation, under the control and leadership of a man, Amnesty International seems to imply that her dignity consists in her ability to choose what to make of her life. As is obvious, each interpretation of dignity seems to contradict the other. So the equivalency response is not successful. For it to be

[10] I will not concern myself with the question of whether the notion of dignity *should* be subject to cultural relativism, since that would take us further afield. What is important is that there appears to be evidence that different cultures define that term differently in practice.

successful, it would need to propose arguments in support of the view that one of the conceptions of dignity in the different cultures is superior, and that the superior conception ought to be viewed as the conception of human dignity every culture would hold if only they gave the subject sufficient thought.

At the beginning of this section I said that there are two approaches typically taken by African scholars to deal with the challenge posed by cultural relativism. The first approach, which I have just discussed, is to find relative equivalents of Western human rights norms in African cultures through overlapping support between African and Western cultures for the notion of dignity underlying human rights. The problem identified with this approach is that dignity faces the same criticism as rights: some African cultures, though they may support the notion of human dignity, interpret the notion in ways that prove inconsistent with any Western conception of human rights.

The second response of African theorists to the challenge of cultural relativism has come in the form of an attempt by African human rights scholars to find ways in which to mediate or reconcile the differences between African culture and the cultural elements that underlie Western human rights, on the belief that African cultures can benefit from adopting some of the tenets of Western conceptions of human rights. This approach, in other words, accepts the cultural differences to which relativists point. However, theorists who take this route believe that there are ways to reconcile these differences without committing to any fundamental inconsistencies. According to Ibhawoh (2000:840), “this desire [to mediate the differences] has led to calls for a regime of human rights founded on the basic universal human rights standards but also enriched by African cultural experience.” The challenge, which is by all accounts a daunting one, on the one hand, concerns the challenge of how, in more specific terms, to adapt human rights to suit African culture, without compromising the essential values of human rights, while, on the other hand, also looking to see how African culture may be adapted to accommodate human rights tenets, without subduing these cultures to undue influence from outside. On the best way to achieve this, there is scant agreement.

One thorough-going example of such effort is made by Makauwa Mutua (1995) in an important essay titled “The Banjul Charter and the African Cultural Fingerprint: An evaluation of the Language of Duties.” Mutua attempts, in this essay, to find ways to mediate between the language of duty in which Africans typically talk about social relations, and the rights-orientation of international human rights instruments (1995:340). He recognizes the opposing inclinations, as follows:

> The argument by current reformers that Africa merely needs a liberal democracy, rule-of-law state to be freed from despotism is mistaken. The transplantation of the narrow formulation of Western liberalism cannot adequately respond to the historical reality and the political and social needs of Africa. The sacralization of the individual and the supremacy of the jurisprudence of individual rights in organized political and society is not a natural, “transhistorical,” or universal phenomenon, applicable to all societies, without regard to time or place…It is now generally accepted that the African pre-colonial past was neither idyllic nor free of the abuses of power and authority common to all human societies. However, the despotic and far-reaching control of the individual by the omnipotent state, first perfected in Europe, was unknown… a feature common to almost all pre-colonial African societies was their ethnic, cultural, and linguistic homogeneity – a trait that gave them fundamental cohesion (1995:341, 347).

Therefore, he suggests that we

> imagine and reconfigure a rights regime that could achieve legitimacy in Africa, especially among the majority rural populace, and become the basis for social and political reconstruction. The reconstruction proposed here is not merely that of human rights norms. In order for the proposal to make sense, a reconfiguration

> of the African state must also be simultaneously attempted (1995:343).

Efforts at reconciling the differences between African culture and human rights are bound, in the end, to encounter problems in reality, as was palpable in our above discussion of the conflicts between African cultures and Western human rights. The Banjul Charter, to which Mutua points, as a document making headway in mediating between African culture and Western human rights, according to Oyowe (2014) and Nhlapo (1989), has encountered such problems as discussed. According to Oyowe, in many instances the task of reconciling African culture and Western human rights involves nothing less than doing the impossible, like reconciling two things that are diametrically opposed (2014:344).The result of the Banjul Charter, he posits, is “a major tension at various levels” (Oyowe 2014:344). In reality, however, a great many cultural practices (Levirate marriages, for example) will have to be abolished if human rights are to have a chance. A great many traditional African cultural practices cannot co-exist coherently with Western human rights tenets. In other words, African cultural relativists argue, reconciling or mediating between African cultures and Western human rights is too simplistic to deal with the very real and deep nature of the conflict between both cultures. Cast in this way, it becomes quite clear that the effort to reconcile the differences between African culture and Western human rights, will likely not have the support of African cultural relativists, since they are unlikely to support an approach to the universality of human rights that depends on the reconciliation of differences between African and Western culture that they take to be fundamental.

To conclude, as was shown, primarily with reference to concrete examples, African cultural relativists are of the view that not all Western human rights can be applied in Africa, since the Western culture from which its tenets are derived is incongruent with African culture. I discussed Kiye’s (2015) demonstration of these cultural asymmetries through his study of Cameroon, Nhlapo’s (1989) study of African marriage practices, and Oyowe’s criticism of the Banjul Charter’s efforts. Neither of the responses to the cultural relativist argument, that we have considered, seems to have been successful in blunting the criticism from cultural relativism. The equivalency approach, as we saw,

portends that there are basic elements of African cultures which may approximate to some basic elements of Western culture, and that these similar elements may serve as a basis for the applicability of human rights in Africa. This approach failed ultimately because it is blind to the fact that the meaning of basic human rights terms, such as :human dignity" typically depend on cultural assumptions, which may conflict with one another. Being culturally relative, dignity is often unable to underwrite certain rights in Africa which are stipulated in the UDHR. The second response to the critique of cultural relativism – the attempt to mediate the differences between both cultures – in my view, cannot work. The Banjul Charter, which aimed to find ways to coalesce both universal human rights tenets and African customary law, according to Oyowe, "fails on several levels" (2014:344). This is because it attempts, in many cases to reconcile the irreconcilable, such as the competing commitments to patriarchy and equality, for example, as discussed above.

1.5 CONCLUSION: AFRICAN CULTURAL RELATIVISM AND AFRICAN COMMUNITARIAN THEORIES OF RIGHTS

To be clear, the thrust of the discussion in this section has not been to argue that African cultural relativists reject the idea of human rights outright. African cultural relativists do not reject human rights *per se.* However, they dispute the universality of human rights as currently interpreted in international human rights law and instruments such as the Universal Declaration of Human Rights (UDHR). To insist that the UDHR is universally applicable is to impose Western culture, which, they argue, underwrites the notion of human rights operative in related legal instruments, against African culture. African cultural relativists have, rather, aimed to argue that the idea of human rights which is applicable to Africa must be one which is congruent with African culture (Oyowe 2014:331). Oyowe (*ibid.*) observes the following about the African cultural relativist project:

> relativists may claim quite generally that the enforcement of values and the meanings of concepts are always relative to some culture. This argument would begin from the observation that there are in fact

> non-trivial, non-superficial variations among the different cultures of the world to the assertion that there are no cross-cultural standards for understanding and assessing the values and practices of particular cultures.

What this suggests, therefore, is that the African cultural relativist is open to the possibility of offering a properly African theory of rights. The reaction of African philosophers to this, it seems, has been to propose theories of rights which they argue have an African pedigree, that is, theories of rights based on some aspect of African culture. African communitarians, such as Ifeanyi Menkiti and Kwame Gyekye have offered accounts based on what they see as the African cultural proclivity for community. This African communitarian approach to the question of rights is the subject-matter of the next chapter.

In closing the chapter, I would like to situate the African communitarian theories of rights which I discuss in detail in the next chapter within the broader African cultural relativist criticism of the supposed universality of Western human rights, which I have discussed here. Oyowe (2014) has argued that the African communitarian view of human rights has its basis in cultural relativism. To an important extent, African communitarians have sought to show, among other things, that human rights, in the African context, must be viewed through the lens of community, as opposed to the individualist lens of Western culture through which the UDHR is said to view rights. According to Oyowe, most African communitarians criticize Western human rights primarily by arguing that it is possible to argue for some specifically African human rights regime that differs from that put forward in Western human rights (Oyowe 2014:331). It seems to me that the need for an “African” communitarian account of rights would not arise were it the case that African communitarian thinkers were receptive to the culture which informs Western human rights. The search for an “African” human rights thesis must, it seems, be predicated upon the supposition that Western human rights are not universal, since they show a fundamental bias towards Western culture, in ways which are fundamentally inconsistent with African culture. In chapter two, I consider such an African

communitarian human rights thesis in greater detail by focusing on Ifeanyi Menkiti's radical, and Kwame Gyekye's moderate, communitarian accounts of African rights.

CHAPTER TWO: AN AFRICAN COMMUNITARIAN ACCOUNT OF RIGHTS

2.1 INTRODUCTION

In chapter one I offered an account of an African cultural relativist criticism of Western human rights, which holds that Western human rights are based on Western cultural attitudes and thinking, and argues that, as a result, they are unsuitable for, and inapplicable to, African cultural contexts. According to thinkers who propose this criticism of Western human rights, the notion of rights that would be applicable in Africa would need to be one based rather on African thinking and cultural attitudes. The following questions seem to follow from this view: upon what aspect of African cultural thought will an African notion of human rights be based? What would an account of human rights look like, which is based on African cultural thought? This chapter considers these questions by investigating one of the main strands of rights-talk in African philosophy, namely, the communitarian strand. I consider the African communitarian theory of rights primarily because of its dominance in the literature and because of its compatibility with the conceptual framework from which the cultural relativists offer their critique of Western human rights. Where cultural relativists argue that Western notions of human rights are based on Western cultural thought, African communitarians typically offer accounts of human rights which they argue are based on African cultural thought.

According to African communitarians, the apparent proclivity for community or communal living among Africans ought to form the basis of an African notion of human rights. In what follows, I will discuss Ifeanyi Menkiti's radical communitarian theory of rights and Kwame Gyekye's (1997) influential moderate communitarian theory of rights. A radical communitarian account of African rights derives rights exclusively from established codes of communal relations. In other words, rights on such an account in any particular community are simply whatever they are said to be by that community. This means, furthermore, that rights belong only to those to whom they have been allotted by community, following some scheme of determining those who deserve them. A moderate communitarian account of rights seeks to find some ground on which the

cultural proclivity for community and the rational autonomous nature of members of community who have (and pursue) distinct ends from those ordained by their communities may be viewed as complimentary. I also discuss some criticisms of each of these African communitarian accounts of rights. By the end of this chapter, I hope to have established that communitarian theories of rights (both of the radical and moderate variety) pay greater accord to the community than to the individual in terms of either the giving, or the exercise of rights.

2.2 TWO COMMUNITARIAN VIEWS ON RIGHTS

As I have mentioned above, African communitarians, in their discussion of the notion of rights, may be divided into two camps. According to Kwame Gyekye[11], on the one hand there are radical communitarians led by thinkers such as John Mbiti and Ifeanyi Menkiti, while on the other, there are moderate communitarians such as he and Kwasi Wiredu, among others. The main difference between those two schools of African communitarian thought lies in the depth and width of the role each ascribes to community. For the radicals, the community is absolute; for the moderates, while the individual is recognized, the community has an overriding role to play. Both communitarian views are based on the belief that there exists a cultural proclivity for community among Africans. Where they disagree, however, is on the extent to which community should determine the substance, content and exercise of rights. What follows is a discussion of both the radical and moderate communitarian views on rights. What will be clear by the end of this chapter is that rights are fundamentally bound up closer with the community than with individuals in African communitarian thinking, and that this is thought to be a result of the importance African cultural thought places on community. Some of the criticisms of the African communitarian theories of rights of Menkiti and Gyekye which I then go on to discuss in chapter three, are directed precisely at this tendency in both the radical and moderate account of rights to give an oversized role to community, at the expense of individual rights.

(i) Radical communitarianism

[11] This classification has largely persisted.

To an important degree, the idea that the community has absolute (or at least near absolute) value in African culture has been an important fixture of postcolonial African political and social philosophy (Gyekye 2003:349). During the periods before the official end of colonialism in many African countries, when African leaders sought ways to establish African political and social independence from their colonial lords, the tendency prevalent among them was to go back to African culture in search of clues. Most of them agreed that community has a special place in African cultural thinking. It was in this connection that Senghor observed, “Negro-African society puts more stress on the group than on the individuals, more on solidarity than on the activity and needs of the individual, more on the communion of persons than on their autonomy. Ours is a community society” (1964:93–94). Jomo Kenyatta, the founding president of Kenya had this to say about the communitarian proclivities of African people:

> according to Gikuyu ways of thinking, nobody is an isolated individual. Or rather, his uniqueness is a secondary fact about him; first and foremost he is several people’s relative and several people’s contemporary Individualism and self-seeking were ruled out… The personal pronoun ‘I’ was used very rarely in public assemblies. The spirit of collectivism was (so) much ingrained in the mind of the people (Kenyatta 1965:180;297).

This tendency toward viewing African culture as deeply communitarian has come to be seen as the central defining feature of African thought. This led many postcolonial African leaders to pursue socialism as the most appropriate political system for Africa (Nyerere 1968). This tendency toward communitarianism among Africa’s postcolonial leaders also informs the basis for the philosophical account of radical communitarianism as offered by thinkers such as John Mbiti and Ifeanyi Menkiti. In this section I discuss the thesis of radical African communitarianism, as well as consider the rights thesis which derives from this radical thesis.

A proper discussion of the radical (or even of the moderate) communitarian view of African rights cannot be given without an explicit understanding of the notion of person

which underlies their account, since they derive rights from attributes of personhood. In fact, Tempels, Menkiti and Mbiti, the most influential figures of radical African communitarian thought, offer, primarily, accounts of a particular understanding of personhood (or selfhood, as they sometimes called it), from which they then deduce notions of rights. The link between the notion of person and rights seems to be based on the supposition that the notion of person encapsulates questions about the constitutive aspects of an individual human existence. To speak of a notion of person is to speak of the human being from a holistic point of view, beyond the chemical and physical constitutive elements, and including metaphysical and normative considerations (Igbafen 2004:125). If this is the case, one's notion of person or self will have significant bearings on whether one thinks persons have rights, and if they do, what these specific rights are. The notion of person one embraces will be influential toward, if not definitive of, the rights one views persons as having. A thin notion of the person or self, abstracted from any kind of relations or communal engagement, will promote an individualist and universalist account of rights, whereas a notion of the person/self as ontologically bound up with community, will produce a notion of rights which makes sense only within such context (Oyowe 2014:332). The former account of personhood is believed by African communitarians to be operative in Western thought, while the latter is operative in African culture.

In terms of a contrast between Western thought on self and rights and African thinking on the same question, Oyowe posits that "because the Universalist picture of human rights rests on a thin concept of self –i.e. of the *individual* stripped of all particularities –it is often closely linked to excessive individualism associated with the West." And the African communitarian account of person and rights is viewed by its proponents as an "alternative way of offsetting the perceived threat of individualism and alleged moral imperialism inherent in the notion of human rights." This contrast between a thin Western notion of person and a thick African notion of person is likewise articulated by Menkiti (1984:171) as follows:

> whereas most Western views of man [sic] abstract this or that feature of the lone individual and then proceed to make it the

> defining or essential characteristic which entities aspiring to the description "man" must have, the African view of man denies that persons can be defined by focusing on this or that physical or psychological characteristic of the lone individual. Rather, man is defined by reference to the environing community. As John Mbiti notes, the African view of the person can be summed up in this statement: "I am because we are, and since we are, therefore I am.

John Mbiti offers what seems to be a general articulation of the thesis of the radical African communitarian (thick) conception of person. Mbiti writes that, “the individual does not and cannot exist alone except corporately… he owes his existence to other people… he is simply a part of the whole… the community must therefore make, create, or produce the individual” (1969:108). It is unlikely that any radical communitarian will deny this central starting point. A detailed discussion of this African communitarian conception of person, as it presents itself in the thoughts of thinkers like Placide Tempels, Mbiti and Menkiti, is therefore important in accessing the notion of rights that radical African communitarians believe to be correct.

On Tempels’ (1959:50) account of African personhood, the notion of person must be understood with reference to particular African conceptions of being and force. In Bantu thinking, argues Tempels, being and force are always conjoined; they are inseparable (whereas, he claims, Western metaphysics separate these). Inability to separate being from force, in Tempels’ view, is “the basis of Bantu ontology.” According to Tempels, “it is because all being is force and exists only in that it is force, that the category “force” includes of necessity all ‘being’: God, men living and departed, animals, plants, minerals” (1959:52). The relationship between being and force, in African thinking, then, must be understood to be interdependent. One of the forces in the universe is the “muntu”, which, according to Tempels, coincides with the notion of person in Western thought. “Muntu,” Tempels notes, “signifies, then, vital force, endowed with intelligence and will” (1959:55). In Bantu thought, this force is used to refer to human beings

especially, but also sometimes to God.[12] The Bantu believe that forces, including the "muntu", do not and cannot remain static. Over time they either gain more force or they lose some force. This gain or loss of force occurs within the context of interactions with other forces; an interaction that is made possible, even necessary, by the force of unity. Unity is the prime force which the Bantu metaphysics recognizes, although this is not to be understood as implying that they do not make any distinctions between different things, or different kinds of the same thing. Individual forces are forced into unity, and they gain or lose force relative to how well they thrive in that unity (Tempels 1959:61). This implies that the unity among "muntu" is central to the Bantu notion of person. In other words, "muntu" cannot but exist corporately with other "muntu".

John Mbiti offers a similar account of the notion of person to Tempels'. Mbiti's statement that "the individual does not and cannot exist alone except corporately" is to be understood along similar lines as Tempels' analysis of the Bantu notion of "muntu" or person. The connections between persons within what both thinkers understand to be the African worldview is not contingent, it is necessary. Persons cannot but be interconnected in this way. The person "owes his [sic] existence to other people…He is simply a part of the whole so that the community must therefore make, create, or produce the individual" (Mbiti 1969:109). The community plays a metaphysical and ontological role in defining the person, wholly. But community also plays an epistemological role, since it is through the lens that community has imbued in persons that they see and know the world in which they live.

Menkiti adumbrates this communal view of personhood in his widely cited analysis in *Person and Community in African Traditional Thought.* Menkiti takes Mbiti's famous line –"I am because we are; and since we are, therefore I am,"– as foundational. What he sees as following from it is instructive in accessing his approach to rights. From this simple thesis Menkiti infers the ontological priority of the community over the individual, that is, he infers the idea that persons descriptively derive from communities:

[12] As when the Bantu say "Vidyeimuntumukatampe" which Tempels translates as "God is a great muntu" or "God is a great person" (1959:55).

> from this inference, he makes three further inferences: first, that in the African view, “it is community which defines the person, not some isolated static quality of rationality, will, or memory” (here he contrasts this with the Western view); second, that the African view supports “the notion of personhood as acquired” –not merely granted as a consequence of birth; and third, that “as far as African societies are concerned, personhood is something at which individuals could fail” (Gyekye 1997:37).

The person, in traditional African thought, according to Menkiti, is defined only in reference to the community of which she is a part. This suggests that, for the African, communal life is extremely paramount. She receives her name, her gender (as different from her sex) and the roles attendant to that gender, her standing in society, her rights and responsibilities, from the community necessarily. She is assigned her destiny by the community, and she can only execute or fulfill it within the community. Respect is given to her by the community to much the same extent as the community judges her deserving of it. It may be taken away when she is adjudged no longer deserving of respect. So, “as far as African societies are concerned, personhood is something at which individuals could fail, at which they could be competent or ineffective, or better or worse” (1984:173). In most cases, an individual’s actions are good (or bad) to more or less the same extent that they are recognized by community as preserving and fostering a better life within community.

Furthermore, the relationship between the person and his community in African thought, as Menkiti conceives of it, “is meant to apply not only ontologically, but also in regard to epistemic accessibility” (1984:171). At the ontological level, community is part and parcel of the being of a person; at an epistemic level, the person can only know herself in reference to community. Both these levels are intertwined in a human whole, for it is in participating in the life of what Menkiti calls an “on-going community”, “that the individual comes to see himself as man [sic], and it is by first knowing this community as a stubborn, perduring fact of the psychophysical world that the individual also comes to know himself as a durable, more or less permanent, fact of this world [sic]” (1984:172).

The terms in which the individual understands her existence cannot therefore be made sense of absent the fact of community. His religious, political, social, economic, moral and emotional lives grow into each other within the inescapable reality of community. In short, according to Menkiti, Mbiti's (1969:141) "I am because we are; and since we are, therefore, I am," roundly captures this view of the traditional African concept of person.

This notion of person which Menkiti endorses is a processual notion of person. According to this conception, personhood is acquired not simply by virtue of a person being born human, but in a process of moral maturation (1984:172). Personhood is only acquired after a process of social incorporation. Menkiti argues that rites of initiation are of great importance for Africans, as a process through which the community confers personhood. Menkiti further notes that "after birth the individual goes through the different rites of incorporation, including those of initiation at puberty, before becoming a full person in the eyes of the community. And then, of course, there is procreation, old age, death, and entry into the community of the departed ancestral spirit" (Menkiti 1984:174). According to this view, "without incorporation into this or that community, individuals are considered to be mere danglers to whom the description 'person' does not fully apply. For personhood is something which has to be achieved, and is not given simply because one is born of human seed" (Menkiti 1984:172). What this means is that older people have more personhood than younger people. Menkiti quotes the Igbo proverb which states that "what an old man sees sitting down, a young man cannot see standing up," to the effect that older people have more moral maturity, and as a result, personhood, than younger people (Menkiti 1984:173).

To illustrate this radical communitarian notion of person, in which a person is not considered a person outside the purview of community, Menkiti observes that this processual notion of person is embedded in many languages. He notes that in the English language, young children are referred to with the pronoun 'it' signifying a certain amount of impersonality. Menkiti writes, "consider this expression: 'we rushed the child to the hospital but before we arrived *it* was dead'" (Menkiti 1984:173). Menkiti says "we would not say this of a grown person" (Menkiti 1984:173). 'It' is typically also used to refer to animals and inanimate objects. Menkiti, however, admits that it is not out of

place to refer to children with the masculine, feminine personal pronouns. This notwithstanding, Menkiti thinks that this flexibility with regards to children is suggestive of the view that personhood has links to age. Also, Menkiti observes that anthropologists have noticed that in many African cultures, there is typically no ritualized mourning when a child dies, as opposed to when an adult dies (Menkiti 1984:174). This suggests that children are not viewed as persons enough to render them deserving of a ritualized burial. So, personhood, according to Menkiti's theory, is processual in that individuals acquire it as they grow older.

Because an account of rights is to be drawn from this notion of person, it seems important to note that the notion of person operative in the radical account is not a straightforwardly ontological or normative account. The question of whether the radical account offers an ontological or a normative account of person is not an insignificant one, especially because it affects what form the notion of rights which derives from it must take if it is to be coherent. The notion of rights which derives from a normative account, as I will show below, will differ significantly from the notion of rights which would follow from an ontological account.

There are two notions of person operative in the discussions thus far, namely, an ontological or a metaphysical notion of person (I use both interchangeably) and a normative notion of person. The metaphysical notion of person has to do with personhood which people have merely by being humans. In Presley's view, the metaphysical account merely describes the metaphysical makeup of the person. An example of this notion of person is to be found in Tempels', Mbiti's and part of Menkiti's notion of person described earlier. Person in Tempel's thinking is made of being and force. Furthermore, when Menkiti speaks of the person as essentially constituted by community, he seems to be appealing to a metaphysical notion of person. For example, in the following statement, Menkiti (1984:171-172) is clearly appealing to an ontological notion of person:

> Man [sic] is defined by reference to the environing community. As John Mbiti notes, the African view of the person can be summed up

> in this statement: "I am because we are, and since we are, therefore I am." One obvious conclusion to be drawn from this dictum is that, as far as Africans are concerned, the reality of the communal world takes precedence over the reality of individual life histories, whatever these may be. And this primacy is meant to apply not only ontologically, but also in regard to epistemic accessibility. It is in rootedness in an ongoing human community that the individual comes to see himself as man, and it is by first knowing this community as a stubborn perduring fact of the psychophysical world that the individual also comes to know himself as a durable, more or less permanent, fact of this world.

Menkiti dispels every shred of doubt one may have about the ontological nature of his account of personhood when he says, in the above quote, “this primacy is meant to apply not only ontologically, but also in regard to epistemic accessibility”.

A normative notion of person is also evident in his theory of personhood. The normative account has to do with the type of personhood for which individuals have to strive by living according to certain communally sanctioned moral codes, that is, norms of recognition (Ikuenobe 2006:51). In order to be recognized as persons, in the normative sense, persons have to meet standards which are based on certain moral norms. In Menkiti’s account, for example, this would include the rites of initiation to manhood or womanhood through which the community bestows personhood on someone whom it determines to have lived up to the requirements of the community’s moral code. For example, Menkiti (1984:172) says, “without incorporation into this or that community, individuals are considered to be mere danglers to whom the description 'person' does not fully apply. For personhood is something which has to be achieved, and is not given simply because one is born of human seed.”

Now, there are two ways one can deal with the fact that there are both normative and ontological notions of person operative in radical communitarian account of person offered by Menkiti and other radical communitarians. On the one hand, one may argue

that both accounts do not oppose each other, that is, that they are compatible. If the normative and ontological accounts of person are compatible, the potential problems for the theory of rights which derives from the radical account offered by radical communitarians virtually disappear. So, how is the normative account compatible with the ontological account of person? Ikuenobe (2006:51) answers this question by arguing that the metaphysical and the normative accounts are two dimensions of the same notion of personhood present in radical communitarian thought. Both dimensions of the notion of personhood are related in that "one cannot be described as a person if one has not satisfied the normative dimension and one cannot satisfy the normative criteria if one does not have the descriptive features of a person" (Ikuenobe 2006:52). Stated otherwise, "an object, X, must satisfy the metaphysical criteria of personhood before X can be evaluated, recognized, and said to have satisfied communal criteria of personhood" (Ikuenobe 2006:52). But I think that this proposal as to how a normative account is compatible to an ontological one, while attractive, seems quite oblivious to the logical difficulties with mixing the ontological and the normative accounts of person, as well as the problems likely to arise from mixing them for the discussion about rights. I will briefly consider each of these problems with mixing the ontological and normative accounts of person.

It is logically difficult to mix the normative and ontological accounts of person because, on the one hand, one may be metaphysically a person, but not normatively so in Menkiti's account. Children, on Menkiti's account, fall in this category. While children are considered persons metaphysically, they are not yet deemed to have acquired full or even significant personhood in a normative or processual sense. On the other hand, it seems possible, for a creature (for example, a dog, cat, cow or rat) to be normatively a person, although not ontologically so. For, if personhood is something bestowed by community as the processual account of person argues, based entirely on a measure set down by community, it is not inconceivable (although admittedly unlikely) that some community could bestow personhood on non-human animals. An anecdotal example that comes to mind is the people of my village, Umudioka village of Awka South Local Government Area, who treat monkeys in the same ways they treat human persons. In this community, it is just as bad to kill a monkey as it is to kill a human person. It is just

as bad to speak ill of a monkey as it is to speak ill of other human persons. This reverence for monkeys in my village derives from the myth that monkeys once helped save lives during one of our ancient wars. What this suggests therefore is that because personhood is bestowed exclusively by community, and based exclusively on criteria set down by community, it is possible for a creature to be normatively a person, although not ontologically so. This means there is a logical roadblock to mixing normative and ontological accounts of personhood in radical communitarianism the way Ikuenobe proposes to do above.

But mixing the normative and ontological notions of person involved in radical communitarianism has a further problem with regards to rights. A normative account of person would produce a theory of rights different in form from the theory of rights an ontological account would produce. A theory of rights which is based on an ontological notion of person will be one which gives rights equally to all, since we assume that human nature is ontologically equal in all who are human. The Lockean natural rights theory is a classical account of a theory of rights which derives from an ontological notion of person. Rights on that account results from the fact that persons are rational. That is, persons have rights by nature in much the same way they have rationality by nature. The logic is something like the following: all humans are rational; all rational beings have rights; therefore, all humans have rights. These are all descriptive statements. This account of rights does not veer into the realm of what *should* or *ought* to be the case. Rights which derive from normative accounts of person, at least in principle, would veer into the question of what should or ought to be the case.

As I said earlier, there are two possible strategies with which we may tackle the fact that both a normative and an ontological accounts of personhood are operative in the radical African communitarian account discussed above. The first is to argue that they are compatible. As I have just shown, they are not always compatible. The second possible strategy is to separate them out. Menkiti's radical notion of rights derives from one, and not both, of these notions of person (at least directly). But which is it? According to Ikuenobe (2006:52), it seems that the normative account of personhood is more directly relevant for rights in radical African communitarianism. This is unsurprising. As we will

now see, since rights in the radical communitarian accounts are conditional upon one's relations to one's community, and fluctuate accordingly, they have to be based on the normative account of personhood. A metaphysical account, like that which is operative in Locke's account, cannot allow for an account of rights which fluctuate according to communal demands. In the metaphysical account, rights belong to anyone who satisfies the basic metaphysical requirements; rights belong to human beings as such (regardless of any other consideration). But, according to the radical communitarian account rights are not given in nature, in the way they are in the metaphysical accounts. They are culturally relative and dependent on normative communal considerations. In other words, a normative account of person, in which a human being is more or less of a person depending on how well/badly he/she has lived according to the normative stipulations of community, will ground an account of rights according to which rights fluctuate relative to how one has satisfied the normative stipulations of society (Ikuenobe 2006:52-53).

Rights, on the radical African communitarian account, are tied to one's fulfillment of the normative requirements of communal life.[13] The logic is something like this: an individual is, on the normative account, a person when they have lived according to the moral dictates of their community. To live according to the moral dictates of their community is to perform their duties to it; one does not have rights until they have been given them by their community; no one is given rights by their community until they are recognized as having performed their duties to community. In other words, a radical communitarian theory of rights follows from what has been called an "ethic of duty" (Cobbah 1989, Gyekye 2004, Oyowe 2014). An "ethic of duty", at least insofar as the radical communitarians use it, holds that one's rights are dependent on one's performance of one's duty.[14]According to Deng (2004:502), "African traditional systems

[13]This is not entirely different from a rights-duty dependency, which Donnelly (1982) describes as having obtained in the Soviet union, in which one has rights only if they have performed the duties of citizenship. Donnelly points out, "Article 59 [of the 1977 USSR constitution] states that 'the exercise of rights and liberties is inseparable with their duties and responsibilities to society'" (1982:309).

[14]This, I think, is different from the right-duty account prevalent in the west, especially in the works of Feinberg (1970), MacCormick (1977) and Waldron (1993), according to which a right is an entitlement so important in and of itself that it creates a duty in another. That is, if I have a right, another person or institution has a duty to grant me that to which I am said to have a right. However, the "ethic of duty" which radical communitarianism adheres to is

are likely to see individual rights in the context of group solidarity, with mutual support entailing rights and duties."

Menkiti (1984:180) articulates the relation the "ethic of duty" has with rights quite clearly in contrast to the Western approach, thus:

> it becomes quite clear why African societies tend to be organized around the requirements of duty while Western societies tend to be organized around the postulation of individual rights. In the African understanding, priority is given to the duties which individuals owe to the collectivity, and their rights, whatever these may be, are seen as secondary to their exercise of their duties. In the West, on the other hand, we find a construal of things in which certain specified rights of individuals are seen as antecedent to the organization of society; with the function of government viewed, consequently, as being the protection and defense of these individual rights.

Rights are secondary and derivative from one's fulfillments of their communal duties. That is, rights result exclusively from how well one has fulfilled the normative requirements of communal life; how well they have performed their duties to community. Menkiti is not to be understood as implying that rights are merely secondary to duties, in the sense that they are less important than duties. Rights, on the radical communitarian account, derive from a normative notion of person, which means it follows the following kind of logic: rights are extended only to those who perform their duties to community; person X has performed their duties to community, therefore; person X has rights. According to Menkiti, "rights, whatever these may be, are seen as secondary to *their exercise of their duties*" (Menkiti 1984:180).

It is important to notice that Menkiti does not say that rights are secondary to duty. To say that rights are secondary to duty would be consistent with much of philosophical

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substantively different, in that one's rights are dependent on their own performance of communal duties (and not another person's).

thought about rights, in which rights and duty are thought to exist in a correlation with each other, whereby rights entail duties, and duties entail rights (Feinberg 1970; Raz 1986). In terms of this correlation, one might argue that rights are secondary to duty, in the sense that we emphasize duties more than rights within that correlation, or even in the further sense that within that correlation, duties are thought to be more important than rights[15] (Feinberg 1970:248). This is more or less the standard understanding of the idea of rights being secondary to duties. But closer examination of Menkiti's language here shows that he aims to make a different point. Menkiti aims to argue instead that rights are secondary *to the exercise* of duties. What this seems to suggest is that the question of rights arises only in connection to the question of whether or not one has exercised their duties to the collectivity. In this thinking, a person has rights if, and only if, they have been recognized as having exercised their duties to community.

Kwame Gyekye has argued that this radical account of rights does not take the rights of individuals seriously. As a result, he offers what he characterizes as a moderate communitarian account of rights. In the next section I offer an account of Gyekye's criticisms of Menkiti's radical communitarian account of rights, as well as an account of Gyekye's own moderate communitarianism.

(ii) Moderate communitarianism

In this section, I discuss Kwame Gyekye's moderate communitarian rights thesis both as a response and as an alternative to Menkiti's radical communitarian rights thesis. Doing this is important for my thesis since my aim in this dissertation is to argue that Menkiti's and Gyekye's communitarian rights theses are not rights thesis in the proper sense. To do this, it is therefore imperative to give an account of the radical and moderate communitarian rights theses in question. Furthermore, some of the criticisms of the African radical and moderate communitarian rights theses that will be considered

[15] To be sure, when Menkiti says that "in the African understanding, *priority is given* to the duties which individuals owe" he seems to accept, invariably the logic of this second possible influential understanding of the idea of rights being secondary to duties. However, the fact that he states that rights are not secondary, not to duties as such, but to the exercise of duties, seems to suggest that his understanding veers away from this influential understanding.

in the next chapter tread precisely on the criticisms which Gyekye makes of Menkiti's radical account.

According to Gyekye, Menkiti's communitarian account is based on a one-sided caricature of the relationship between individuals and the communities in whose lives they share. "The metaphysical construal of personhood in African thought such as Menkiti's and Mbiti's," Gyekye (1997:37) argues, "is overstated and somewhat misleading." So, Gyekye begins by offering some direct criticisms of at least three of Menkiti's arguments in favour of his radical notion of person.

Gyekye argues that there is at least one serious problem with Menkiti's view that because the neuter pronoun 'it' can be used to refer to children in the English language that therefore it follows that children are viewed as less of persons. The problem is that English is not an African language, and the account Menkiti purports to offer is supposed to be African. Gyekye says, "it is surprising that an inference based on the characteristics of a non-African language is being regarded as having serious implications for African thought!" (2003:354). Gyekye argues that a cursory examination of some African languages, for example, the Akan language spoken in Ghana, would not support Menkiti's conclusion. According to Gyekye, the Akan language does not use the neuter pronoun 'it' to refer to animate things at all. What this means is that "

> 'He is in the room' is translated in Akan as *ōwō dan no mu;* 'she is in the room' as *ōwō dan no mu;* and 'it (referring to a dog) is in the room' also as *ōwō dan no mu*. However, 'it' is used for inanimate things. Thus, the answer to one question 'where is the book?' will be *éwó dan no mu,* that is, 'it is in the room'. Thus V is used as the neuter pronoun for only inanimate objects. Children and newly borns are of course not inanimate objects. Since the Akan neuter pronoun 'ō' applies to all the three genders (strictly only to a part, i.e. the animate part, of the neuter gender, though), it would follow, on Menkiti's showing, that not even the adult or oldest person can strictly be referred to as a person! For the answer to the question,

> ‘where is the old man?’ (if we want to use a pronoun) in Akan will be *ōwō dan no mu,* that is, ‘he/it is in the room’ (2003:354).

This means that one could not say “it died” about a child, in Akan. We would say the Akan equivalent of “he/she died”, just as we would say when an elderly person dies. Furthermore, Gyekye observes that this fact extends beyond the Akan language, and is also the case with Ga-Dangme languages, also spoken in Ghana. This suggests that Menkiti’s argument that the use of ‘it’ for children means they are not persons falls by the way side.

Gyekye goes on to attack Menkiti’s argument that the absence of ritualized burials for children means they are not taken to be persons, since they have not lived long enough to have been conferred it by community. Gyekye notes that it is not at all factual that every older person in African culture gets a ritualized funeral when they die. He posits, “the type of burial and the nature and extent of grief expressed over the death of an older person depend on the community’s assessment, not of his/her personhood as such, but of the dead person’s achievements in life, his/her contribution to the welfare of the community, and the respect he/she commanded in the community. Older persons who may not satisfy such criteria may in fact be given simple and poor funerals and attenuated forms of grief expressions” (Gyekye 2003:355). Gyekye argues elsewhere, “surely there are many elderly people who are known to be wicked, ungenerous, unsympathetic, whose lives, in short, generally do not reflect any moral maturity to excellence” (1997:49). So in Gyekye’s view, there is no correlation between being older getting a ritualized burial.

Lastly, Gyekye argues that Menkiti seems to confuse two claims, namely, the claim that persons are not persons until personhood has been bestowed on them by community, and the claim that persons cannot reach full personhood outside of community. In Gyekye’s view, the first seems more likely to be Menkiti’s view. But Gyekye thinks the second is the more defensible of the two claims. The human person, Gyekye posits, “is a person whatever his/her age or social status” (2003:355). The community is the arena in which personhood is developed and nurtured; it is not where it is given. According to

Gyekye, “what a person acquires are status, habits, and personality or character traits: he/she, *qua* person, thus becomes the subject of the acquisition, and being thus prior to the acquisition process, he/she cannot be defined by what he/she acquires. One is a person because of what one is, not because of what one has acquired” (2003:355). As it stands, Gyekye’s argument here is weak; it has not offered some account of why we need to accept the claim that personhood is latent in the human person and developed in the community, as opposed to Menkiti’s idea of personhood as given entirely by community. It seems he appeals primarily to the intuitive attractiveness of the idea that personhood is given in human nature, and developed in the community.

But Gyekye’s point does not stop there. He also argues that Menkiti’s account does not jive with the notion of person in some African cultures. According to Gyekye, human nature in Akan culture is taken to be naturally good. He says: “it means that human nature is considered in Akan culture to be essentially good, not depraved or warped by some original sin; that the human person is basically good, can and should do good, and should in turn have good done to him/her. It means, further, that the human person is considered to possess an innate capacity for virtue, for performing morally right actions and therefore should be treated as a morally responsible agent” (2003:356-357). This suggests that humans are *capable* of doing good. They are persons because they are taken to be *capable* of doing good. They actualize that capacity, and become better or worse persons when they either do good or do evil. Gyekye says, “the human person was created a moral being then might be that he/she is a being endowed with moral sense and capable of making moral judgments. The human person can then be held as a moral agent, a moral subject—not that his/her virtuous character is a settled matter, but that he/she is capable of virtue” (2003:357). So Menkiti’s notion of person does not make much sense at least from the point of view of Akan culture.

Having considered these criticisms which Gyekye makes of the radical communitarian account I will proceed to discuss Gyekye’s moderate communitarianism which he offers as a criticism of Menkiti’s radical communitarianism.

To be sure, Gyekye's own view does not constitute a complete departure from the theoretical underpinnings of this radical view of community. In his view, the radical communitarian view of rights is incomplete, but not out-rightly wrong, and can still offer us some guidance in formulating a better view.

Gyekye grants the intuition which underlies the radical communitarian view: individuals are essentially (that is, not contingently) communally oriented. It is a fact, Gyekye (2003:299) writes, "that an individual human being is born into an existing human society and, therefore, into a human culture, the latter being a product of the former." This is the view expressed in several African proverbs. For example, according to one Akan proverb, "when a human being descends from heaven, he (or she) descends into a human society" (1997:38). This fact, according to Gyekye, yields the virtually unavoidable conclusion that the identity of an individual or person is at least partly constituted by her relations with her community. "The person is constituted, but only partly, by social relationships in which he/she necessarily finds him/herself" (Gyekye 2003:300). As Gyekye sees it, this view of persons suggests that community is not a contingent aspect of human existence, and that participation in community cannot be a result of choice. To function, the individual requires the cooperation of other people, for while he may be able to do some things for him/herself, there are things which he cannot do, which are no less important toward his/her wellbeing. Gyekye notes that the "attribute of relationality or sociality in some way makes up for the limited character of the possibility of the individual, a limitation that whittles away the individual's self-sufficiency" (Gyekye 1997:38). It is only within the framework of community that people may meaningfully expect others to exercise some responsibility in helping them lead a full life. If this is the nature of community, the conclusion that community is prior to the individual seems to naturally follow, according to Gyekye.

But Gyekye is quick to notice that the opposite idea, that is, the idea that individuals are prior to community, is also persuasive. Gyekye notes that "if a community consists of individuals sharing interests and values, would this not imply that the individual has priority over the community, and that therefore the community existentially derives from the individuals and the relationships that would exist between them?" (Gyekye 1997:38).

You cannot speak of community without first speaking of individuals. That is to say, the existence of community is premised on the existence of individuals with personal goals and interests. The character of any community is the aggregated character of the individuals that make it up; “the priority of the individual vis-à-vis the derivativeness of the community appears implicit in the maxim” (Gyekye 2003:300).

However, Gyekye cautions against accepting this view at face-value. The notion of community as merely derivative, Gyekye observes, is lacking in one core respect: it seems to suggest that individuals may flourish in solitary existence. In his view, “the individual human being cannot develop and achieve the fullness of her potential without the relationships of other individuals” (Gyekye 1997:39). Furthermore, Gyekye argues that one may not hold that the individual is naturally social, as many African thinkers do, and that the individual is contingently communal coherently. If community is not a contingent aspect of human existence, individuality cannot be absolute. In effect, Gyekye finds both ideas – that community is prior, and that the individual is prior – mutually unsatisfactory.

Radical communitarians seem to fall into the trap of choosing communality over individuality, and rights-thought in the West seems to favour individuality over communality (Gyekye 1997:38). In response to this conundrum, Gyekye argues that we should not be forced to choose between individuality and community. A moderate communitarian view, he observes, would be one in which account is taken of the individuality, autonomy and rational capacity of the individual, but all within a community context. The following Akan proverb epitomizes the view of the relationship between the community and the individual which Gyekye envisions: “the clan is like a cluster of trees which, when seen from afar, appear huddled together, but which would be seen to stand individually when closely approached” (1997:40). In explaining this proverb, he posits, though the trees that make up the cluster may touch, shield, and sometimes guard each other, they are each individually rooted. In other words, in order to avoid ascribing priority to neither community nor the individual, “the most satisfactory way to recognize the claims of both communality and individuality is to ascribe to them the

status of equal moral standing" (1997:41). The claims of communality and those of individuality ought to be given equal consideration and attention.

According to this view, the choice between individual autonomy and communality is a false choice. Gyekye (1997: 65) sums this claim up thus: "Individual rights, the exercise of which is meaningful only within the context of human society, must therefore be matched with social responsibilities."

To be sure, Gyekye sometimes sounds as if he is open to allowing for some disproportion between both values. For example, he argues that his view of the interaction between community and individuality ought to be viewed in a relativistic light. For him, Senghor's relativistic articulation of the African proclivity for community in the following quote is the model for his own articulation: "Negro-African society puts *more* stress on the group *than* on the individual, *more* on solidarity *than* on the activity and needs of the individual, *more* on the communion of persons *than* on their autonomy" (Senghor 1964:93-94). For Gyekye, the emphasis on "more" and "than" suggests that individuality is not simply to be discarded, but thought of as part of a trade-off system, in which individuality and communality continuously negotiate. Nevertheless, it seems that within this trade-off, Gyekye is inclined more toward granting the demands of community. He (Gyekye 1997:42) posits that

> "the notion of a shared life –shared purposes, interests, understandings of the good– is crucial to an adequate conception of community. What distinguishes a community from a mere association of individuals is the sharing of an overall way of life. In the social context of the community, each member acknowledges the existence of common values, obligations, and understandings and feel a commitment to the community that is expressed through the desire and willingness to advance its interests."

If communities are as Gyekye describes them above, it is not clear at all how individual rights can be given due consideration therein, except when the rights of individuals and communities coincide. If they conflict, then it would seem, even on the moderate account, communal demands must come first. What, then, is to be the lot of some

individual if they are wronged by communal demands? It will be hard, if not impossible, for Gyekye to preserve in all cases his plea for the equal consideration of the demands of community and individuality, where these conflict. For example, if, in articulating his criterion of rights Gyekye centers around the respect for the rational and autonomous capacity of individuals (and as I have shown, he does), Gyekye must then forfeit his communitarian bona fides in the process. But since he insists on offering a communitarian account, Gyekye places the exercise of individual rational autonomy at risk in his account. I go on to argue, in this thesis, that the "rights" Gyekye's theory of rights presumes, are not rights in the proper sense because his account makes the exercise of rights a secondary matter to prior communal demands. For rights to count as such, I will argue, they must meet a minimum condition of exemption from social and communal interference.

Before my argument can be considered in full, it is necessary to consider Gyekye's rights thesis.

Gyekye begins his discussion of rights by pointing out how unlike most communitarian thinkers (both in Africa and in the West) he is on the issue. In his view, the complaint, prevalent in the literature, that communitarians give short-shrift to rights, is not unfounded. Menkiti as we saw relegated rights to a secondary status, relative to the performance of duties.

Gyekye disagrees with this attitude toward rights. According to Gyekye,

> "[I]Individual autonomy – which is acknowledged in communitarian conceptual scheme – must involve recognition of the ontology of rights: indeed, individual autonomy and individual rights persistently appear as conceptual allies. A communitarian denial of rights or reduction of rights to secondary status does not adequately reflect the claim of individuality mandated in the notion of the moral worth of the individual. Such a notion would be extreme and would be at variance with the moderate communitarian view that I think is defensible" (1997:62).

In Gyekye's thinking, rights are bound up with the autonomy and dignity of all people. Rights, for him, are entitlements humans can claim because they are autonomous human beings with dignity, for only in this way can the conditions which are to further human flourishing be guaranteed. "Communitarianism's absorbing interest in the common good, in the provision for the social conditions that will enable each individual to function satisfactorily in a human society, cannot –should not– result in the willful subversion of individual rights" (Gyekye 1997:64). It should rather lead to the guaranteeing of rights.

As seems obvious, Gyekye retains a general understanding of rights as belonging to the individual as such, despite his communitarian leanings. The role of rights as a safeguard against societal incursions into the realm of individuality – common in an individualistic, Western account of rights, is preserved. What appears threatened, however, is the communitarian bona fides of Gyekye's account of rights. How can he guarantee rights individuals supposedly have to express their individuality, while at the same time arguing for the overriding importance of community? Or alternatively, how can Gyekye argue for the overriding importance of community (since he is a communitarian) if rights remain construed as safeguards against incursions by the community against the individual? To deal with this, he argues that a communitarian, while noting the inviolability of rights, "cannot be expected to be obsessed with rights" (Gyekye 1997:65). For him, such an obsession would be inconsistent with the very logic of communitarianism. Rights, he argues, must be expressed in line with what each society views as its overall aims and values. As communities will typically value "peace, harmony, stability, solidarity, and mutual reciprocities and sympathies" above all else, such societies cannot be expected to be obsessed with the rights of individuals to stake claims that undercut these.

Gyekye makes this point clear in his discussion of his own version of the "ethic of duty". While a communitarian would not be obsessed with rights, according to Gyekye, she would be obsessed with duty. The communitarian, he says, "will expectably give priority to duties rather than rights" (Gyekye 2003:363). Communitarianism will be obsessed with duties because communitarians are most interested in "the common good or the

communal welfare, the welfare of each and every member of the community" (2003:363). Duties are the services and responsibilities which people feel they morally owe to others. Gyekye situates rights within this ethic of duty. He argues that in a communal situation where all members of society feel they owe duties to each other, and take those duties seriously, claims of rights would be rendered redundant. He sums up this dynamic relationship of rights and duties within his moderate account as follows:

> although it is conceivable, as has already been explained, that the communal structure will allow the exercise of individual rights, yet it can be expected that communitarianism would not suggest to individuals incessantly to insist on their rights. The reason, I suppose, is the assumption that rights, i.e. political, economic, social, are built into the ethos and practices of the cultural community. Thus, the economic, political, and social needs of the individual members, which are the concern of most individual rights, would be expected to have been recognized, if not catered for, to some degree of adequacy by the communitarian structure. Individuals would not have a penchant for, an obsession with, insisting on their rights, knowing that insistence on their rights could divert attention to duties they, as members of the communal society, strongly feel towards other members of the community (Gyekye 2003:362).

Also crucial to the moderate communitarian rights regime, according to Gyekye, is the distinction between rights individuals may be said to have, on the one hand, to perform actions which affect, in all the relevant senses, only the individual performing them, and, on the other, rights to perform actions which may be said to have effects on other people, and society as such. The former rights may be expressed unperturbed by society, since they do not counteract any overriding communal considerations. On the other hand, it is society's prerogative to allow, or disallow the expression of rights to actions which affect others and society. Gyekye does not offer any suggestions as to how to distinguish actions that affect others from those that affect only the person performing them. Does my being an atheist affect others? Most might say, no. But, what

if others think that I am degrading society by holding and espousing atheistic views in society? Surely this would cross the line. Or would it? This kind of confusion, weakens Gyekye important point here. In fact, Gyekye seems to lean heavily toward the view that the community can decide what affects it, or is in its interest, and pursue them, with the potential effect of suppressing of individual rights. In sum, Gyekye claims, in his own words, that “individual rights, the exercise of which is meaningful only within the context of human society, must therefore be matched with social responsibility. In the absence of the display of sensitivity to such responsibilities, the community will have to take necessary steps to maintain its integrity and stability” (Gyekye 1997:65).

To conclude, the broad communitarian approach to rights which I discussed in this chapter, links rights to community, whereby, on one hand, rights are thought to be granted to persons relative to how well they adhere to communal norms, in Menkiti’s radical account, and, on the other hand, though rights are thought to belong to individuals by nature, in Gyekye’s moderate account, they may be curtailed and repressed if the community views it as in its interest to do so. So, it is fair to say rights are linked to the community in important ways in both the radical and moderate African communitarian rights theses. This linking of rights to the community is what both accounts have in common; it is also the basis for calling them communitarian accounts, and it is the target of some the criticisms brought against the communitarian account which I consider in the next chapter. Furthermore, my argument in chapter five of this research, that the rights in the radical and moderate communitarian rights theses are not really rights, treads importantly on their linking of rights to community in precisely the ways they do. To this end, I established here that both the radical and moderate communitarian accounts of rights I discussed give preference to communal duties over individual rights.

CHAPTER THREE: SOME CRITICISMS OF THE AFRICAN COMMUNITARIAN RIGHTS THESIS

3.1 INTRODUCTION

In chapter two, I discussed in detail the theory (or more properly, theories) of rights offered by African communitarians of the radical and moderate variety. I established that both the radical and the moderate communitarian rights theses link rights to the community in important ways. In this chapter, I consider some criticisms that have been brought against these theories. In what follows, I will consider the criticisms brought by Bernard Matolino (2009), J.O. Famakinwa (2010), and Anthony Oyowe (2014). I will discuss three articles by these three thinkers, in which they offer discussions and criticisms of Menkiti's and/or Gyekye's communitarianism broadly, and their rights theses, specifically. It is important to point out at the outset that some of the discussion in this chapter might at certain junctures seem pointless since they concern the radical and moderate communitarian theory generally, and not necessarily their rights theses directly. My sense is that since, as I noted in chapter two, Menkiti's and Gyekye's rights theses are embedded within their general communitarian theories, it helps this research not to ignore the criticisms which Matolino, Famakinwa and Oyowe make of Menkiti's and Gyekye's whole communitarian theories. In theory, if it is correct to say (as I have done) that Menkiti's and Gyekye's rights theses depend on, or derive from, their general communitarian theses, it follows that to undermine the communitarian theses which follow from such prior commitments. I have chosen these particular thinkers because they aim their criticisms precisely at the Afro-communitarian answer to the question "what are rights?" It is important to engage with existing criticisms of the Afro-communitarian theories of rights, perchance there is something that can be drawn from their arguments for the work I want to do here.

I will proceed by discussing each thinker's criticisms and then giving some account of possible responses which Menkiti or Gyekye or someone sympathetic to either of them, can propose to those criticisms. By the end of this chapter it should be clear, I think, that only one kind of criticism which they propose holds much water in my view, namely, the criticism that African communitarian rights thesis does not offer an account of rights

which agrees with the way rights are supposed to, or are typically understood to, function. Rights are, at their most basic, understood to exempt individuals from interferences from society and community (at least with regards to that in respect of which they have some right) even when those interferences are arguably in the interest of the community.

Before proceeding, it is important to bear in mind the purpose of this discussion for the argument put forward in this dissertation. The arguments I will now discuss, raised by Matolino, Famakinwa and Oyowe, all suggest, in one form or other, that the radical or the moderate African communitarian rights thesis does not make sense as an account of rights, given the basic function rights are typically presumed to perform, which is to safeguard individuals against the demands of others. These criticisms are possess an implicit understanding of this fundamental feature of rights, which I elaborate in later chapters. Although Matolino, Famakinwa and Oyowe are correct in offering this criticism, they fail to provide any positive substantive account of what rights are or of how rights function, which their criticisms imply. This weakness detracts from the efficacy of their arguments. To remedy this, in chapter four, I offer a standard, minimal theory they must presume of what rights are and how they function, namely Dworkin's account of rights as trumps. In chapter five, I solve the problem with Matolino's, Famakinwa's and Oyowe's criticisms by reformulating their arguments in light of a fully-fledged substantive theory of what rights are and how they function.

3.2 MATOLINO AND THE COMMUNITARIANS

In a 2009 article titled "Radicals versus Moderates: A critique of Gyekye's Moderate Communitarianism," Matolino summarizes Gyekye's moderate communitarian project as follows: "he [Gyekye] is of the view that radical communitarianism is faced with insurmountable problems and ought to be jettisoned in favor of his moderate communitarianism. Gyekye's strategy is twofold; he firstly seeks to show the shortcomings of radical communitarianism – particularly by attacking Ifeanyi Menkiti's position. Secondly, he seeks to show the authenticity of his version as well as its serious regard for individual rights as representing a triumph over radical

communitarianism" (2009:160). In response to this strategy, Matolino argues that Gyekye's "version of moderate communitarianism is not only inconsistent but not sufficiently different from radical communitarianism" (2009:160). If Gyekye's moderate communitarianism is not different from Menkiti's radical communitarianism, the implications are that Gyekye ultimately fails to offer a theory which can consistently guarantee rights. Matolino explicitly accepts this implication in his 2014 book "Personhood in African Philosophy" when he says, "while Gyekye is correct in showing that radical communitarianism is in error; his own version of moderate communitarianism is in error; his own version of moderate communitarianism does not succeed" (2014:34). So, Matolino proceeds by taking on Gyekye's arguments against Menkiti's communitarian theory.

I

The first dissatisfaction which Gyekye has with Menkiti's theory, which Matolino takes on, concerns Menkiti's view that personhood is acquired processually, and his suggestion that this means that personhood may be found in people relative to their age. In other words, Matolino takes issue with what he views as Gyekye's claim that Menkiti's processual account of person falters because Menkiti links it to age. Menkiti may be viewed as suggesting that the older a person is, the more of a person she is. Gyekye's view is that this view is as bizarre as it is inconsistent. For him, tying personhood (that is, morality) to old age raises one serious problem: if we take Menkiti's view to be correct, we will have to take old people to be of necessity moral, and therefore persons. But this is an awkward conclusion to reach, according to Gyekye. For, "surely there are many elderly people who are known to be wicked, ungenerous, unsympathetic; whose lives, in short, generally do not reflect any moral maturity to excellence. In terms of a moral conception of personhood, such elderly people may not qualify as persons" (Gyekye 1997:49). In Matolino's view, this criticism of Menkiti's view aims to show that Menkiti's notion of person is internally inconsistent. But, according to Matolino, "I am not convinced that Menkiti's account is internally confused and incoherent since Gyekye does not show where the confusion or incoherence lies in

Menkiti's account. I think an efficacious objection to Menkiti's version would be to claim that the radical version is false for some reason or other" (2009:164).

Now, I do not agree that Gyekye's aim was to show the "internal inconsistency" of Menkiti's view. Nothing in Gyekye treatment of Menkiti shown above, suggests that he is specifically concerned with "internal" inconsistencies. Rather it would seem he is interested in "external" inconsistencies here. Matolino's response to Gyekye's criticism seems to ride on the distinction between inconsistencies within a theory (what I will refer to here as internal inconsistencies) and inconsistencies between some theory or another or with reality, or what one might refer to as external inconsistencies. As I understand it, on one hand, a theory is internally consistent if all of its component parts cohere with each other. That is, if all the claims it makes can be true at the same time. On another hand, a theory is inconsistent within itself when its component parts do not cohere with each other, or contradict each other; if the different claims it makes cannot all be true at once. For example, according to some atheists, the Christian theory of the world is internally inconsistent because the bible (if we take the bible to be the complete statement of the Christian theory of the world) contains elements within it that contradict other elements within it. But it is not enough for a theory to be internally consistent, for a theory may be internally consistent but inconsistent with reality. That is, all of its component parts, if they were true, could all be true simultaneously, only that they are not true at all to begin with.

Matolino's response that Gyekye does not succeed in showing how Menkiti's theory is inconsistent seems to suggest that Matolino has the first understanding of inconsistency in mind, where all the constituent parts of the theory are not in agreement. As I show latter, from this point of view, clearly Matolino is right that Gyekye does not succeed in showing that Menkiti's theory is inconsistent. However, Gyekye's allegation that Menkiti's theory is inconsistent seems to ride on the second understanding, that is, on external inconsistency. It seems quite clear to me that Gyekye means to suggest that Menkiti's view is inconsistent in the second sense, that is, that it does not cohere with reality. I think this is made clear when we observe that Gyekye does not attack Menkiti's use of age to illustrate the processual notion of person by arguing that there is

something inherently wrong with the processual account of personhood *per se*. He merely argues that if we accepted that link between personhood and age which Menkiti uses to illustrate the processual notion of person to be correct, that is, if we took it to be the case that the older are necessarily more of persons, certain real-life implications would be forced to follow, namely, we would be forced to take every elderly person to be moral and good, including those who seem immoral or bad. Such precepts lead to inconsistent judgments: an old murderer is moral; a young one is not, for example. So, Gyekye thinks that such an implication is bizarre since most people will agree that such a claim is empirically unjustified.

Understanding Gyekye in this way also helps us make sense of the fact that he calls Menkiti's linking of personhood to age "bizarre." The Merriam-Webster dictionary defines the term "bizarre" quite simply as "strikingly out of the ordinary… involving sensational contrasts or incongruities." Menkiti's linkage of age and personhood is clearly bizarre in that a cursory look at reality immediately disproves the view that the older a person is the more morally mature and upright they become. It is bizarre in that it is so obviously inconsistent or incongruent with reality. To be sure, Gyekye may be faulted for not stating explicitly that he intends to suggest that Menkiti's linking of personhood to age is inconsistent with reality and with competing moral judgments. But, nonetheless, it seems fruitful and warranted to understand Gyekye's criticism of Menkiti in this way.

Matolino argues that "it cannot be the case that the radical account is bizarre and incoherent on the grounds that notions of 'more of a person' and 'full personhood' are bizarre" (2009:164). Matolino is convinced that Gyekye's criticism depends on a misunderstanding of Menkiti's notion of personhood. Matolino writes:

> Gyekye's point appears to have some force. However, on close examination it is a misapprehension of Menkiti's argument. The radical account's claim is that personhood is something akin to an activity. Menkiti makes the point well when he notes that personhood in African thinking is essentially of a dynamic nature as opposed to

> being a static quality. What this means is that the process of becoming a person is amenable to the idea of gradual acquisition. It can be seen as little or more of that particular activity of becoming a person. We can find an analogy in any process that is acquisitive by nature (2009:164).

Matolino employs the example of an apprentice mechanic in illustrating Menkiti's processual notion of person. When she begins her training, the mechanic knows little about the way engines work and how to repair them when they malfunction. Over the course of her training, she becomes more of a mechanic, supposing that she is diligent and learns what she is being taught. Over the long term, she may even become a fully knowledgeable mechanic. Concurrently, she remains less of a mechanic if she does not learn what she is being taught. According to Matolino, "the point I seek to make here is that if a state of being is determined by a processual acquisition of certain features, it is quite possible that some individuals will acquire most or all of those features while others may acquire much less or none of those features. A successful acquisition of all or most of these features will make one more of that being" (2009:165). In Matolino's view, there is nothing really bizarre or incoherent about such a straightforward notion of person.

Matolino is clearly correct. Menkiti's theory is internally coherent. But as I pointed out earlier, Matolino misses Gyekye's point altogether. He supposes that Gyekye intends to suggest that an internal inconsistency exists within Menkiti's account or that a processual account is by definition bizarre, whereas it seems more likely that Gyekye is pointing to the obvious difficulty of accepting the evidently problematic example Menkiti gives with which he links old age with personhood. In other words, the notion of processual personhood linked to age as Menkiti suggests is bizarre and incoherent not because it is internally incoherent, but because, despite its internal coherence, the example of old age is a bad illustration of it since it clearly does not jive with reality. Gyekye does not argue that there is anything problematic about the internal logic of the view he aims to criticize; he only aims to observe that there is strong incongruence between the processual account, linked to age, and what obtains in reality.

Matolino's misapprehension of the point of Gyekye's criticism seems to become even more obvious when he (Matolino) observes that Gyekye does not necessarily disagree with a processual normative notion of person.[16] Matolino points out that "according to Gyekye, although one may not be granted the status of personhood she still remains a human being because we do not call her a tree or a beast. Gyekye holds that 'there is no implication, however, that an individual considered "not a person" loses her right as a human being or that she loses her citizenship or that she ceases to be an object of moral concern from the point of view of other people's treatment of her. Only that she is not a morally worthy individual'" (2009:165).

The distinction between Gyekye and Menkiti on this point is that for Menkiti, personhood seems to have both normative and ontological links to community. The notion of personhood in Menkiti does not seem to distinguish between the individual as a human being and the individual as a morally mature person. For Gyekye, however, the distinction between human being (the individual) and the person is an important one. Individuals deserve regard merely because they are human beings or individuals, but they do not deserve the rewards of moral uprightness if they do not satisfy the community's stipulations for advancing and actualizing their personhood. Gyekye "argues that a person who removes herself from her community and lives a life that is detached from her community, is taken to be an irresponsible moral agent. This moral agent, in Gyekye's terminology, would have failed at personhood altogether but still remains an individual who is a human being" (Matolino 2009:165). In other words, Gyekye himself would not think a processual account of person is bizarre and internally incoherent, since he himself holds it. Gyekye does not think a processual account of personhood is not bizarre simply because it is processual, as Matolino seems to suggest. Menkiti's processual account is bizarre because of the link Menkiti creates between the acquiring of personhood and age.

In my view, this Gyekyean criticism of Menkiti, although it escapes unscathed from Matolino's own criticism of it, is not a decisive one. That is, it is not one which poses any

[16] Although of course as I showed in the last chapter, rather than saying, like Menkiti that persons acquire personhood in community, he says persons have personhood in their nature, but develop it in community.

serious challenge to Menkiti's general communitarian approach. This is the case primarily because, as I observed, Gyekye does not aim to dispute the idea at the core of Menkiti's communitarian account, namely a processual notion of person. He agrees with a processual notion of person (although he notes that while an individual may not be much of a *person* it should not be taken to mean that they are not deserve of some regard, since they are human beings and, for Gyekye, being human entitles individuals to respect). What Gyekye's criticism here aims to take issue with is the example Menkiti deploys in elaborating on the processual notion of person; the example of how personhood is linked to age. The processual account does not stand or fall on the strength of that example. In other words, demonstrating that personhood is not necessarily linked to age, is not at once to disprove the processual account of person. Matolino's own mechanic example, discussed above, clearly is a better example of a processual account of person than Menkiti's. So Menkiti may simply respond to Gyekye's criticism of his example of old age and person by swapping it with Matolino's example and, as far as I can see, Gyekye's criticism would vanish. As I said in the introduction to this section, if one succeeds in undermining the communitarian accounts of personhood of both Menkiti and Gyekye, one could in turn undermine their accounts of rights, since both accounts are intertwined, and flow from each other, as I showed in chapter two. Hence it is important to note that Gyekye's criticism of Menkiti, to which Matolino is responding, does not make much of a dent on Menkiti's account of rights.

II

The second kind of problem which Matolino has with Gyekye's moderate communitarianism is that it is not sufficiently different from Menkiti's radical offering in important respects. Matolino starts his articulation of this argument by noting Gyekye's distinction between individuals and persons. In Gyekye's theory, individual is synonymous with rational autonomous human being, whereas persons are individuals who have proved themselves in the moral arena. According to Gyekye, individuals have rights and therefore cannot simply be casually treated badly. In Gyekye's estimation, this distinction allows him to offer a more attractive account than Menkiti's, since, for him, Menkiti does not leave any room for the human being, that is, the rational

autonomous aspect of the individual. “This difference,” Matolino observes, “is supposed to explain what happens to persons who fail in the moral arena thus, supposedly, rendering Gyekye’s view preferable to that of Menkiti” (2009:166).

In Matolino’s view, however, there is nothing in Menkiti’s communitarian thesis that keeps him from agreeing with Gyekye’s distinction between individuals and persons. He says, “although Menkiti does not say what happens to those who fail at morality and consequently personhood, there is nothing in his account of persons that prevents him from also saying that there are individuals and persons. He can maintain the same distinction as Gyekye has made. On that score Gyekye’s moderate communitarianism does not have a superior appeal to what he has called radical communitarianism” (2009:166). In my view, Matolino’s argument here proceeds too quickly.

Matolino’s argument does not seem to take into consideration the full use to which Gyekye puts that distinction between persons and individuals. In other words, for Gyekye, it is not simply the distinction between individual and person that is important. If it were, then Matolino would be correct in arguing that since Menkiti’s theory does not preclude such a division, or even may be said to imply it, that therefore Gyekye’s communitarianism is not sufficiently different from Menkiti’s communitarianism. What is important is rather the use to which the distinction between person and individual is ultimately put, or its implication for the rights theory. For Gyekye, people have rights on account of their being individuals, and not on account of their being persons. He says, “there is no implication, however, that an individual considered “not a person” loses her right as a human being or that she loses her citizenship or that she ceases to be an object of moral concern from the point of view of other people’s treatment of her” (Gyekye 1997:50). In other words, in Gyekye’s framework, rights entitle people to being treated with respect and dignity, regardless of whether they are full persons. They are entitled to rights simply by virtue of their being human beings. Being treated well has no connection to living a morally good life; it has no connection to being a person.

But Menkiti cannot maintain such a view, at least not in a way that is consistent with his broader rights theory. Rights, in Menkiti’s framework, are given by community on

account of having lived up to the community's normative stipulations. The implication, which Menkiti leaves unstated, is that only individuals who have personhood have rights. As I argued in chapter two, personhood is, on Menkiti's account, causally linked to the possession of rights. The amount of rights someone has will correlate more or less directly with their level of moral maturity, as determined by their community. So, even if Menkiti admits of the notion of the individual, as distinct from that of person, he does not extend rights to individuals but only to persons. If rights are meant to safeguard the individual against unjust interference from others, regardless of their moral position, Menkiti's account clearly cannot guarantee that individuals can be preserved from such interference in the community, for presumably not everybody will have full personhood. For Menkiti to be able to maintain the distinction between person and individual in the specific way Gyekye does, as Matolino claims he can, Menkiti will have to either revise his theory radically either to claim that rights are given on account of being an individual, or that everyone has personhood, and therefore rights. Menkiti does not say any of these, which means Matolino is wrong in stating that "although Menkiti does not say what happens to those who fail at morality and consequently personhood, there is nothing in his account of persons that prevents him from also saying that there are individuals and persons" (2009:166). Menkiti cannot maintain the same distinction Gyekye has made. Contra Matolino, on that score, Gyekye's moderate communitarianism does have a superior appeal to what he has called radical communitarianism.

III

This difference between the Gyekyean and the Menkitian approaches to the individual and person leads to the third problem which Matolino identifies with Gyekye's account, *vis a vis* Menkiti's radical communitarian theory. For Gyekye, the community ought not to be seen as the sole determinant of personhood. Individuality (rational autonomy) also has to play a role, since that is the only way rights can be protected for all. According to Gyekye, the person is only partly constituted by the community. Without paying attention to this individual rational autonomous aspect of the person, a communitarian account cannot make room for individuals to thrive. In Matolino's view, Gyekye merely

assumes, without offering argument, that radical communitarianism will not leave room for individuals to thrive. To show that Menkiti's radical communitarianism has room for individual expressions of rational autonomy, Matolino notes that "the individual who has such creative powers which can be used to further the interests of the community is always recognized as outstanding and the community will turn to that individual whenever there is need for her inventiveness" (2009:167). In my view, one question immediately arises from Matolino's argument here, namely, what happens when an individual who has creative powers chooses to use it in ways that are of no immediate use to the community as such? Without rights, it would be perfectly proper for the community to punish the very same expression of individuality which it is willing, at other times, to call upon the individual to contribute. I suspect that Matolino will admit that Menkiti's radical account does not possess the theoretical wherewithal to protect that individual from being punished or restricted by community, or at least it cannot do so on account of rights.

Recognizing that individuals have the capacity to be inventive is not the same thing as recognizing that they should be able to be inventive even when the community is not directly in need of their inventiveness. As is clear in Matolino's sentence above, individuals are recognized to have creative capacities, and are tapped when society needs them. But that says nothing about whether the community would recognize their use of those creative powers at moments the community does not directly benefit from their exercise. This means that the individual's ability to express themselves is entirely at the mercy of the community. Gyekye's moderate communitarianism clearly does not put individuals entirely at the mercy of community, at least not in theory. As I discussed in Chapter two, Gyekye's moderate communitarianism, wants to say that individual rational autonomy is given equal consideration with community.

Furthermore, according to Matolino, Gyekye "does not show what precise element in the radical communitarian scheme would be responsible for that [impeding individual thriving]. He also does not show what particular element in his moderate version will be responsible for promoting individual creativity and talent. He just states that this is going to be the case. It is difficult to see how his version of communitarianism would promote

individual talent when he holds that personhood, in all communitarian thinking, is attained when one has shown herself to be a person of certain moral worth. If that is the key requirement, then everything else must be harnessed in pursuit of the attainment of that requirement" (2013:167).

So Matolino is tasking Gyekye of two things here: (i) that Gyekye does not show what aspect of radical communitarianism would be responsible for impeding individual expression, and (ii) that he does not show what aspects of his own moderate account which would allow it to countenance individual expression. I think that Matolino is wrong on both counts. Contra Matolino, Gyekye does show how Menkiti's view fails to countenance individual expressions of rational autonomy. As I argued above, Menkiti cannot both link rights to personhood, which he views in a processual way, and guarantee individual rights which individuals have merely on account of being human beings, simultaneously. He can do one or the other, but not both. According to the discussion in chapter two, it is clear Menkiti does the former, and not the latter, which means he cannot guarantee individual rights. If it is by virtue of individual rights that individuals are able to express themselves freely, it is clear therefore that Menkiti cannot guarantee the ability of individuals to express themselves. And it is precisely on account of this ability to separate the individual out from the person that Gyekye says Menkiti cannot guarantee individual expression. Perhaps the only way Menkiti can offer an account of rights which is based on personhood but guarantees individual self-expression is if he suggests that individuals may go on and express their individuality and bear the consequences that follow from not been given rights which protects their doing so. But then, suggesting this is to lose sight of what it means to *guarantee* individuality or individual expression. At the least it ought to mean that individuals can express their individuality without undue interference.

On the other hand, Matolino is also wrong to claim that no aspect of Gyekye's own moderate communitarianism is able to guarantee the expression of individual rational autonomy. Gyekye is able to recognize individual self-expression since Gyekye does not give rights on account of personhood, but on account of individuality. The fact that he holds a communitarian notion of personhood does not necessarily preclude the

expression of individuality, for (i) the performance of duty would render claims of rights redundant (Gyekye 2003:365), and (ii) community "would realize that allowing free rein for the individual rights which obviously includes the exercise of the unique qualities, talents and dispositions of the individual, will enhance the cultural development and success of the community" (Gyekye 1997:64). Now, of course I have not lost sight of the possibility that the expression of individuality and the demands of community (or personhood) may sometimes clash. I have also not lost sight of the fact that, according to Gyekye, when they do clash, the needs of community ought to take priority. But two things must be said about this fact. First, the clashes between individual expressions of rights and communal needs are only possible but not necessary, and Matolino's criticism suggests that such clashes are necessary since Gyekye's account is commnutarian. The two points made about Gyekye's rights view above show how conflict is not necessary, although possible. Second, following from the first point, Gyekye's theory recognizes that all individuals have rights by their nature as rational autonomous entities (Menkiti's does not), but because of the possibility for clashes between communal demands and individual rights, it cannot be said to guarantee the expression of rights, at least not in all possible cases. But, of course, Matolino may argue that rights are no good, or that they are not even rights at all, if their exercise is not always guaranteed. I take this to be a strong rebuttal. One that I think is able to undermine Gyekye's rights thesis. The last problem Matolino identifies with Gyekye's rights account deals precisely with this kind of problem.

IV

Matolino recognizes that moderate communitarianism proposes to give equal weight to individuality and communal considerations. According to Matolino, this recognition makes it all the more startling that Gyekye would say that "it must be granted that moderate communitarianism cannot be expected to be obsessed with rights. The reason, which is not far to seek, derives from the logic of the communitarian theory itself: it assumes a great concern for values, for the good of the wider society as such. The communitarian society, perhaps like any other type of human society, deeply cherishes the social values of peace, harmony, stability, solidarity, and mutual

reciprocities and sympathies" (Gyekye 1997:65). Matolino argues that this preoccupation with communal values places communitarianism, including Gyekye's, in opposition to rights, which typically allow people to live lives which the community would not necessarily sanction (2009:168). Gyekye, Matolino argues, cannot guarantee individual rights and remain overwhelmingly concerned with community, for individual rights will sometimes run counter to communal interests. This is a strong argument, to which I am sympathetic. The criticism of Gyekye's theory of rights which I offer in this thesis ultimately rides on such a criticism of Gyekye. Much of that discussion occurs in chapter five.

However, as has been discussed in chapter two, Gyekye may respond by saying that a community may be arranged such that it defines its interests as a community to inculcate the rights of individuals, by (i) arguing that an ethic of duty might render claims of rights redundant (Gyekye 2003:365), and (ii) arguing that community "would realize that allowing free rein for the individual rights which obviously includes the exercise of the unique qualities, talents and dispositions of the individual, will enhance the cultural development and success of the community" (Gyekye 1997:64). In other words, a communitarian account does not have to exclude rights. But Matolino's criticism persists, since Gyekye here seems to take for granted that individuals will always want to express themselves in ways that are utterly in line with community's general interests. What happens when individuals do not judge it in their personal interest to do things in the community's general interests? It would seem that Gyekye is forced to argue they can be prevented from expressing such rights. I think that this is the real problem with Gyekye's theory of rights.

To sum up, it seems that all but one of Matolino's criticisms of Gyekye do not succeed. The last criticism succeeds in showing that there is room for contradiction in Gyekye's equal consideration of individual rights and communal considerations. This contradiction will force Gyekye to argue, as he does, that individual rights ought to be repressed where their expression clashes with communal goods. This possibility of repressing the exercise of rights when they run counter to communal interests runs contrary to the way rights typically function. Where an individual has a right, it is understood that it is wrong

to interfere with their exercise of that right. This is in line with my argument in chapter five, whereby I argue that what this means is that Gyekye's "rights" are not rights in the proper sense.

3.3 FAMAKINWA'S CRITICISM OF GYEKYE'S NOTION OF PERSON

In a 2010 article titled "The Moderate Communitarian Individual and the Primacy of Duties," Famakinwa argues that

> though Gyekye recognizes the moral need to respect certain individual rights, in the case of a moral clash between those rights and the values cherished by the community, the latter must be upheld. I wish to critically examine the arguments in support of this position. Contrary to Gyekye's view, I argue that the natural interpersonal bond among members of the same cultural community does not strongly support some of the duties mentioned. However, I am not arguing that the individual person is not morally obligated to the cultural community at all. I argue that natural membership of the cultural community could be a necessary condition for the justification of certain duties; it is not, morally, a sufficient condition (2010:152).

So, Famakinwa's criticism of Gyekye's moderate communitarianism is twofold. First he argues that Gyekye's moderate communitarianism effectively views rights as that which ought to serve the "common good." Secondly, in Gyekye's communitarian theory, the natural membership in a cultural community necessitates certain duties of the individual toward other members of the community. Famakinwa argues that the natural membership of the cultural community does not ground these duties. I think that since Gyekye's account of duty and his account of rights are so intertwined that they either stand or fall together, Famakinwa's arguments can do lasting damage to his moderate communitarian view of rights, if they succeed. I argue, in what follows, that only one of Famakinwa's arguments succeeds, which states that since Gyekye's "rights" are entirely aimed at securing the common good, that they fall short of how rights typically function.

I

Famakinwa begins by granting that Gyekye's communitarian theory grants rights. But he notes that "the mere recognition of rights is not enough to make him a non-communitarian" (2010:152). Famakinwa recognizes that a communitarian theory, as I argued against Matolino, can in principle guarantee rights. Where he anchors his criticism is in how said rights are used. Gyekye, Famakinwa observes, is at one with Menkiti in endorsing what he calls "the moral supremacy of community." According to Famakinwa, "Gyekye is a communitarian not because he accepts the individual's social nature, but basically because he endorses the moral superiority of the community and certain duties. He, like other communitarians, is of the view that striking a balance between rights and responsibilities is at times, possible, but wherever a moral clash occurs between duties and rights, where striking a balance seems impossible, the former ought to be salvaged. The community is 'a good', in fact a common good, that must be protected, no matter what" (2010:153). So, on this account, rights are meant not necessarily as the entitlements of individuals to being treated with dignity and respect, but as a tool for protecting the "common good" of community (*ibid.*). The value of rights, within this framework, is closely linked not to the dignity of the individual as such, but to what the dignity of the individual can do for the protection of community. And Gyekye is clearly of this view when he says that the community "would realize that allowing free rein for the individual rights which obviously includes the exercise of the unique qualities, talents and dispositions of the individual, will enhance the cultural development and success of the community" (Gyekye 1997:64).

In my view, the problem with linking the exercise of rights so closely to the common good is that the sanctity of individual rights is not unconditional. The question that arises out of this is, up to what point can people be assured that they will be allowed to exercise their rights? Famakinwa uses an example to illustrate this point. The right to elect one's leaders, among other things, implies the right to elect any leader, including a demonstrably bad leader, or a leader whose actions will have evidently bad consequences for the community. In Famakinwa's view, "under this condition, we are confronted with the moral choice between allowing the electorate to exercise their

voting rights the way they want, and the community good which such freedom could undermine" (2010:154). A moral problem is created that Gyekye's moderate communitarianism does not seem equipped to deal with, except by saying that such rights will be suspended or suppressed since their exercise will undermine the common good of community.

I agree with this important criticism of Gyekye's communitarian theory of rights. If my rights to free speech allow me to say whatever I like, should I not be able to say even things that are judged to be detrimental in some way to the common good of community? Now, of course Gyekye may wonder if rights to, say, free-speech should be thought of as entitling a religious cleric to say things that incite others to violence. This raises an important question about rights which will be discussed in the next chapter. It suffices to state, for now, that (i) rights do not typically include the right to hurt or threaten others, and (ii) that where a person is understood to have a right, it is understood that it is wrong to interfere with their exercise of that right, even when something may be gained in doing so.

The main problem with Famakinwa's specific iteration of this criticism is not that it is wrong *per se*, but that it is incomplete. It assumes a certain definition of rights and a certain account of how rights function, but it does not articulate it clearly. Not articulating the theory of how rights work which underlies his criticism puts the criticism at risk of being willfully misapprehended. To effectively bring this criticism against Gyekye's communitarian theory of rights, one needs to give some account of what rights are and how they function. To do that a full-fledged classical theory of rights, such as Dworkin's theory of rights as trumps, is required. That is what I aim to offer in chapter four (and in part of chapter five I reformulate this criticism in the light of that classical theory of rights).

II

The second criticism Famakinwa makes of Gyekye's moderate communitarianism is that the natural membership in a cultural community does not seem to ground some duties, as Gyekye believes that it does. According to Gyekye, our natural sociality

implicates the individual in a web of moral obligations, commitments and responsibilities to be fulfilled. As I noted earlier, if Famakinwa is correct in claiming that our natural sociality does not ground Gyekye's duties, Gyekye's entire theory of rights is undermined since Gyekye intertwines rights so intricately with duties. Gyekye notes that in a moderate communitarian framework, individual's rights will be automatically catered to (such that they will not need to assert them) because everyone would have done their duties to everyone else in community. For example, if it is the duty of members of community to work toward peaceful coexistence in community, and they perform that duty, no one will need to claim their right to live in a peaceful society (assuming there is such a right). If Famakinwa succeeds in proving that Gyekye's duties don't hold, the problem of rights will arise again, and this could undermine Gyekye entire rights theory.

The duties which Gyekye believes our natural sociality gives to all individuals are as follows: "respect for the elderly, sensitivity to the plight of others, and mutual aid and social co-operation with others" (Famakinwa 2010:155).

Famakinwa begins with the first of these duties by asking, "how much support does social bond offer the duty to respect the elderly in this way?" (2010:156). Famakinwa recognizes that in African communities, respect is shown to elderly people in many ways. One such way is that it is typically expected, even demanded, that younger people vacate their seats in a crowded public bus for an elderly person. Famakinwa focuses in on this specific form of respect for the elderly. According to Famakinwa, it is important to notice how the duty to vacate one's seat on a crowded public bus for an elderly person arises. He says, "old age is not a disease, though it could be associated with the general weakness of the body. The moral duty of the younger person to give up a seat for the elderly person is, in those communities where it is practiced, actually informed by deteriorating health, not necessarily by old age. If this is granted, then it is not in all cases that a younger person would be morally expected to leave his or her seat for an elderly person on a public bus" (2010:156). For example, a sick young person would not be expected to vacate his/her seat for a relatively healthy, or at least a healthier, elderly person. In fact, such elderly person may be expected to give up their seat (assuming that some other younger people cannot do so in such instance) for the

sick young person (Famakinwa 2010:156). So, Famakinwa posits, “allowing someone else to take one’s seat on a public bus morally should have little to do with age, but with deteriorating health” (*ibid.*).

But Famakinwa thinks that there are further problems with the idea that natural membership in the cultural community creates a duty in younger people to vacate their seat in a crowded bus for the elderly. For example, Famakinwa wonders: “an Akan youth who finds himself [sic] on the same bus as an elderly Nigerian person in Ghana would be expected to leave his or her seat for him or her. In this case, shared community membership has little to do with the practice. A younger person does not need to share the same cultural community as an elderly person to recognize the moral need to leave his or her seat for the latter under certain conditions” (2010:156). Furthermore, assume that both the elderly and the younger person involved are from the same cultural community but are on a bus in a cultural community foreign to both of them, where people are not understood to have such duties at all. In this scenario, the younger person would not be expected to vacate their seat. This would be contrary to Gyekye stipulation. In other words, the need to vacate the seat for the elderly person is grounded on something other than membership in the common community.

Now, there are some problems with Famakinwa’s arguments against Gyekye here. It is not clear to me why Famakinwa thinks that the expectation that younger people vacate their seat for elderly people in a crowded public bus is an example of respect for the elderly. It is not an obvious example at all. It seems that Famakinwa purposefully picks a weak example so that he can make his point more pointedly. The expectation that people vacate their seat in a crowded public bus is not so much an example of respect for the elderly, as it is an example of the second duty which Gyekye mentions, namely, “sensitivity to the plight of others.” As Famakinwa himself points out, the reason why people are expected to vacate their seat for the elderly has nothing to do with the common membership of community, at least not in any direct way. Rather it has to do with the presumption that the elderly are weaker and deserve more consideration. This weakness is a plight all other members of society have a duty to be sensitive to. An elderly person as well as a younger people can be sensitive in this way to the plight of

those that are weaker than themselves. This clearly explains why an elderly person may be expected to vacate their seat for a sick young person. So, Famakinwa's sleight of hand actually does him a disservice since it distracts him from demonstrating how that duty does not derive from natural membership in community.

Some appropriate examples of respect for the elderly at least from the point of view of my own cultural community, the Igbo cultural community of Nigeria, are the admonition to always greet an elderly person when you see them, never calling an elderly person by their first names, never lying to an elderly person (although it is sometimes permissible for older people to lie to younger people). In each of these cases the elderly person does not have any such reciprocal responsibility toward the young.

Furthermore, Famakinwa seems to think that to say that one's duties arise out of their natural membership in a cultural community is to conclude that those duties are owed only to members of that immediate community. This applies to his argument that "an Akan youth who finds himself [sic] on the same bus as an elderly Nigerian person in Ghana would be expected to leave his or her seat for him or her. In this case, shared community membership has little to do with the practice" (Famakinwa 2010:156). Logically speaking, it does not have to be the case that if one's duties arise out of their natural membership in a cultural community those duties are owed to only members of that immediate community. It is possible for a duty I have to someone or something to arise from something of which they are not a part. For example, I believe myself to have a duty to care for and respect animals, or at least not to cruelly kill or mutilate them, not because they belong to my community, but because I belong to my community; that is, because I belong to a community of vegans who hold those duties to derive from membership in our community.

III

Beyond the duty to be respectful toward the elderly, Famakinwa also has some problems with the idea that the duty to be sensitive to the plight of others derives from common membership in a cultural community, as Gyekye argues. Famakinwa writes, "according to Gyekye, in a typical cultural community, 'economic success does not

confer personhood on the individual if he or she is indifferent to the welfare of others.' The rich have a moral responsibility towards the economically worse-off members of the community" (2010:156). In Famakinwa's view, there may potentially be a problem with this duty. For example, Famakinwa wonders about whose responsibility it is to determine the identity of the economically worse off members of society, since, according to him, this knowledge is central to the act of offering help. One cannot give help to people who they do not know. Famakinwa observes that there are a number of groups that can be identified as economically worse off, and they include, "petty traders, roadside mechanics, palm-wine tapers, peasant farmers, poorly paid labourers, unemployed youths and roadside beggars" (2010:156). Of these, only roadside beggars explicitly seek help from others. But beyond that group, "who actually identifies the needy? Is it the needy person him- or herself, the community or the individual who wishes to provide the help? The community and the individual need not agree on all occasions on the identity of the needy. The determination of the needy is not as straightforward as presented by Gyekye" (2010:156).

First, Famakinwa seems to leave completely untouched the question of showing that Gyekye's duty to be responsive to the plight of other does not derive from natural membership in a cultural community. To argue that it is not clear who determines the identity of those in need, is not the same thing as arguing that such duty does not derive from natural membership in community. Furthermore, it is not necessarily very damning to argue that Gyekye does not give a clear account of whose prerogative it is to identify who needs help. At best, what Famakinwa succeeds in doing here is proving that Gyekye has some more work to do clarifying the content of this duty.

That said, if we read Gyekye a bit more charitably than Famakinwa does, it seems quite possible to me that Gyekye was depending on our moral intuitions about those in need of our help. Everyone, except perhaps the seriously morally impaired (such as psychopaths and sociopaths), has some intuitive sense of when someone in their surrounding is in need of help. Some of this intuition is informed by culture, the general standard of living in that society (a person without at least a bicycle to transport themselves around, even if they have food, shelter and clothing, could be viewed as

“needy,” in some parts of The Netherlands, whereas such a person may be considered relatively better off in some parts of Nigeria) and some other factors. To be sure we might ultimately need to go beyond the intuitive level to trash the intuitive idea of what it means to be needy out properly. But most people will probably agree that we all have that intuitive sense of when someone around us needs help. Most people will intuitively agree that if someone does not have food to eat, cloths to wear, and shelter over their heads, they are in need. To play on the fact that Gyekye does not explicitly delineate this, is to read Gyekye somewhat uncharitably.

To be sure, this intuition about when someone around us needs help is quite different from the sense of when someone around us needs *our* help. A situation when someone requires our assistance, say, when they walk up to us and ask for some kind of help, is quite different from when we discern by ourselves that someone requires help. In the case of our general intuitions about when people need help, it may well be the case that the needy person in question actually does not want to ask for help, or is trying to conceal their neediness or is too proud to accept help when given. This is entirely possible. But it is not possible in cases when someone needs *our* help. Our ability to gauge someone’s neediness seems to be faulty when they ask us directly for help. For example, when someone comes up to you muttering something in a language you do not understand (assume that they are begging us for help), it is quite possible that we might not be able to determine whether they are asking us for help, that is, whether they need our help, even if they are dressed in a way that should make it obvious that they require some assistance. Even in cases when such a person is speaking a language we understand, sometimes we are still not able to determine whether they actually need our help or if they are attempting to run a scam on us. The scenario which Famakinwa paints with which he argues that it is not clear who determines the identity of those who need help, seems quite like this one. But I think it is fair to take Gyekye as basing the duty to be responsive to the needs of others on our intuitions about those who are in need.

If we accepted that Gyekye’s second duty is based on the moral intuition we typically have about the identity of those who require help, then Famakinwa’s criticism here

evaporates. But even if one argues that we do not have sufficient grounds to make that assumption, at worst, as I said before, the consequences of this is that Gyekye needs to flesh out this duty better. One cannot argue that, because it is not clear who determines the identity of those who need help, that therefore this duty is not based on the natural membership in the cultural community. In other words, being able to demonstrate that it is not clear whose prerogative it is to point out those who are needy, does nothing to undermine the general point, which Famakinwa sets out to undermine, namely, that the duty to help those in need derives from the natural membership in community. As I have noted before, if Famakinwa succeeds in showing that there are problems with Gyekye's account of duty, it would follow that there are problems with Gyekye account of rights, since both Gyekye's account of rights and his account of duty are so intertwined that they either stand or fall together. Famakinwa has failed to show, thus far, that there is a problem with Gyekye's account of duty.

IV

The last problem which Famakinwa identifies with Gyekye's duties is that they are overwhelmingly contextual. In other words, Famakinwa takes issue with the suggestion inherent in Gyekye's moral theory that one has an obligation only to members of their own cultural community. According to Famakinwa (2010:156),

> the implication creates a moral vacuum. An individual may be confronted with the problem of a moral choice between helping a fellow community member and a foreigner. Though community membership could be one of the factors to be considered in helping others, it is not always the ultimate factor in all cases. Morally, the severity and urgency of the support required by the needy is more crucial than the community affiliation shared by members of the same cultural community. If I am faced with the moral choice between helping a fellow community member who needs financial support to settle his or her school fees and a non-community member who desperately needs a kidney transplant, when I am not

> in position to fulfill the two needs simultaneously, the latter option should be morally favoured.

As far as I can tell, as I have pointed out earlier, Gyekye does not advocate the view that members of different cultural communities have “natural” duties to their own specific communities alone, only that they have duties which derive from their natural membership in their cultural community. Those duties are not necessarily to be understood as been owed to only, or mainly, to members of their cultural community. Their membership in their own specific community is an accident (certainly not in the sense that they could just as well not have been born into any cultural community at all). They might just as well have been born into a totally different cultural community. But natural sociality belongs to all human beings by nature in more or less equal measure (at least to the same extent that their humanity belongs to all humans in equal measure). And if their duties derive from their natural sociality as Famakinwa argues, those duties ought to hold toward all who are naturally social (that is, toward all of humanity). So, on the one hand, I disagree with Famakinwa that Gyekye limits the scope of the duties to members of one’s cultural community.

But, on the other hand, even though Gyekye does not limit the scope of duties to members of one’s cultural community, there are practical reasons why he might be justified to do so if he did. It is a fact that human beings are divided into cultural groups. No one culture is shared by all human beings (although globalization is increasingly leading humanity toward some semblance of a shared culture). It would therefore be practically impossible for all human beings to view themselves as holding exactly the same duties, toward every other human being, since what one sees as their duty is determined by their cultural community. Most people would probably agree that it would be awkward (and perhaps uncomfortable) if someone comes up to you and begins to perform a duty you do not see them as having, or even a duty you do not believe (given your own cultural norms) anyone should have towards other people. It would likewise be at least disconcerting to another person if I impose on them a duty my culture states I am entitled to, if their own culture does not say same. The kind of borderless moral universe which Famakinwa envisages would be a practical nightmare, it seems.

To conclude, as I have demonstrated throughout this section, most of Famakinwa's criticisms against Gyekye's moderate communitarianism do not succeed. In the only one that does have, at least in my view, some potential for success, Famakinwa argues since rights in Gyekye's account are aimed exclusively at securing the common good, they run afoul of the way rights typically function. If an individual has a right to do something, it is typically wrong to interfere with their doing that thing, even if the reason for interfering is that some good may arguably accrue to community. As I mentioned before, the main problem with Famakinwa's only successful criticism of Gyekye is that it is incomplete. It assumes what rights are and how they function, but does not articulate them explicitly. Neglecting to do this renders Famakinwa's valid criticism of Gyekye vulnerable to misapprehensions which can take away from the validity of that criticism. It needs to be set within a full-fledged theory of what rights are and how they function, which is what I will do in the next chapter.

3.4 OYOWE AND WHAT RIGHTS ARE

Oyowe's criticism of the African communitarian rights thesis is laid out in a 2014 article titled, "An African conception of Human Rights? Comments on the Challenges of Relativism."[17] According to Oyowe, "this paper contests specifically the position that a conception of human rights is culturally relative by way of contesting the claim that there is an African case in point. That is, it contests the claim that there is a unique theory of rights" (2014:329). While the bulk of Oyowe's criticism of the communitarian theories of rights has to do with showing how inconsistent with the idea of rights they are, he also does consider internal conflicts or untoward implications of these theories. In his analysis, Oyowe separates Menkiti's radical communitarianism from Gyekye's more moderate communitarianism, and criticizes them differently. So I will discuss his criticism of these communitarian theories in that order.

I

[17] Oyowe uses the term Human Rights throughout, but he discusses the philosophical arguments about what I have referred to simply as rights. He says, "a conception of human rights as it is employed here is a theory proposing a philosophical foundation, typically a conception of human nature and/or dignity in virtue of which rights are grounded" (2014:332).

Oyowe begins with the observation that “perhaps, the most common and widely cited conception of human nature discussed in the African literature on self is the idea that the human being depends both descriptively and normatively on the community” (2014:332). Among the key acolytes of this view of the person is John Mbiti who argues that “the individual does not and cannot exist alone but corporately” (Mbiti 1969:108). Menkiti picked up Mbiti’s mantle in a seminal essay (discussed in detail in chapter 2) tiled “Person and Community in Traditional African thought” where he argues that persons are not persons until personhood has been conferred on them by the community. The community does not confer personhood on one until it has judged one to be deserving of it through having lived up to the standard laid down in society’s norms. According to Menkiti, “the various societies found in traditional Africa routinely accepted this fact that personhood is the sort of thing, which has to be attained, and is attained in direct proportion as one participates in communal life through the discharge of the various obligations defined by one’s stations” (1984:176).

According to Oyowe, the notion of rights which derives from this conception of person is unsurprisingly, if naturally, collectivist (2014:333). As was discussed in chapter two, rights, according to Menkiti’s radical communitarian conception of rights, are accorded to individuals within community who, through their actions and deeds, have shown themselves deserving of it. The ascription for rights in this conception is linked inextricably to the acquiring of personhood. In other words, you acquire personhood by living up to community’s normative standards, and you are awarded rights if you acquire personhood. In this conception, therefore, rights are collectivist in that they are awarded primarily for community oriented reasons, that is, they are awarded only when one has achieved a level of normative status. Now, of course, if all this is true, I think the radical communitarian account of rights will eschew self-regarding action, defined as actions which serve the interests of the individual exclusively as opposed to that of the collectivity, since self-regarding actions run counter to the “ethic of duty” which Menkiti argues grounds rights. Menkiti says, “in the African understanding, priority is given to the duties which individuals owe to the collectivity, and their rights, whatever these may be, are seen as secondary to their exercise of their duties” (1984:180).

Now, while this Menkitian conception of rights may seem attractive, there are reasons why it is problematic, according to Oyowe. To begin with, Oyowe points to a potential problem with the notion of human nature which supposedly grounds Menkiti's account of rights. Before discussing Oyowe's first criticism of Menkiti, I should like to note that Oyowe's criticism of Menkiti's notion of human nature here is aimed at the ontological notion of person. As I argued in chapter two, there are two, potentially conflicting (at least as far as the notion of rights they can ground) notions of personhood in Menkiti's radical communitarianism, namely the normative and the ontological account. The normative notion of personhood is that according to which individuals acquire personhood piecemeal. This is the processual notion of person (Menkiti 1984:171; Ikuenobe 2006:51). The ontological account, on the other hand, argues that persons *are* ontologically constituted by their community (1984:171-172). As I argued in chapter two, both notions of personhood ground different notions of rights; the ontological account grounds an account of rights in which all individual persons have rights equally, whereas as the normative account grounds an account of rights in which individuals have rights if, and only if, they have performed their normative duties to community. As I noted in chapter two, Menkiti's account of rights seems to cohere with the normative account of person, but not the ontological account of person. However, Oyowe's criticism of Menkiti's radical communitarian rights thesis here is aimed at the ontological notion of person. In part, the fault here lies with Menkiti for offering contradictory notions of personhood. But that said, it is fair to state that Oyowe's criticism does not get off the ground since it misfires. That is, it aims to criticize a notion of personhood which ultimately has no role in the theory of rights which Oyowe is interested in criticizing. I will, however, go on and consider this criticism of the ontological communitarian notion of human nature to see if there is perhaps something to be said for it.

Oyowe argues that there is a logical problem with the ontological notion of human nature in Menkiti's radical communitarian theory. He argues that it seems difficult, if not impossible, to make logical sense of the idea that individuals derive ontologically from the community. On this point Oyowe quotes Didier Kaphagawani approvingly. Oyowe writes,

> the idea that individuals derive ontologically from the collective seems unattractive as a logical option. This insight was first noted by Kaphagawani (2006) who, in response to the uses of Mbiti's dictum 'I am because we are and since we are therefore I am' as a foil against Descartes' cogito ergo sum and as a justification for a collectivist conception of human nature, pointed out that the argument failed the simple test of validity. 'Although the cogito argument could have pretensions of validity when provided 'Whatever thinks exists' as a suppressed premise', Kaphagawani (2006) writes, 'I find it difficult to imagine quite what suppressed premise would render Mbiti's argument valid' (Oyowe 2014:333).

This seems to be a critical point. On its face, it seems quite impossible to make sense of the idea that "I am because we are," in any ontological way. But I think that the only way the ontological notion of human nature is logically problematic is if we take the "I" in question to be a biological, physico-material individual. If we take the "I" to be the biological me, then it is clear how individuals literally don't exist because others exist (although one would have to admit that one cannot exist in the literal sense without at least two other people having existed). Additionally, it is even weirder if we considered it from the point of rationality. We often say that humans are ontologically rational. The implication of Mbiti's logic here is that "I" am rational because other people are rational, or something to that effect.[18]

So, it seems to me that much of the efficacy which this Oyowe's criticism is supposed to have hinges crucially on what is meant by "I" here. At best, we can grant Oyowe and Kaphagawani that there is some ambiguity on what is meant by "I" from the point of view of ontology. "I" can mean the material human nature of human beings. That is, we can say human beings are ontologically human, where "human" is defined as, say, the ability to think, and determine their ends, like Kant does. But "I" can also be defined from the vantage point of social ontology, whereby Menkiti says that individuals do not

[18] Admittedly this view loses its weirdness if one agrees with Edward Hayes (1911) that reason is a social phenomena, that does not any intrinsic nature beyond what it is thought to be by each particular social community. But this is a minority view in philosophy.

have the means to define the world and themselves, save for the tools they receive for this end from their community. Their existence in the world is utterly and inescapably mediated by their community. In this sense, individuals have no sense of self, removed from community; their being as humans interacting with the world, is ontologically a product of the tools and ideas they have received from their communities. If this interpretation is correct, it becomes quite clear how the validity of Mbiti's logic can be defended on the basis of social ontology. If their identity and their sense of themselves as existent entities among other entities are ontologically linked to community, humans are ontologically, if only in a social way, a product of their community, since a sense of their existence is an important part of their existence. Clearly this is Mbiti's view. So, Mbiti's logic is not as problematic as Oyowe makes it out to be.

II

Oyowe's second argument against the radical communitarian view is that the "idea of the collective as 'producing' the individual implies a questionable idea of community i.e., the idea of community as a natural formation. It is the idea of the community as some fixed, unchangeable entity existing independently of the individual...in order for the community to create or produce the individual its existence must be independent of and prior to the existence of individual human beings" (Oyowe 2014:334). Oyowe does not believe that this is a plausible view of community. According to Oyowe, two questions are raised by the idea that community produces the individual, namely, (a) is the community prior to the individual?, and (b) is the community a fixed entity? In Oyowe's reckoning, if we answered the first of these questions in the affirmative, that is, if we said that community was prior to the individual, we are at once claiming the community is a fixed, independently existent entity. In Oyowe's view, the community seems rather to be the kind of entity whose existence depends crucially on distinct individuals, with distinct interests, forming it. Before such a formation, community cannot be said to exist.

I think that Oyowe is wrong when he argues that to posit that the community produces the individual is to imply that community is a fixed unchanging entity. I do not see how the logic follows, and Oyowe does not offer much by way of argumentation to make that

link clear. Clearly, it is quite possible for individuals who have received from community the tools with which to understand themselves as individuals in the midst of other individuals and other entities in the world, to then turn around and use those tools to effect change in their community. For example, if community teaches me to be critical and question reality beyond things as they appear at face value, there is no reason why I cannot then apply that tool to community itself. Doing so may have the effect of effecting change on the community. This is precisely the sense in which parents often say that the community they received from their parents is different from the one they will hand to their children.

The second point Oyowe makes is that it seems to be the case that if we argue that community produces individuals, the community must be prior to the individual. Someone may notice that this argument may only apply to the first members of that community. In other words, beyond the original founders of any given community, it is easier to see that community could then be said to be prior to the individual. But this interjection is weak. All Oyowe needs to prove to reinstate the validity of his claim is that in principle, or in theory, individuals cannot but precede communities, even if all the communities that currently exist precede all the human beings that currently exist. In my view, that is undeniable. Community cannot be an empty set. It cannot form itself. This is as straightforwardly true as the principle of non-contradiction. Communities can form naturally, without any conscious effort on the part of people who form it, but if humans do not first exist, even that is impossible. So, clearly, the individual in theory is prior to the community. If this is correct, Oyowe's criticism of the priority of the community over the individual, in Menkiti's theory, stands.

But one may reject the clear-cut nature of the argument that "in theory individuals cannot but be prior to the community" and attempt to introduce some nuance. One might say rather that what evidence suggests (even theoretical evidence) is that the community is prior to the individual at least most of the time. Now, even if Oyowe were to concede the latest interjection that community is prior to the individual most of the time, Menkiti's communitarian thesis still falls apart, since Menkiti's argument, as is evident in the discussion in chapter two, implies an all or nothing priority of community.

Menkiti does not make any exceptions to his view that the community "produces" the individual, which, as we may recall, is the basis for this criticism by Oyowe. As we noted in chapter two, according to Menkiti, the community pervades the normative development of the individual (Menkiti 1984:175). This means that Menkiti understands the community to be, in theory and in reality, to be prior to the individual. So, Menkiti would not agree with the claim that the community is prior to the individual most of the time. If this is correct, Oyowe's point here then remains valid.

Now, as I noted in the introduction to this chapter, it is important to take on the wide-ranging criticisms which Matolino, Famakinwa and Oyowe level against the radical and moderate communitarian theses generally, not only the criticisms against the radical and moderate communitarian rights theses directly, mainly because their general radical and moderate communitarian theses are critical building blocks on which their rights theses stand. To undermine their general communitarian thesis is, therefore, to undermine, in a roundabout way, their communitarian rights theses. Nowhere is this more visible than in terms of the consequences of the fact that Oyowe has succeeded, as I argued above, in undermining Menkiti's view that community necessarily produces the individual. Oyowe does this by arguing that for the community to produce the individual, the community will need to be prior to the individual. As we saw, Oyowe succeeds in showing that, at best, the community is prior to the individual some or most of the time, but not necessarily all of the time as Menkiti's account implies. The consequences of this weakness in radical communitarianism leads quite naturally into what Oyowe takes to be the problem with the theory of rights it offers.

III

Menkiti thinks rights are connected intrinsically with community, in that they are given only when one has performed their duty to the community. Now, if community is not always prior to the individual, as Oyowe has managed to show, rights which belong to individuals cannot be subordinated to community. Oyowe makes this point thus:

> because it prioritizes collective or people's rights over individual rights by construing collective rights and interests as existing over

> and above individual ones, this conception of human nature yields the undesirable consequence that individual rights must always make way for collective rights. It seems to me that the litmus test for any serious conception of human rights is its performance over a range of conflict situations; so-called African conceptions of human rights readily imply that human rights always give way to traditional values (e.g. communal harmony, kinship relations, etc.) whenever these values conflict. Moreover, prioritizing collective rights over individual ones may summarily exclude non-conforming individuals and minorities (2014:334).

According to Oyowe, the consequence of placing collective interests over those of the individual who has rights, is that the theory offered is not a proper account of rights. Rights, he argues are entitlements which play a role principally when the question of what the collectivity cannot do to or with the individual rights-holder is at issue. If a conception of rights is shown to be incapable of protecting human dignity in all cases, even in cases where it is consistent with the collective interest to undermine the dignity of some member of community, it cannot be acceptable as an account of rights.

Furthermore, an account like Menkiti's which argues that individuals are descriptively and normatively produced by community does not have the facility to account for what it is about humans which makes them bearers of rights. According to Oyowe, "it cannot fully capture the intuition that rights are properly grounded in the individual. This is because it takes the individual to be a derivative of the collective such that whatever attribute the individual has is merely an instance of something ultimately attributable to the collective" (2014:335). In other words, if the individual is derived from the community, and all the attributes of the individual are at once attributes of the community, rights cannot therefore be said to belong to individuals. They belong to community. But this is contrary to the general intuition about rights that they belong to individuals as such.

In my view this argument is valid. Rights are typically grounded in individuals, and they may be exercised against community. Since Menkiti's theory views individuals as derivatives of community, they cannot ground individual rights. The problem with Oyowe's criticism here is that it gestures toward a theory of what rights are and how they function that he has not given a detailed account of. Not explicitly basing this criticism on a theory of what rights are and how they function leaves his argument susceptible to distortions, and assumptions about what he may be saying that will have unwelcome consequences for his overall argument. In the next chapter, I hope to begin remedying this problem by offering a detailed account of a classical theory of rights, Dworkin's rights as trumps.

III

According to Gyekye, the best way to balance individual rational autonomy and community is to give them equal moral weight. In Oyowe's view, "Gyekye's way of circumventing the difficulty of the first conception [Menkiti's conception] is to propose a conception of human nature that is based not on priority of the collective but on the equality of individual and collective features in the constitution of human nature. The resulting view of human rights is one that assigns equal moral importance to these individual entitlements as well as to the duties of individuals in service of the collective good" (2014:337). In Gyekye's view, this allows his moderate communitarian account to overcome the perennial difficulty of overshadowing the individual's rational autonomous self-expression.

According to Oyowe, there are two main difficulties with this account. First, individual expression and rights are potentially at odds with the community in a way that virtually renders it impossible to avoid necessary tradeoffs. Conflicts between individual rights and what is seen as the social good can and do occur. Oyowe argues that "meeting the relevant social objective usually means overriding the right of some actual individual or vice versa" (2014:338). As I argued in response to Matolino (2009), this does not have to be the case, at least not in application to Gyekye's theory. Community may make it its objective to see to it that the rights of individuals are guaranteed. Gyekye argues that in

a moderate communitarian system, since everyone would perform their duties to everyone else, (i) no one would need to claim rights, because the content of their rights would already have been catered to, (Gyekye 2003:365), and (ii) the community "would realize that allowing free rein for the individual rights which obviously includes the exercise of the unique qualities, talents and dispositions of the individual, will enhance the cultural development and success of the community" (Gyekye 1997:64). As I mentioned before, this means a clash between individual and community is not necessary, although it remains a possibility. This mere possibility of interfering with rights means that Gyekye's notion of rights is incongruent with the general idea about rights that they are not to be interfered with. By their nature, rights are such things which, if they are recognized, as Gyekye's theory does, have to be guaranteed, even in the face of communal objections. This is typically how rights function. I will discuss this criticism further in chapter five.

IV

The second difficulty which Oyowe identifies with Gyekye's moderate communitarianism is that its account of rights is fundamentally naïve. According to Oyowe,

> it fails to see that human rights by their very definition are for the most part conflict notions, entailing claims that are held against others, society or the state. Because human rights are protections against legal, social and political abuses, including policies that threaten human dignity, they may not always be consistent with programmes and policies that purport to advance the collective good (e.g. state sanctioned torture against terrorism). A sophisticated conception of human rights must demonstrate keen awareness of the political and moral tradeoffs that respect for human rights often demands rather than insist on blanket claims that presuppose that there could be no radical conflicts between individual rights and collective good or that these claims ought to be equally held (2014:338).

Oyowe argues that by their nature, rights are notions which can be claimed against the community. In my view this is a fair point, and I think it overrides the argument which Gyekye makes that, in a moderate communitarian system, duties would take precedence so much so that everyone's needs will be met and no one will need to claim rights they may have to some need. This hope that duties would take precedence to such extent that everyone's needs will be met and no one will need to claim rights reveals a fundamental misunderstanding of how rights function. Oyowe appeals to the definition of rights, although he does not necessarily offer one, to observe that rights are by their nature conflict notions. By definition, rights are things which are claimed against community. They are not things that can be swallowed up or subsumed under the purview of duties. Duties are things people have on account of some end which the community has determined to pursue. Rights function in such a way as to allow individuals to reject the ends set for them by the community, or at least to refuse to be used as a tool toward its achievement.

I am in agreement with Oyowe that rights are necessarily conflict notions. But in order to give an account of what it means to say that they are conflict notions it is necessary to explain what rights are and how they function. In the next chapter, I will discuss the influential rights theory of Ronald Dworkin, according to which rights are trumps. In other words, where someone has a right, the community is never justified in intervening in that right, even if the purpose of doing so is the common good of community. This understanding of rights, as I demonstrated, is implied in Matolino's, Famakinwa's and Oyowe's criticisms of the radical and moderate communitarian rights theses. In the next chapter I discuss a theory developed by Ronald Dworkin, which supports and which is implied in all these criticisms.

CHAPTER FOUR: HOW RIGHTS FUNCTION: DWORKIN'S THEORY OF RIGHTS AS TRUMPS

4.1 INTRODUCTION

As I said in the last chapter, while there is much in Matolino's, Famakinwa's and Oyowe's criticisms of the African communitarian rights thesis that I disagree with, there is much in their criticisms which, as I argued, is correct. The most important criticism I consider has to do with the notion of what rights are and how they function in the African communitarian rights theses, as compared to how rights are typically understood to function. I hope to argue in the last chapter (chapter five), using an influential theory of what rights are and how they function, that the notion of rights offered in the African communitarian rights thesis does not meet the minimum requirement for what rights are, or how they function. In this chapter, I will offer an account of such a rights theory. I will specifically offer an account of Dworkin's "rights as trumps" thesis. Dworkin's theory of rights as trumps is not only useful for this purpose because it is an influential account of what rights are and how they function. To be sure, there are many more or less influential accounts. Locke's natural rights theory, for example, is likewise influential. But what renders Dworkin's theory much more suitable for our purposes here is that, unlike Locke and others, it does not offer an account of what rights people have, it rather offers a lean account of how rights function, which imposes the least possible culturally variable presuppositions, to allow for integration with the greatest possible range of cultural variables. This is important because, as we saw in chapter two, African communitarians do not offer accounts of what rights people have (although some such account may be derived from their theory); they, like Dworkin, only offer accounts of how rights function. In my view, the criticism I aim to offer of the African communitarian rights theory in this research will fail, if I utilized an influential account of rights that is incommensurable to the African communitarian rights thesis. Effective comparisons demand that the theories compared be commensurable.

In what follows, I will offer a more or less detailed analysis of Dworkin's rights as trumps.

4.2 DWORKIN'S RIGHTS AS TRUMPS

Dworkin developed this theory over the course of his career, and in multiple essays. But for my purpose here, I will draw on only two of his works, since they contain the most elaborate discussion of this theory. I will draw on "Taking Rights Seriously", published in 1977, as his first expansive treatment of this theory. The second work I will draw on is his "Justice for Hedgehogs," his last book, published in 2011. While he applies this theory in his other scholastic endeavors, especially in the philosophy of law, some of which will come up in the discussion here, these two works represent the main spaces where he develops this theory in any detail.

Dworkin's central claim is the following: "in most cases when we say that someone has a right to do something, we imply that it would be wrong to interfere with his [sic] doing it, or at least that some special grounds are needed for justifying any interference" (1977:188). Dworkin does not use the word "special" here, lightly. For him, to say of a person that they have rights is to remove nearly all grounds on which any interference by the community or government[19] would be justifiable. We will return to the cases where Dworkin admits that it would be reasonable for the consideration of rights to be over shadowed by other considerations. For now, what seems to be quite clear in Dworkin's thinking about rights is that, where rights exist, the community is not justified in upending them.

Dworkin offers two primary examples in explicating this view. In "Taking Rights Seriously," he writes:

> Of course a responsible government must be ready to justify anything it does, particularly when it limits the liberty of its citizens. But normally it is sufficient justification, even for an act that limits liberty, that the act is calculated to increase what the philosophers call general utility–that it is calculated to produce more overall benefit

[19] I use both terms interchangeably. Dworkin does define government as the sum-total of all the interests that make up the community. He says that when the government performs an action, it is the people (or at least a majority of them) that perform that action (Dworkin 1977:194). Dworkin sometimes refers to government as an "artificial collective person" (2011:328).

> than harm. When individual citizens are said to have rights against the government, however, like the right to free-speech, that must mean that this sort of justification is not enough. Otherwise the claim would not argue that individuals have special protection against the law when their rights are in play, and that is just the point of the claim (1977:191).

Likewise, in “Justice for Hedgehogs” he posits:

> A policy is normally justified, for instance, if it would make the community safer by reducing violent crime: that is a good all-things-considered justification for increasing taxes to pay for more police. But increased safety is not an adequate justification for forbidding unpopular speeches on street corners or for locking up suspected terrorists indefinitely with no judicial review of the charges against them. Those latter policies violate political rights— the right to free speech and not to be punished without a fair trial. This trump sense of a right is the political equivalent of the most familiar sense in which the idea is used in personal morality. I might say, “I know you could do more good for more people if you broke your promise to me. But I have a right that you keep it nevertheless.” (2011:329).

What Dworkin means when he says that rights are trumps seems quite transparent in these examples. When I am said to have a right to do something, what I have may not properly be called a right, if another person or the government may interfere with my doing it. Or put another way, if I have a right to do something, interfering with my doing that to which I have a right, is thereby wrong. At the core of the idea of rights, according to Dworkin, is a certain inviolability, and this claim of inviolability which holders of rights have on account of those rights, is held against government. Governments cannot appeal to their task of obtaining the advantage of the community as a whole as a justification for curtailing rights persons have.

This raises questions as to the conception of the source of rights implied in Dworkin's analysis. Clearly he does not imply a positivist conception of legal rights, where rights are simply whatever is stipulated by government and encoded in the law of the land. But his account also does not accept Locke's natural rights thesis, where rights derive from something in human nature, either. A more expanded discussion of this will be given in a latter part of this chapter. It suffices to note, for now, that Dworkin goes beyond the understanding of rights as given by community. In fact, about this Dworkin says, "if I have a right to speak my mind on political issues, then the government does wrong to make it illegal for me to do so, even if it thinks this is in the general interest. If, nevertheless, the government does make my act illegal, then it does a further wrong to enforce that law against me. My right against the government means that it is wrong for the government to stop me from speaking" (1977:192). The idea that people have rights against which the government cannot legislate suggests that rights proceed from something other than governments, against Bentham's thinking. A right cannot be legislated out of existence, according to Dworkin. It would be equally wrong for governments to legislatively sanction a particular right, when doing so suits them, and repeal it when it no longer suits them, even if their argument is that the majority would stand to benefit from this in some way (Costa-Neto 2015:160-161). "The government," Dworkin notes, "cannot make it right to stop me just by taking the first step" (1977:192).

Furthermore, according to Dworkin, most people tend to take it to be the case that everyone has a duty to obey the laws, whatever they are. This, for people who hold this view, is a mark of a decent society, and grounds for stability. However, in Dworkin's view, "this general duty is almost incoherent in a society that recognizes rights. If a man [sic] believes he has a right to demonstrate, then he must believe that it would be wrong for the government to stop him, with or without the benefit of a law" (1977:192). One who has a right, has that right, irrespective of governmental action. Rights, for Dworkin, precede governments and laws, and "any society that claims to recognize rights at all must abandon the notion of a general duty to obey the law that holds in all cases" (1977:196).

Now, there are some possible problems with this account of rights. Dworkin considers two such problems which he says a conservative may pose to his theory of rights. First, “conservatives…will argue that even if the government was wrong to adopt some law, like a law limiting speech, there are independent reasons why the government is justified in enforcing the law once adopted. When the law forbids demonstration, then, so they argue, some principle more important that the individual’s right to speak is brought into play, namely, the principle of respect for the law” (1977:193). For proponents of this criticism, the question boils down to that about which societal principle should take priority over the other. They recognize that the principle that rights ought to be respected and ought not be legislated or acted against by government or anyone else, is an important one. But, in their view, once a law is in place it is much more important for society’s overall good that such law is obeyed and enforced. The consequences of not enforcing society’s laws, even the wrong one’s among them, is that the legal structure which allows society to function would be undermined. The consequences of the weakening of the legal structures of society can be dire.

According to Dworkin, to begin with, proponents of this criticism seem to assume that civil disobedience detracts from the respect members of society have for their laws. This is far from self-evident. In fact, it may be argued that acts of civil-disobedience display a great amount of respect for the law. When Dr. Martin Luther King Jr. urged disobedience of discriminatory laws in America’s south, he could be viewed as implying that laws are so important, so loftily positioned in society that they should not possibly encode discrimination. But, for Dworkin, this is even beside the point. For, even if we were to accept that civil-disobedience eroded respect for law, “the prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do, and the supposed gains in respect for law are simply utilitarian gains” (1977:193).

Throughout his discussion of rights, Dworkin is quite clear that considerations of the greater good (that is, utilitarian goods) are not sufficient to permit interference in actions persons have a right to do. It seems quite obvious how the conservative argument offered above is a utilitarian one. Respect for law ensures an environment in which all members of society, or at least most of them, are able to live a reasonably good and

stable life. While this is an admirable goal, Dworkin argues that a society in which utilitarian goals such as this are allowed to take precedence over rights, is not a society that respects rights. "There would be no point," he posits, "in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient. So the general benefit cannot be a good ground for abridging rights , even when the benefit in question is a heightened respect for law" (1977:193).

However, on its face, it seems that Dworkin's response to this criticism is unsatisfactory in one key respect. It seems to equate all utilitarian considerations. For example, it is a utilitarian benefit to make sure that all, or at least most, members of society have the means to move from one place to another. It is also a utilitarian benefit that all or most members of society have enough to eat. While most would agree that both of these are or contain utilitarian considerations, most would probably agree that the second proposition is much more important and dire than the first. It is more important that people have enough to eat than that they are able to travel from point A to point B. This is because without food to eat, they cannot sustain the life with which they would travel. The best transport system in the world does not sustain life, at least not in the first instance. Would it be just as wrong for the government to intervene with rights in its quest to sustain life, as it would be when its aim is to build a good transport system? Now, while this seems, on its face, to be a serious problem for Dworkin, it may not be fair to attribute this equation of utilities to Dworkin since, as I will discuss latter, Dworkin does allow for some exceptions to his theory. It seems that there are some utilitarian (or non-utilitarian) considerations Dworkin will be forced to admit as reasons for intervening with rights.

I stated earlier that Dworkin considers two conservative arguments against his theory or rights as trumps. The first argument is that while it is wrong to make a law which abridges rights, there may be good reasons to enforce such a law once it has been made. In the second conservative criticism, which I now consider, a conservative may argue that a government "may be justified in abridging the personal rights of its citizens

in an emergency, or when a great loss may be prevented, or perhaps, when some major benefit can clearly be secured" (1977:195). This is an appealing criticism of Dworkin's view, since it seems that at a moment of great social upheaval or some other emergency, forces stronger than certain individual rights are forced to the forefront.

Dworkin (1977:195) begins his response to this criticism by asking: "can the conservative argue that when any law is passed, even an unjust law, this sort of justification is available for enforcing it?" It would not be clear how one may answer this question affirmatively, while maintaining the desire for a lawful society. Moreover, Dworkin argues, "if we allow speculation to support the justification of emergency or decisive benefit, then, again, we have annihilated rights" (1977:195). Dworkin's suggestion here seems to be that if we allowed, by mere speculation, the abridging of rights, the society of which we speak cannot be one which respects rights. He expresses this view more pointedly as follows:

> If the issue were simply the question whether the community would be marginally better off under strict law enforcement, then the government would have to decide on the evidence we have, and it might not be unreasonable to decide, on balance, that it would. But since rights are at stake, the issue is the very different one of whether tolerance [for people's rights] would destroy the community or threaten it with great harm, it seems to me simply mindless to suppose that the evidence makes that probable or even conceivable" (1977:196).

In other words, we have no reason to suppose that respect for individual rights undermine in any way, society's ability to seek what is in its general interest. Where rights are thought to exist, it must be the case that the government cannot interfere with the exercise of those rights, not even to obtain some benefit for the majority.

Now, it might seem that Dworkin unreasonably admits of no exceptions to his rights as trumps. But as I stated earlier, this would be unfair. Dworkin does admit of a few exceptions to this rule. In "Taking Rights Seriously," Dworkin (1977:191) writes

"although citizens have a right to free speech, the government may override that right when necessary to protect the rights of others, or to prevent a catastrophe." While in "Justice for Hedgehogs" he modifies those exemptions and restates them thus: "a right may be regarded as a trump even though it might not trump the general good in cases of emergency: when the competing interests are grave and urgent, as they might be when large number of lives or the survival of a state is in question" (2011:473). It is not clear what we might make of his slight modification of the exemptions between the books. Perhaps we may take it as suggesting either that Dworkin had changed his mind about the protection of the rights of others as a ground for intervening with rights, or he understood the protection of the rights of others to be part and parcel of the existential catastrophes or emergencies he refers to in the latter text.

Dworkin does not give account of the specific rationale for the choice of these particular exemptions and not others. But sense can be made of them. If one's rights are important, it is the case that other people's individual[20] rights are equally important.[21] Whatever it is which renders my rights important, also renders every other person's individual rights important. This suggests that I cannot be thought of as having a right to intervene in any other person's exercise of their own individual rights, and vice versa. When there is an unwitting clash of rights, that is, when one of one individual's rights and another individual's rights conflict, in Dworkin's view, governments have the responsibility to adjudicate between them. Governments should decide which of the rights in question is most important and rule in its favor. In discussing one example of these possible clashes, Dworkin notes,

> "individuals have personal rights to the state's protection as well as personal rights to be free from the state's interference, and it may be necessary for the government to choose between those sorts of

[20] It is important to keep in mind that it is other people's *individual* rights that in question here, rather than other people's rights as a collectivity, that is, society's rights qua society. Dworkin does not accept that the society's rights (whatever they may be) can justifiably trump the individual rights of people (1977:194). This is the whole point of the rights as trumps argument.

[21] I will subsequently discuss how rights come about in Dworkin's thought. That discussion should make it clear, not only that for Dworkin, rights belong to all members of society equally, it should also make it clear why that must be the case.

> rights. The law of defamation, for example, limits the personal right of any man [sic] to say what he thinks, because it requires him to have good grounds for what he says. But this law is justified, even for those who think that it does invade a person right, by the fact that it protects the right of others not to have their reputation ruined by a careless statement" (1977:193).

Also, it seems quite sensible to allow governments permission to intervene with rights in the face of an existential catastrophe. Although Dworkin does not elaborate on why he allows this exemption, one can easily grant that for rights to be enjoyed, one needs to be alive and have a minimally worthwhile life. Any occurrence that poses a threat to a great number of lives would be understandable, or even acceptable, grounds for intervening with people's exercise of some of their less important rights. Beyond this limited parlance, Dworkin argues that rights, *qua* rights, exempt its holders from intervention by government even if the reason for doing so is to bring about some benefit for the general population.

In the next section, I discuss a critical confusion in the discussion about rights, which Dworkin lays bare as the reason why opponents of his theory of rights as trumps are suspicious of his view that rights may not be contravened, even when the end is society's good. Dworkin motions toward it when he says:

> I must emphasize that all these propositions concern the strong sense of rights, and they therefore leave open important questions about the right thing to do. If a man believes he has the right to break the law, he must then ask whether he does the right thing to exercise that right (1977:196).

4.3 RIGHT IN THE STRONG SENSE AND "RIGHT" IN THE WEAK SENSE

One of the reasons it is pertinent to offer some discussion of this distinction, however brief, is that I think the African communitarian rights thesis falls into the error which Dworkin points to in his discussion of this confusion. I will show how it does this in the

next chapter. For now, I will consider, in the next few pages, what Dworkin means when he asserts “if a man believes he has the right to break the law, he must then ask whether he does the right thing to exercise that right” (1977:196). In Dworkin’s usage, to think of rights as trumps follows from a strong sense of what rights are. The sense in which right may be analogous to “proper”, “appropriate”, “prudent”, “not wrong,” “socially acceptable or desirable” is the weak sense.

The distinction Dworkin wants to make here is twofold: (i) having a right is not the same thing as having a right to do something good or socially acceptable, and (ii) to say of a person that they have a right is not to say of a person that they are “right” in exercising that right in some instance. In (i) one may have a right to do something which others may find repugnant, or simply do not approve of. In (ii) one may have a right to do something, but it may also be unwise or imprudent for them to exercise that right in some instance.

Dworkin appeals to the distinction in (i) when he mentions in one of his examples that while gambling may be socially unacceptable, if a person has a right not to be interfered with in doing it, they concurrently have a right to gamble. He says, “I use this strong sense of rights when I say you have the right to spend your money gambling, if you wish, though you ought to spend it in a more worthwhile way. I mean it would be wrong for anybody to interfere with you even though you propose to spend your money in a way I think is wrong” (Dworkin 1977:188). One may have a right to do something unpalatable. Notice that Dworkin does not say that one has the right to do something wrong. Stating the matter in those terms may raise the problem of wronging other people. Dworkin does not believe people have the right to wrong other people, if wronging someone entails preventing them from exercising their own rights.

Furthermore, a person may have a right to do something which their conscience advices them against. Dworkin says in this connection, that “the state of a man [sic] may be decisive, or central, when the issue is whether he does something morally wrong in breaking the law; but it need not be decisive or even central when the issue is whether he has a right, in the strong sense of that term, to do so. A man does not have the right,

in that sense, to do whatever his conscience demands, but he may have the right, in that sense, to do something even though his conscience does not demand it" (1977:190). I have the right to self-defence, even if my conscience strongly advices me against defending myself against someone who I know is unlikely to cause lasting damage to me.

This leads quite naturally into (ii). To say of a person that they have a right is not to say anything about how they are to exercise it. That is, whether they exercise it wisely or unwisely, prudently or imprudently. For example, I have the right to self-defense, but it may not be "right" for me to exercise that right when it is clear that an attacker does not have the means to cause lasting damage. Members of society have a right to free speech, but it may not be "right" (because unwise, or imprudent) to raise criticisms of a peace deal, if the absence of that deal means war. But, according to Dworkin, not exercising a right prudently or wisely is never a grounds for interfering with the exercise of that right. To say that someone has used their rights unwisely is not to suggest that they should not have those rights, or that the community is justified in interfering with their exercise of it. It is in this spirit that Dworkin (1977:196) states that "If a man [sic] believes he has the right to break the law, he must then ask whether he does the right thing to exercise that right."

4.4 THE SOURCE OF POLITICAL RIGHTS

Having established the distinction between rights in the strong sense and rights in the weak sense, I will then turn to an issue I touched on earlier in discussing Dworkin's rights as trumps, about the source of rights. It is important to engage with this question because it is important toward determining how rights gain their capacity to trump interferences from one's community or from the state.

In classical Western philosophical literature on rights, there are two polar points as to the source of rights. At one polar point, John Locke argues that rights derive from human nature and precede governments. In fact, one of the ends of government is to protect the rights of individuals (Waldron 1984:3; Letsepe 2011:130). Bentham, on the other hand, thought of the idea of rights that precede their establishment in law – that is,

the idea of rights in nature – as “nonsense upon stilts” (Bentham 1968:501). Bentham argued that the idea of natural rights was not only implausible but also dangerous. Moreover, for Bentham, society or government has one purpose (and one purpose only), and it is not the protection of any species of natural rights which are derivative of human nature. Bentham argued that the aim of government was solely to promote “the greatest happiness of the greatest number” (1968:501). The doctrine of the natural rights theory, on this basis was wholly unintelligible to Bentham (Hart 1983:181). Laws are enacted and rights granted strictly according to how well the government judges this will contribute to the greatest happiness of the greatest number.

Dworkin does not seem to fit neatly into any of these two polar points in rights talk. While he argues that societies are solely an accident, not purposely set in place to grant or protect rights, he also argues that, now that they exist, rights are an essential aspect of where governments derive their legitimacy. He summarizes his views on the matter in “Justice for Hedgehogs” as follows:

> A political community has no moral power to create and enforce obligations against its members unless it treats them with equal concern and respect; unless, that is, its policies treat their fate as equally important and respect their individual responsibility for their own lives. That principle of legitimacy is the most abstract source of political rights. Government has no moral authority to coerce anyone, even to improve the welfare of well-being or goodness of the community as a whole, unless it respects those requirements person by person. The principle of dignity therefore states very abstract political rights: they trump government’s collective policies (2011:330).

In the remainder of this section, I will flesh out this claim.

Dworkin begins with the simple claim that it is quite evident that governments do exist. He says, “familiar governments do exist, their boundaries and hence their claims of dominion are the product of historical accident, and almost all of us are born or brought

into one of them" (Dworkin 2011:318). This claim is generally evident in the world as we know it today. Except for a few peoples around the world, such as the Tuaregs of Northern Mali and the Muslim Rohingya people of Burma, who are often described as stateless, we all belong within states that have governments; governments that claim dominion over us. The dominion they claim over us entails that we have to obey the laws and respect the traditions that obtain within the boundaries of that state. Part of the reason we have the obligation to obey the laws and traditions of the state is that, according to Dworkin, "we are related to our fellow citizens in some special way that gives each of us special responsibility to others independently of any consent" (2011:319).

But where does this obligation to our fellow citizens come from? Citizens of countries ("anything larger than a tiny community") typically don't know each other. When they do, they do not feel much affinity for each other. Moreover, it does not seem to make much sense to posit that this obligation they feel toward each other merely derives from the fact they salute the same flag. In Dworkin's view, there is equally no answer to be found in the history of countries or political societies, since these seem to be no more than the result of "a series of historical and geographical accidents–where rivers run and kings slept–that has made political boundaries of the United States or France or any other place what they are" (2011:319). Dworkin suggests that we "seek the moral force of fellow citizenship not in anything that preceded these accidental political groupings or explains them historically, but rather in the contemporary consequences of these accidents" (*ibid.*). He finds it in the fact that this special relation which members of each society have with each other is built on reciprocity, since "they include the responsibility of each, at least in principle, to accept collective decisions as obligations" (*ibid.*). In Dworkin's reckoning, citizens accept this bargain because to reject it and claim a moral freedom from this collective obligation is to concede such freedom to everyone else as well. Such a situation would lead invariably to a tyranny, where the state would force people to do things they feel no obligation to do. So, according to Dworkin, "it is an important part of our own ethical responsibility, and therefore part of our moral responsibility to others, that we accept for ourselves and require of them the particular associative obligation–political obligation–that we are now considering" (2011:321).

This political obligation, Dworkin says, is important for our dignity. The kind of order and efficiency which such collective coercive government can assure is a necessary ingredient for a good and dignified life. “Anarchy,” Dworkin says, “would mean the end of dignity altogether” (2011:320). So a government is legitimate when it is one to which all members of society feel obligated, and one which strives “for its citizens’ full dignity even if it follows a defective conception of what that requires” (Dworkin 2011:322). Legitimacy is not an all or nothing value. A government may put in place laws and policies which respect dignity and reflect the obligations citizens feel toward each other, while also pursuing other policies that undermine these for some group or the other. What is important, for Dworkin, is that “a political community has no moral power to create and enforce obligations against its members unless it treats them with equal concern and respect; unless, that is, its policies treat their fate as equally important and respect their individual responsibility for their own lives. That principle of legitimacy is the most abstract source of political rights… The principle of dignity therefore states very abstract political rights: they trump government’s collective policies” (2011:330).

As I see it, the focal point from which rights issue in this system is not only the obligations people have to each other in the context of society, but also the fact that part of what that entails is reciprocal respect for each individual’s responsibility over their own lives. A government is illegitimate that does not respect people’s responsibility over their lives. Rights are trumps because they guarantee each individual’s ability to exercise this responsibility over their own life. A government that does not respect this responsibility does not take rights seriously. A government that does not take rights seriously is not legitimate.

Now, legitimacy is always a matter of degree. Dworkin notes that:

> a state’s laws and policies may in the main show a good- faith attempt to protect citizens’ dignity, according to some good- faith understanding of what that means, it may be impossible to reconcile some discrete laws and policies with that understanding. A state may have an established democracy, provide for free speech and press,

> offer constitutional tests through judicial review, and provide adequate police service and an economic system that enables most of its citizens to choose their own lives and prosper reasonably. Yet it might pursue other policies that cannot be understood other than as a fl at denial of the principles on which that attractive general structure is based. It may exclude some particular minority—of race or economic class— from benefits its policies assume to be requisite for others. Or it may adopt coercive laws that threaten liberty in misperceived emergencies or to enforce some cultural imperative: to improve the sexual ethics of the community, for example. These particular policies may stain the state's legitimacy without destroying it altogether (2011:322-323).

The significance of pointing out that legitimacy may be had in degrees, as Dworkin argues, is that minor acts of intervening in individual rights may not necessarily render a government illegitimate altogether. But it certainly does detract from such government's legitimacy. Rights trump government action, even if the end of that action is to obtain what the government believes is the interest of all members of society collectively.

In the next section, which is the last of this chapter, I show that Dworkin's account of rights as trumps does not contradict other influential theories of what rights are and how they function.

4.5 DWORKIN AND OTHER INFLUENTIAL THEORIES OF RIGHTS

At the onset of this chapter, I noted that I chose Dworkin's theory of rights as trumps because it is an influential account of how rights function. But, as I also noted there, there are a number of other influential accounts of rights that have come to receive wide acceptance and elicit broad engagement in the literature. I will consider two such influential theories, with the aim of showing that they do not contradict Dworkin's rights as trumps as far as the idea of rights trumping communal interference is concerned. In many respects they corroborate it. I will consider, in particular, Joseph Raz's rights as interests as elaborated in his 1986 book, "The Morality of Freedom", and Joel

Feinberg's rights as valid claims as offered in his 1970 essay, "The Nature and Value of Rights." To be sure, each of these accounts disagrees with Dworkin's theory in terms of what people are taken to have rights to, that is, in terms of what the content of rights are. I do not go into that aspect of these theories here because that is irrelevant to my end here. I will, however, argue that they agree with Dworkin in the respect that matters, in terms of how rights function.

Raz defines rights as interests people have which are so important in and of themselves that they spontaneously create duties in other people. In other words, "'X has a right' if and only if X can have rights and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty" (Raz 1986:166). Raz uses interest and well-being interchangeably. According to this theory individuals have rights to things that they have an interest in. Raz further explicates on this theory by offering an account of what it means to be capable of having rights. He says, "an individual is capable of having rights if and only if either his wellbeing is of ultimate value" (*ibid.*). Rights derive from how important it is to guarantee people's wellbeing, seeing as they have ultimate value. But do all interests people have count equally towards their rights? Raz does not seem to believe so. But he leaves the task of sorting out the interests that deserve more serious attention undone. According to Waldron, "on Raz's conception, the idea of rights is a discriminating idea, sorting out those interests that merit special attention from those for which utilitarian calculation seem appropriate. It is the task of a substantial theory of rights to provide a rationale for this discrimination" (1989:504).

In Dworkin's statement of his theory of rights as trumps, he explicitly refers to rights as interests. Dworkin writes in "Justice for Hedgehogs," "sometimes, however, people use the idea of political rights in a stronger and more discriminating way: to declare that some *interests* particular people have are so important that these interests must be protected even from policies that would indeed make people as a whole better off" (2011:329). Unlike Raz, he does not offer a detailed account of what he means by interest. But Dworkin can agree with Raz's conception of rights without contradicting the idea of rights as trumps. What the idea of rights as trumps simply involves is that rights

are such entities that take precedence over other considerations governments or communities may have. Dworkin's account of how rights are generated, as discussed in the previous section, is consistent with Raz's interest theory, in that it seems that, for Dworkin, "individual responsibility for their own lives," is an interest sufficiently important as to generate a duty in the government to refrain from interfering in their exercise of rights (Dworkin 2011:330). It seems that the emphasis by each of these theories is on different aspects of rights theory, although, as it appears that they both agree that (i) rights derive from interests people have which are important in and of themselves, and (ii) rights generate a duty in others and the government to refrain from interfering in the exercise of rights. Raz places emphasis on how rights derive from interests, and generate duties in others. Dworkin emphasizes the notion that rights (generated from interests people have in being responsible for their own lives) trumps other governmental considerations, that is, generates a duty in government to steer clear of rights.

Dworkin's theory of rights as trumps is also consistent with another influential theory of rights, Feinberg's rights as valid claims. According to Feinberg, the idea of rights is fundamentally linked to the notion of claiming. He says, "the conceptual linkage between personal rights and claiming has long been noticed by legal writers and is reflected in the standard usage in which "claim-rights" are distinguished from other mere liberties, immunities and powers, also sometimes called "rights," with which they are easily confused" (1970:247). Rights, for Feinberg are valid claims people have to that in respect of which they are said to have a right. In other words, "when a person has a legal claim-right to X, it must be the case (i) that he [sic] is at liberty in respect to X, i.e. that he has no duty to refrain from or relinquish X, and also (ii) that his liberty is the ground of other people's duties to grant him X or not to interfere with him in respect to X" (*ibid.*). My right to a thing allows me to claim a duty from you in respect to that thing.

The specific way Feinberg frames rights when he says that "his [sic] liberty is the ground of other people's duties to grant him X or not to interfere with him in respect to X" is instructive in terms of how consistent his theory is with Dworkin's rights as trumps. Part of what rights involve is that they give others a duty to refrain from interfering with the

right-holder's exercise of the right. This is clearly consistent with Dworkin's view that rights are such things that they trump other policy considerations the government may have, even when those policy considerations are thought to be beneficial to society as a whole. Rights demand that governments refrain from interfering with the exercise of rights. It is hard to imagine that Dworkin would not concur with Feinberg that when one has a right, he or she has the impetus to demand or claim from others (including their government) that the exercise of said right not be interfered with. To be sure, Feinberg also wants to argue that when one has a right to a thing, somebody else or the government does not only have a negative duty of not interfering, but also the positive duty of making that to which the person has the right available to them. Dworkin's theory of rights as trumps does not go so far. But it does agree with the more minimalist part of Feinberg's theory, that rights allow one to claim non-interference from government. Both accounts would agree that rights are trumps to other government or community considerations, even those that are expected to be in the interest of all members of society.

In conclusion, as I stated at the onset, my aim in offering an account of Dworkin's theory of rights as trumps, is to offer some theoretical basis for the criticism which Matolino, Famakinwa and Oyowe raise against the African communitarian theory of rights, namely, that it does not offer a sufficient account of rights. As was discussed in chapter three, Menkiti argues that community grants rights only to those who have lived up to its norms, and Gyekye argues that the community is at liberty to interfere with the exercise of rights when doing so suits some aim the community may have. These notions of rights in the radical and moderate communitarian accounts are clearly inconsistent with rights that trump other considerations. In the next chapter, I will reformulate that criticism with the benefit of Dworkin's theory of rights as trumps, that is, of how rights function, to guide me. I shall argue that the African communitarian rights thesis misses the point of rights in this respect altogether.

CHAPTER FIVE: IS THE AFRICAN COMMUNITARIAN THEORY OF "RIGHTS" ACTUALLY A THEORY OF RIGHTS?

Having discussed, in chapter four, an influential contemporary theory of how rights are typically understood to function, I will now argue in this chapter that the notions of rights contained in the African communitarian theories of Menkiti and Gyekye do not meet basic minimum requirements for how rights are typically understood to function. I will do this in the following three ways: (I) I will compare the idea of what rights are, and how they function, in Dworkin's influential account of rights as trumps, with the accounts of rights put forward by Menkiti and Gyekye, and show that the "rights" in Menkiti and Gyekye just do not measure up to how rights are typically understood to function. I will highlight some further implications of this incongruity by arguing, (a) that what Menkiti offers is rather is an account of how the society or community reward its members, and that rewards-systems are typically so different from rights-systems that rewards-systems can sometimes oppose rights-systems, and (b) that the "rights" Gyekye offers seem superfluous in that a system that actively eschews rights (such as a benevolent dictatorship) could produce precisely the same kind of society as Gyekye rights account would produce in reality; (II) I will argue that the African communitarian rights thesis, both of the moderate and radical varieties, place too much value in the pursuit of utilitarian goods to be able to offer accounts of rights which meet the basic minimum requirement of rights; (III) and finally, I will reconsider Famakinwa's and Oyowe's criticism of the moderate and radical communitarian rights theses in light of Dworkin's account of rights as trumps. I will end this chapter by considering two possible criticisms of my argument (IV).

I

As was discussed in chapter two and parts of chapter three, two altogether different ideas of rights appear within the communitarian rights corpus in African philosophy. On the one hand, Menkiti, and the radicals, offer an account in which one must earn rights within a community just as one earns personhood. On the other hand, the more moderate communitarian view proposed by Gyekye, offers an account in which rights

belong inalienably to the individual, but in which the exercise of rights may be subverted at times for communal and social ends. In this section, I will compare each of these views to Dworkin's theory of rights as trumps separately, because although they both place community in the commanding role, they do not both do it in the same way, and they do not both do it to the same extent (which is precisely the idea behind their characterization as radical and moderate).

Dworkin and Menkiti:

As has been discussed in chapter two and parts of chapter three, Menkiti links rights to the notion of personhood. Personhood, according to Menkiti, is processual, in that it is not acquired all at once. It is acquired gradually, relative roughly to how well one lives the normative stipulations of community. Personhood, therefore, belongs to those whom the community has judged worthy through their exercise of the community's moral stipulations. Rights are linked to personhood in that rights are the reward one receives when they acquire personhood, that is, when they have been recognized by a particular community for having reached a level of responsiveness to the moral stipulations of the community. As I wrote in chapter two, the logic of rights in the radical communitarian rights account runs as follows: an individual is, on the normative account, a person when they have lived according to the moral dictates of their community; to live according to the normative dictates of their community is to perform their duties to it, and through it to one another; one does not have rights until they have been given them by their community; no one is given rights by their community until they are recognized as having performed their duties to community.

So, if rights are acquired concurrently with how well one adheres to society's norms in the radical communitarian framework, how are we to understand such rights as functioning? In this system, there are three distinct but interrelated ways rights may be understood as functioning. First, they function as rewards. You get them when you have behaved well, that is, when you have lived up to society's moral standard. You get rights if, and only if, you have been judged worthy according to the normative standards of community. Good deeds are rewarded with rights. Second, they function as a tool for

encouraging and re-enforcing good behavior. People may be expected to persist in their good behavior if they want to continue enjoying certain rights. Third, rights, or more specifically, their denial, serve as a tool for penalizing people who behave badly. Not being given rights, or being denied certain rights, may be a form of punishment for not having lived up to society's moral standards.[22] What these three possible ways of viewing the role of rights in the radical communitarian framework have in common is that they yield rights entirely to community. Secondly, they link rights to community's normative stipulations inextricably.

One practical problem with this view of the ways rights function concerns the fact that it is not clear how rights as rewards for faithfulness to communal norms would pan out in reality. I suspect radical communitarians accept the proposition that there is not just one right; there is a whole array of them (for example, the right to life, the right to bodily integrity, the right to free-expression, the right to freedom of worship, the right to freedom of assembly, etc.). Since there is an array of rights that people can have, the question is, when they are given rights by community, do they get all of these rights simultaneously, or do they only get some rights, or do they get rights in some other random unspecified way? An account that links the granting of rights progressively to the measure in which an individual has lived up to the community's norms surely should give rights in degrees. But which rights would be given first, and which would be given last? Menkiti does not seem to take on this issue at all. The problem of why the radical communitarian would choose any of these ways of delivering rights as opposed to the others is one a radical communitarian might want to think seriously about. Furthermore, what happens when one's expression of their rights allow them to veer away from the

[22] One might notice that the denial of rights, for example, when ex-cons are denied the right to vote in the US state of Florida, is likewise a way to penalize bad behavior through rights in the West, and that this means Menkiti's account is not unique in this respect. Two responses are possible to this observation. First, if Menkiti's account is devoid of a real account of rights, as I aim to argue, a society which is similar to the one Menkiti envisions is equally devoid of a real account of rights. That it is "Western" does not salvage it. Secondly, I would disagree that a system in which you are denied certain rights because you committed a crime such as killing, for example, which is what obtains in the US state of Florida, is similar in the way relevant here, to a system in which you are denied rights because you were self-serving, for example, when you refuse to share your food with the hungry. The latter is what obtains in Menkiti's proposed system since his notion of rights is linked to his "ethic of duty" in which each member of society is awarded rights only when they have performed their duties to others and to the community. Some of those duties include, being sensitive to the plight of others, and respecting the elderly, etc (Gyekye 1997).

kind of behavior which rendered them deserving of rights to begin with. Now, while these are important practical questions which accrue to the radical communitarian account of rights I have presented, none of the problems which those questions can raise for the radical communitarian account suggests that, for that account of rights, rights function in any way other than as a reward, as a tool for encouraging and re-enforcing good behavior, and as a penal measure against those who do not adhere to community's norms.

If it is correct to say that rights, in the radical communitarian account, function as reward for good behavior, as a tool for encouraging and re-enforcing good behavior, and as a penal measure against those who do not adhere to community's norms, a community would most likely avoid granting rights to those who carry out actions which are not beneficial to the community, or which do not accord with community's norms. In other words, we can assume that the rights given will be thought by the community to be consistent with communal norms. It does not seem sensible that rights given as a reward, a re-enforcement and a penalty regarding communal norms, will allow their holder to go against those same communal norms. To be sure, Menkiti does not go into great detail regarding this aspect of his theory, but I suspect that we can speculate that, to be consistent with the reason rights were given to begin with, and how they are expected to function once they have been given, the rights given in the radical communitarian setting will not allow, say, a person who has access to more food than she needs for herself, in a hunger stricken community, to keep this to herself. People would not have such right because it would be against the duty radical communitarians believe people to have to help those who are in need in their community. So rights are not only given as a reward for good behavior. They are given in such a way as to benefit the continued performance of communal duties.

So it would seem that what Menkiti is offering is, rather than an account of rights *per se,* an account of reward. The idea that what Menkiti is offering is an account of reward leads to a further point. The idea of reward is one that may be culture-specific, or may play out in reality in culture-specific ways. To be sure, it is probably the case that reward, in every context, is a form of recognition for something someone has done, or

achieved, or made an effort to achieve. That is, regardless of cultural context, when someone is said to be rewarded, it is likely always the case that they are being given some form of recognition for something they have done. However, it is also the case that what counts as an act of recognition or a reward for good deeds, will differ across cultures. David Flamm and Peter Kihl (2004), for example have noted that "companies encounter problems when they try to structure reward systems, which is capable to improve both individual and collective efforts…a cultural aspect can have an effect on a reward system. A Swedish employee might not react to a specific reward in the same way as an Englishman or an American" (2004:ii). This suggests that different cultures take different things to count as rewards. In my own anecdotal cultural experience as a Nigerian Igbo person, raised among Nigerian Ibibios, it seems to me that there are significant differences in terms of what each of these cultures take as counting toward a reward. For example, from my experience, exempting a child from manual labour for some time, and placing them in a position to supervise other children, is one way the Ibibios reward hard-work in children. Whereas the Igbos reward hardworking children by increasing the amount of labour that is allotted to them. It is important to note that it does sometime seem strange to Igbos that the Ibibios reward hard-work by exempting people from work, and Ibibios sometimes view the Igbo reward-system as punishing people for their hard-work by giving them even more work.

Now, if this is correct, it seems clear to me that in principle, it is possible for some culture to reward good deeds in ways that undercut the dignity of the individual, as members of other cultures view it. I think that since Menkiti's theory utilizes rights in a system of reward for adherence to societal and communal norms, the rights it proposes could turn out entrenching indignities, since different people and communities have vastly varying, even opposing, reward-systems. To be sure, this is only correct if we assume, as one has to if they reject moral relativism, that two communities with diametrically opposing moral practices cannot both be morally correct at the same time; one of those communities' moral practices are morally wrong. I think that one has to reject moral relativism since it is arguable that much of the indignities against which rights are a safeguard result from a certain degree of moral relativism among those who would violate other people's human dignity. So, rewards can sometimes be at odds with

human dignity which rights are supposed to safeguard. Furthermore, moral relativism undermines law in multi-cultural societies, such that a theory of rights which depends on reward-system, could actively undermine the laws. This suggests that Menkiti's rights accounts is not an account of rights in any sense that allows the word "rights" to mean much for the dignity of those who are said to have it.

Furthermore, the radical Afro-communitarian conception of rights as rewards and as entitlements which serve the community's benefit, also contradicts the notion of rights as trumps offered by Dworkin. According to Dworkin, rights (that is, each individual's entitlement to unilaterally decide the course of their own life without interference) belong to all members of society, and they belong to all members of society equally. In Dworkin's thoughts, they derive from the obligations members of society have to recognize each other's responsibility for their own private lives (2011:330). The community is not justified in intervening with the performance of any actions in respect of which members of society have a right, even if their reason for wanting to do so is that there is some benefit for the whole community. Rights trump other social and communal considerations. To have a right is to have a right to do something of which other members as well as the government may not necessarily approve. A society, according to Dworkin, which undermines rights simply because doing so will bring some benefit for the general community does not take rights seriously. In other words, a theory according to which community gives rights as rewards, and only for actions which are thought to have a social or communal benefit, according to Dworkin, does not satisfy this basic condition for rights.

In fact what such a theory as radical communitarianism offers can hardly be called rights. Rights belong to all, and equally. Put differently, each member of society has an equal entitlement to unilaterally determine the course of their own lives without interference. The rights offered by Menkiti belong to only people who have been judged deserving of them by a relevant community to which they may be said to belong (Oyowe 2014:332). And even among those to whom rights have been given, these can be given to them in varying measures, relative to how well each adheres to community's normative stipulations. But according to Dworkin, rights cannot be overridden simply by

appealing to some good to be gotten by community in doing so. People have rights to do things which the community may not approve of. Menkiti's rights would not countenance this understanding of rights.

Furthermore, the radical communitarian "rights" thesis seems to be confusing rights in the strong sense, and "rights" in the weak sense. As I discussed in chapter four, rights in the strong sense are rights as trumps, whereas "rights" in the weak sense have to do with doing the right thing. A person may have a right (in the strong sense) to gamble with their money, although that is not necessarily the right thing (in the weak sense) for them to do. Attaching rights so closely to what the right thing is, Menkiti's radical account of rights misses the point of what rights are altogether. In Menkiti's system no one would ever have rights to do what the community views as the wrong thing, since rights are only given as a reward for having lived up to the normative standards of the community. But, for Dworkin, rights are utterly useless if they are only had when the community wants them to be had. They are also useless if they do not allow their holder to do what their rights entitle them to, even when the community disapproves. What the radical communitarian account offers are rewards, and rewards function differently from rights. Rewards, generally speaking, are meant to encourage people to continue doing the right thing. Rights are meant to allow its holder to be the sole determinant of what they do, provided they do not intervene with other people's rights in the process.

Dworkin and Gyekye:

Gyekye's account of rights avoids some of the most damning problems with the radical account. While Gyekye also argues that personhood is ascribed to people by the community like Menkiti, he however does not link rights to it. For Gyekye, rights are based on the notion that humans are rational autonomous entities, in addition to their being communal in nature. So, in Gyekye's system, rights belong to all, and equally, because rights are entitlements people have on account of their being autonomous rational human beings. But where Gyekye's account's veers away from how rights function according to Dworkin is in terms of their exercise.

According to Gyekye, a communitarian system, even a moderate one, cannot be obsessed with rights. The community has the prerogative to identify what it judges to be the values it wants to pursue, and channel everything else (including the exercise of rights) through those values. The implication of this is that it could be appropriate to repress the exercise of rights that may allow people to go against those values. Of course, Gyekye uses a sleight of hand to say this, which he expects would exempt him from criticism which would be due to his account if he had just stated that rights which are counter to society's common good are to be suppressed. He arrives at that view via the roundabout route of placing greater emphasis on duties. According to Gyekye, although a communitarian will not be obsessed with rights, she will definitely be obsessed with duties. In Gyekye's view, if people perform their duties to the community, some of which he identified as being respectful to elders, being responsive to the plight of others, and doing things which advance community, rights will ideally become redundant, that is, no one will ideally need to claim rights, because that for which they need rights would already be provided for. The question Gyekye's argument raises here, is the question of what happens if individuals who Gyekye recognizes have a right to arrange their lives as they please by virtue of their rational autonomy, choose to exercise the right to not be responsive to the plight of others in community, for example. Gyekye would be forced to admit that his account would have to override those rights.

It would be wrong to equate Gyekye's account of rights to Menkiti's simply because both accounts give great weight to communal considerations. Both do not give the same kind of role to community. Menkiti gives ultimate weight to community as the point where rights emanate, and as the sole beneficiary of rights. Gyekye grants that individuals have rights inalienably and equally, but that their exercise of it ought not to interfere with what is good for community, but rather should protect it. Gyekye is ultimately interested in the common good (and he views community as a common good), and rights, he posits, must be consistent with the common good.

However, even this more moderate Gyekyean account of rights is clearly at odds with Dworkin's account of rights since rights in Dworkin's account trump communal considerations. Communal considerations should not be able to trump rights people

have to conduct their lives as they see fit, insofar as they do not interfere with other people's exercise of the own rights. Rights, by their nature cannot be subordinated to the common good. In fact, Dworkin may say that the common good is precisely that everyone is able to exercise their rights without interference from community, even if interference would secure some greater good for the community as a whole. In Dworkin's account, if I have a right to a seat on the bus, my supposed duty to vacate it in response to the plight of an older ill person, should not override that right. The decision to stand up should be mine to make. And if I decided not to vacate the seat, the community is never justified in forcing me to do so.

This does not, of course, mean that Gyekye confuses rights in the strong sense, with "rights" in the weak sense. Gyekye does recognize that rights entitle people to conduct their private affairs in whatever way they see fit (so far as they do not interfere with other people's rights in the process), but he places the exercise of rights at the mercy of community according to what they determine to be in the common interest. To prevent someone from exercising their rights, according to Gyekye, is not the same as saying they do not have those rights. So Gyekye would admit that people have the right to do things which fall outside the community's definition of good, but they can be prevented from exercising that right.

Even without confusing rights in the strong sense and the weak sense, Gyekye's account misapprehends rights by placing them lower on the pecking order, second to the common good. An account which characterizes rights as giving way to community considerations, according to Dworkin, does not sufficiently account for rights. What use are rights, Dworkin may ask, if the community may override them at will? Rights are supposed to defend individuals from the tyranny of the collective. In a system that respects rights, a rights-holder should not have to endure sacrifice they would rather not endure, in order that some good may accrue to the community as a whole.

Furthermore, an account which places rights lower on the pecking order than some idea of the common good is one in which rights are superfluous. In Gyekye's rights system, although people supposedly have rights, the community can interfere and prevent the

exercise of those rights. This system does not seem to differ significantly from the system a benevolent dictator might set up. Rights are not a typical feature of dictatorships, regardless of how benevolent they promise to be. But it is not inconceivable that since the benevolent dictator has the good of her people at heart, she will, whenever it suits her idea of what a good society is, allow her citizens to make some of the choices for their lives. I suspect that Gyekye's rights system and the benevolent dictator's regime will play out in more or less the same way in reality. Both will play out in such a way that (i) the "common good", however that is defined, is the overwhelming consideration in the decisions the society or community makes; and (ii) individuals occasionally do have the opportunity to exercise some decision-making power in their own lives (this is the typical form the exercise of rights take).

Notice that I have not veered into the question of whether or not a dictatorship, benevolent or otherwise, is an acceptable way to organize society or to govern. My general suspicion is that any kind of dictatorship is probably going to prove unacceptable over a large enough time-frame. However, I do not need to make that claim in other to establish my point above, because I am not necessarily attempting to argue that Gyekye's rights system would be unacceptable. All that I assume is that, at least in theory, a benevolent dictatorship is a system of government in which the individual rights of citizens are not recognized, almost as a first principle. The defining feature of benevolent dictatorships is that the leader exercises absolute control over society, but does so to benefit members of society (Gilson & Milhaupt 2010). As I noted above, it seems conceivable that a system in which does not feature rights at all, would produce the same effects for its members in reality as Gyekye's right system.

It is important to note that there are other systems which do not take rights into consideration but which would not produce the same effect in reality as Gyekye's rights system. So, I am not suggesting that every system which does not recognize rights would produce effects similar to those that may be produced by Gyekye's rights account. But clearly a benevolent dictatorship could, and this allows us to see the weakness in Gyekye's account of rights. It would be impossible, I think, to argue, at least not correctly, that a theory that takes rights seriously, say, Dworkin's theory of

rights, would produce the same results in reality as a theory that does not even countenance rights at all, such as the benevolent dictatorship.

II

Another way in which the African communitarian rights theses runs afoul of how rights are typically understood to function, which has been hinted at repeatedly in the discussions above, has to do with the fact that African communitarianism puts great emphasis in utilitarian gains. Theories that put great weight on utilitarian considerations typically argue that "the purpose of morality is to make life better by increasing the amount of good things (such as pleasure and happiness) in the world and decreasing the amount of bad things (such as pain and unhappiness)," and that "what makes a morality be true or justifiable is its positive contribution to human (and perhaps non-human) beings" (Nathanson 2015). I think African communitarian rights theories of Menkiti and Gyekye give weight to utilitarian gains in exactly this way.

Thaddeus Metz, in a 2012 article titled *Developing African Political Philosophy: Moral-Theoretic Strategies,* argues, and I think correctly, exactly the thesis that African ethical thought in general, and Gyekye's communitarian view in particular has utility as its fundamental concern. Metz (2012:62-63) writes:

> About twenty-five years ago, in the initial (1987) edition of his first book, *An Essay on African Philosophical Thought*, Gyekye clearly expressed the view that, for the Ghanaian Akan and many other African peoples' moral thinking, utility is one foundational concept, at least when it comes to the point of praiseworthy action. For Gyekye, the best theoretical interpretation of African morality, that is to say, one that attempts to reduce all moral considerations to a single basic property, is this: 'Moral value in the Akan system is determined in terms of its consequences for mankind and society. "Good" is thus used of actions that promote human interest. The good is identical with the welfare of the society. . . . Just as the good is that action or pattern of behaviour which conduces to well-being and social

> harmony, so the evil (*bone*; that is, moral evil) is that which is considered detrimental to the well-being of humanity and society.' Gyekye has continued throughout his career to advance a welfarist theory of the aim of sub-Saharan ethical behavior and has as recently as 2010 said that from a traditional sub-Saharan perspective,' what is good is constituted by the deeds, habits, and behavior patterns considered by the society as worthwhile because of their consequences for human welfare. The goods would include such things as generosity, honesty, faithfulness, truthfulness, compassion, hospitality, happiness, that which brings peace, justice, respect, and so on. . . . African morality originates from considerations of human welfare and interests, not from divine pronouncements. Actions that promote human welfare or interest are good, while those that detract from human welfare are bad.'

So, according to Metz, Gyekye takes the end of morality to be the maximization of utility. Gyekye argues for the pursuit of the things that would conduce with the good of the community as such, as determined by the community. Viewed through this prism, it makes sense that Gyekye would subjugate the exercise of rights to the good of the community as such. But, this also allows us to make sense of the fact that Menkiti argues that rights are given as a reward for having lived according to community's normative stipulations, since the community's norms are geared toward the good of community as such.

If this correct, it becomes clear that the notions of rights contained in the African communitarian rights theories do not measure up to how rights are typically understood to function, according to Dworkin's rights as trumps. According to Dworkin, utilitarian concerns are never a good reason to subvert rights. Dworkin declares, "the prospect of utilitarian gains cannot justify preventing a man [sic] from doing what he has a right to do" (1977:193). If I have a right to determine what happens with my property, the chance that the community may benefit from depriving me of it, or preventing me from using it as I please, does not justify subverting my right. This is clearly at odds with

Menkiti's system in which rights are given only as a way to further community's norms, and Gyekye's system in which rights which are not in the common good may be suppressed. In both systems it seems perfectly proper to forcibly deprive me of my property if some good may accrue to the community in doing so. So, as utilitarian views or as theories which place weight on utilitarian gains, both Menkiti's and Gyekye's rights theses, do not meet the standard of how rights function, that is, they do not meet the basic minimum of rights.

III

By now, it should have begun to become clear how the criticisms of Famakinwa and Oyowe fit into the broader problem with the African communitarian rights thesis, in terms of how the rights they propose function. I will now reconsider those specific criticisms offered by Famakinwa and Oyowe which gestured toward a problem with the way the rights offered in the radical and moderate communitarian accounts function, as opposed to how rights are typically understood to function.

According to Famakinwa, "Gyekye is a communitarian not because he accepts the individual's social nature, but basically because he endorses the moral superiority of the community and certain duties. He, like other communitarians, is of the view that striking a balance between rights and responsibilities is at times, possible, but in the case of a moral clash between duties and rights, where striking a balance seems impossible, the former ought to be salvaged. The community is "a good", in fact a common good, that must be protected, no matter what" (2010:153). So, rights are meant not necessarily as what entitle individuals to being treated with dignity and respect, but as a tool for protecting the "common good" of community (*ibid.*). The value of rights, within this framework, is closely linked not necessarily to the dignity of the individual as such, but what the protection of dignity may acquire for the common good.

It seems quite clear that the rights offered in Gyekye's account appear wrongheaded in Famakinwa's reckoning precisely because the rights offered there are closely linked to the utilitarian good of community, which, in Dworkin's account, should never justify interferences with rights. In Dworkin's account, we have no reason to be proud of rights

if they can easily be overridden by speculations about what good may be had in overriding them. So, in the example of electing one's leader which Famakinwa invokes, properly speaking, where rights entitle one to being able to choose their leader, some perceived gain for the community which can be had by preventing them from exercising that right does not, or should not, justify preventing their exercise of those rights. The moral dilemma "between allowing the electorate to exercise their voting rights the way they want, and the community good which such freedom could undermine" only exists for Gyekye because fails to account for rights as trumps.

Oyowe's criticisms of Menkiti's and Gyekye's rights theses follow a similar trajectory. Oyowe notes, regarding Menkiti's notion of rights, that

> because it prioritizes collective or people's rights over individual rights by construing collective rights and interests as existing over and above individual ones, this conception of human nature yields the undesirable consequence that individual rights must always make way for collective rights. It seems to me that the litmus test for any serious conception of human rights is its performance over a range of conflict situations; so-called African conceptions of human rights readily imply that human rights always give way to traditional values (e.g. communal harmony, kinship relations, etc.) whenever these values conflict. Moreover, prioritizing collective rights over individual ones may summarily exclude non-conforming individuals and minorities (2014:334).

According to Oyowe, the consequence of placing collective interests over those of the individual who has rights, is that the theory offered is not a serious account of rights. Rights, he argues are things which play a role principally when the question of what the collectivity cannot do to or with the individual rights-holder is at issue. If a conception of rights is shown to be incapable of protecting human dignity in all cases, even in cases where it is consistent with the collective interest to undermine the dignity of some member of community, it cannot be desirable as an account of rights. And Oyowe is

quite in agreement with Dworkin when he says that “the litmus test for any serious conception of human rights is its performance over a range of conflict situations.” As we have noticed repeatedly, Dworkin argues that a theory of “rights” which prioritizes the ends of the community as a whole, does not take rights seriously.

Furthermore, according to Dworkin, communities do not have rights, or they have rights in a sense different from the one at issue here. A proponent of Menkiti’s theory cannot restate the issue by claiming the collective’s rights should be able to trump those of the individuals, and that in doing so the rights of individuals are not completely eroded, but only curtailed since they clash with those of the community. The community cannot claim any rights because such right would amount to a tyranny of the majority. Dworkin argues,

> It is true that we speak of the “right” of society to do what it wants, but this cannot be a “competing right” of the sort that may justify the invasion of a right against the government. The existence of rights against the government would be jeopardized if the government were able to defeat such rights by appealing to the right of a democratic majority to work its will. A right against the government must be a right to do something even when the majority thinks it would be wrong to do it, even when the majority would be worse off for having it done (1977:194).

Menkiti cannot claim that his account safeguards the rights of individuals if it claims that those individual rights may be curtailed when they clash with the community’s rights. In attempting to issue rights exclusively in a way as to satisfy the community’s ends, Menkiti misses the point of rights altogether.

Additionally, Oyowe finds that Gyekye’s account also does not seem to offer an account of “rights” which cohere with the way rights typically function. He is in total agreement with Dworkin when he says of Gyekye’s rights thesis that

> fails to see that human rights by their very definition are for the most part conflict notions, entailing claims that are held against others, society or the state. Because human rights are protections against legal, social and political abuses, including policies that threaten human dignity, they may not always be consistent with programmes and policies that purport to advance the collective good (e.g. state sanctioned torture against terrorism). A sophisticated conception of human rights must demonstrate keen awareness of the political and moral tradeoffs that respect for human rights often demands rather than insist on blanket claims that presuppose that there could be no radical conflicts between individual rights and collective good or that these claims ought to be equally held (2014:338).

Rights are utterly useless if they do not safeguard the individual from external interference. Oyowe's criticism here recognizes this fact about rights. Gyekye, in subjugating the exercise of rights to the common good, misses this point altogether. In doing so Gyekye's moderate African communitarian theory of rights misses the basic point of rights.

IV

This last section defends my argument against two possible objections. To be sure, there may be many more possible criticisms of my argument, but I will only consider this two because they get at the heart of what I am doing in this research, which is to argue that the radical and moderate African communitarian rights theses of Menkiti and Gyekye do not meet a basic minimum condition for how rights are supposed to function as laid out by an influential account such as Dworkin's theory of rights as trumps. The first has to do with my choice of Dworkin's theory of rights as trumps. Proponents of this criticism may argue that I simply chose him to further a particular view of rights as the correct one; that there are several views of rights which I could have chosen but did not. The second criticism has to do with my apparent argument that simply because the

African communitarian rights theses does not cohere with rights as trumps that therefore they are not about rights at all. I will discuss each in turn, in what follows.

In the first criticism which may be leveled against my argument in this research, an opponent of my view may argue that my choice of Dworkin's rights as trumps reflects a predisposition on my part to a particular conception of rights. They may argue that there are other influential[23] contemporary accounts of rights which may present a less-stark picture of whether or how the African communitarian account veers far from rights. This is an important criticism since, if it succeeds, it has the potential of making my argument seem like simply a dismissal of one theory of rights in favour of another without much argument. I will answer this criticism in two ways.

First, Dworkin's theory of rights as trumps seems to cohere with the way the word "rights" is typically deployed in our everyday language (at least in the English-speaking world). If Dworkin's account coheres with our general usage of rights in everyday life, then it is a generally good yardstick for whether or not a theory is a theory of rights generally speaking, if even if does not cohere with other influential accounts. But as I argued in the last chapter and will observe at a latter point in this chapter, it coheres with other influential rights accounts in the relevant sense. How does Dworkin's theory of rights as trumps cohere with our everyday usage of the idea of rights? We can think of this from two perspectives, namely, a domestic perspective and a political perspective.

In a domestic relationship, that is, in a relationship between parents and children, siblings, spouses, and we can even add business relationships here although they are much more formal and formalistic than the others. When a husband says to his wife that he has the right to something with respect of their marriage, or the child says to her parents that she has a right to something with regards to her role as a child in the home, or a business partner says to another partner that she has a right to something pursuant to a signed and binding contract, what do they mean? They typically mean that it would be wrong for the other participant to do something to go against what they have a right

[23] I understand an influential contemporary account here as one that has received wide acceptance, or at least wide engagement in the contemporary philosophical literature.

to. This seems quite rudimentary. “I have a right to live in our marital home,” means nothing if it does not mean that the wife is wrong in doing anything to interfere with the husband’s living in that home. When a child says to his mother, “mum, I have the right to eat lunch in peace,”[24] the underlying suggestion is that any interference in the child’s eating of their lunch in peace is wrong. Of course, most of us will agree that, save for the case of a business relationship, rights are not very much a prominent feature in domestic relationships. The mother or father typically feeds their child because they love their child and want her to survive and thrive, not because the child has a right to be fed. But what the use of rights in this setting undoubtedly takes for granted is that where someone has a right to something it is, as a direct result of that right, wrong to interfere with their exercise of that right. This approach to rights is quite in line with Dworkin’s rights as trumps. Rights people have trump other considerations. It is precisely because rights trump other considerations that it is wrong to interfere with rights. To allow other considerations to trump rights is wrong because it perverts the way rights function.[25]

In liberal democratic political contexts, where the idea of rights is prominent, there is typically no doubt about how rights function. To say of a person that they have a right to freedom of expression, is to say that it is wrong to interfere with their exercise of that right. Where there are laws against some speech, such as hate speech, libel, or slander, it is often on the grounds that they interfere with other people’s rights, and no one has a right to interfere with other people’s rights (Waldron 2012a). It is on the basis of this understanding of rights that actions by the government of the United States, for example, to collect meta-data on all the phone calls within and between the US and any other country, have elicited moral outrage. This program, some have argued contravenes the right to privacy. The US’s drone program has also been met with moral

[24] Of course, I do not intend to maintain here that the child actually has such right. I only suggest that should it be the case that they he has that right, what it means is that the mother is wrong in interfering with his eating lunch.

[25] We may choose to restate my point here by suggesting what one might call a spectrum of rights. On one extreme, people have rights. On the other, people have no rights. Between these two extremes there are instances of where two rights an individual has clash, or the rights of two individual and other more or less controversial cases. In my discussion of the everyday understanding of rights, I have steered away from the controversial cases since engaging with them will likely take me far afield. On the extreme where people have rights, it is simply the case that when one is said to have a right to something, what is meant is that it is wrong to interfere with their doing of that thing to which they have a right.

outrage, not simply because of its often indiscriminate killing of civilians, but because it is believed to contravene the right its targets have to a fair trial, and to legal representation. In South Africa, some have framed the #FeesMustFall movement as a movement which fights for the rights of South Africans to a free, quality education at all levels. The outrage which the #FeesMustFall campaigners have, one must assume, is drawn from their view that such right means that it is invariably wrong for anyone to stand in the way of tuition-free quality higher education. This is how rights function in the political arena, and it coheres with an idea of rights which trump other societal considerations. It is wrong to prevent a person who has a right to free speech from speaking because it is wrong for other considerations to trump rights, except of course if the right to speak violates the rights of others.

Now, clearly rights can be contravened, like in the example of the US government's surveillance program. To say of a person that they have a right to life, is not to say that no one will kill them. It is simply to say that no one *should* kill them. Rights do not exempt their holders from interference even in the areas in respect of which they are supposed to have a right. Rights, at the least, make it wrong, unjustified, and illegal to intervene in that action.[26] This is how rights are used in everyday language, as far as I can tell, and it coheres with Dworkin's theory of rights as trumps. So, if it is correct to say that our everyday usage of the idea of rights coheres with Dworkin's theory of rights as trumps, I think it is fair to suppose that a theory which does not cohere with Dworkin's theory of rights as trumps, could not cohere with our everyday usage of the idea of rights.

Second, Dworkin is far from alone, among what I have described as the influential contemporary accounts of rights, in holding that rights are things which trump utilitarian or other considerations, although Dworkin is alone in making the functioning of rights as trumps explicit. The other classical contemporary accounts of rights imply it. I have

[26] Obviously there are a few cases where it is allowed to intervene with the exercise of rights which most people probably recognize. In the event of an apocalyptic event, most people will probably allow their government to intervene with their rights in such event. But these are very rare, and Dworkin, as I mentioned in chapter four, grants that in such events rights may be contravened.

argued in part of chapter four, that the account of rights as interests by Joseph Raz, and rights as valid claims by Joel Feinberg, do not contradict the idea of rights as trumps.

To be sure, all the widely accepted and engaged-with (classical) contemporary theories of rights do not agree on every detail of what rights are, and what rights people may be said to have. As I discussed in chapter four, Raz (1986) views rights as interests people have that are so valuable in themselves that they create duties in others. Feinberg (1970) thinks of rights as valid claims which allow its holders to make claims of duties from others. Neil McCormick (2007) offers another competing account of rights–the Benefit theory of rights–according to which people have rights to that which is to their benefit, thereby creating a duty in someone to provide those benefits. He uses this theory to argue for the rights of children. As is obvious, all these accounts of what rights are accept the Hohfeldian rights-duty correlation. According to Hohfeldian (1919) correlation, rights create a duty in others, in respect of that right. This correlation also holds in Dworkin's account of rights. For example, my right to free speech, creates a duty in the government to refrain from interfering with the exercise of that right. So Dworkin's account agrees broadly with other classical accounts as to how rights function. Broadly, rights entitle an individual to something which other persons or governments have a duty not to interfere with. And it is precisely because something like this correlation is missing, broadly speaking,[27] in the African communitarian theories of rights that they fall short of being proper theories of rights. This means that no influential contemporary theory of rights would present a less stark account of how far from being a theory of rights the African communitarian account is.

One might interject with the observation that it seems to be absurd to claim, as I seem to do, that all theorists of what I referred to as the influential contemporary theories of rights would agree with Dworkin's theory of rights. On what grounds then, proponents of such argument may ask, would these theories then be taken to be different theories,

[27]I say "broadly speaking" because Gyekye grants it in respect of negative duties. Gyekye says "this, I think, is generally true, and would be very much so in a social structure like the communitarian, which does not lay any particular stress on rights. A rider is, however, required here: negative duties, such as not to harm others, to refrain from killing or robbing others, do have corresponding rights. For, one's right not to be harmed imposes a duty on others not to harm one" (2003:365).

given as we know that they are at least nominally different theories? But these is a misapprehension of the claim I aim to make here, and which I also made in parts of chapter four. I have not aimed to minimize the differences between these theories of rights. As I noted before, these theories are clearly different in terms of what they place emphasis on. While Dworkin places emphasis on the trumping character of rights, Raz and Feinberg place emphasis on the idea that rights create duties, and MacCormick places emphasis on the idea that whatever rights are, they ought to bring about some benefit for those that have them. Moreover, each of these thinkers are likely to disagree on the content of rights. In order words, they may not all endorse the same list of rights. While some of them may endorse a right to free-speech, for example, others may oppose it, and argue instead for a substitute right, which the first group may not endorse. At a more granular level, while some of these thinkers may endorse some form or amount of a certain right, some others may endorse another form and amount of that same right. These kinds of disagreements abound among these classical theories of rights and may become clear on closer examination of their accounts. I have steered clear of them in this research since it is of little relevance to the argument I aim to make overall. In my view, and as I noted above, and in chapter four, all of these theories accept rights as giving people certain entitlements with which the society or community may not interfere. That is, they are agreed in terms of the way rights typically function. It is precisely on the basis of the way rights function that I have argued that the rights theses offered by the African communitarians discussed are not rights theses in the proper sense.

At the onset of this section, I said that I will consider two possible criticisms against my argument in this research. I have dealt with the first of those criticisms above. I will now turn to the second one here. The second criticism which an opponent of my argument, or an African communitarian, might offer is that in using Dworkin's theory of rights as trumps as a foil for the African communitarian rights thesis, I am essentially ignoring the cultural attitudes which underlie that theory. Proponents of this criticism will claim that Western cultural attitudes underlie Dworkin's rights as trumps, and I will not contest that claim. So my argument may be said to amount essentially to claiming that the Western cultural attitude toward rights is the superior one and that the African communitarian

notion of rights, which is based on the African cultural proclivity for community should either try to emulate it, or be counted out as having nothing to do with rights. I will address this criticism in two ways. First, I will argue that this criticism involves a conceptual confusion. Second, I will argue that because the idea of rights is always embedded with other concepts, concepts that are essentially coherent with it, it is unhelpful for African communitarians to attempt to embed it with African concepts which do not support the idea of rights; rights seem unsupported by the African proclivity for community and the cluster of ideas on which African communitarianism is built.

In respect of my first response, it seems that proponents of this criticism are confusing two things. They are confusing, on the one hand, the view that "the African communitarian rights thesis falls short of being a rights thesis", and on the other, the view that "there cannot be an African rights thesis which is faithful to African culture but also not fall short of being a rights thesis in the proper sense". They seem to be suggesting that to say the first of these is to say the second. But I contest this view. My argument in this research is the first of these. The second is a much more expanded claim, which I do not make at all. I would need to have claimed the second for it to be the case that I am assuming that Western culture is simply superior to African culture in respect of rights. It seems to me that it is, in theory, possible to argue for an account of rights which is faithful to some interpretation of African culture and which meet the basic minimum of how rights function. It is important to remember that the African communitarian account is just one possible interpretation of African culture that there can be. What I have simply done is argue that an account based on one specific interpretation of African culture–the African communitarian interpretation–falls short of rights. So in this sense, I leave the door open for further accounts of rights which are consistent with African culture which, at least, treat rights as trumps.

Proponents of this criticism may insist that, regardless of whether or not there can be other African accounts that can be consistent with the way rights typically function, the African communitarian rights theory is one understanding of rights based on African culture, and that it is thereby not supposed to, or that it epitomizes cultural imperialism to expect it to, emulate other influential Western contemporary theories of rights which

are based on Western culture. To say that it is supposed to do so, they might argue, is to suggest that African culture is inferior to Western culture. This criticism is consistent with the view of cultural relativists that “the meanings of concepts are always relative to some culture” (Oyowe 2014:331). In response, I should like to note that I have not suggested that African communitarian accounts should emulate the Western accounts. I have only made what I understand to be a freestanding claim that if rights are generally understood to function as trumps which override any and all communal concerns, and the African communitarian accounts offer accounts of rights in which the community may interfere to grant or suppress the exercise of rights, it simply follows that the African communitarian rights accounts simply do not measure up to a typical and basic understanding of how rights work.

Furthermore, in my view, what this criticism of my argument misses is that ideas do not typically stand alone. Within any given social or political context, ideas are embedded with other background ideas, outside of which they lose their usefulness. The idea of rights does not exist in isolation in Western discourse; it is accompanied by the view that the individual is the centre of the moral universe (Pollis & Schwab 1979:2). It is likewise accompanied by the idea that each person has responsibility for what they make of their private lives (Dworkin 2011:330). It is also accompanied by the idea of political neutrality, which mandates governments to abstain from endorsing some specific moral views over others (Rawls 1987:437). African communitarians typically would not endorse these ideas. African communitarians cannot simply lift rights out of that context without being cognizant of this accompanying body of ideas. Whatever new meaning they give to rights must allow it to continue doing the job for which they are useful. If they cannot do this, they must scrap all talk of rights in their accounts altogether, since without it doing that job for which it is required, it ceases to be clear what role rights are needed for.

GENERAL CONCLUSION

In conclusion, I have argued that the radical and moderate communitarian rights theses do not measure up to the way rights are typically understood to function. I have done this by first offering accounts of the radical and moderate communitarian rights theses, where I argued that both accounts place great emphasis on the role of community either in granting rights (radical communitarianism) or in allowing the exercise of rights (moderate communitarianism). Secondly, I considered some criticisms of the radical and moderate communitarian rights theses by Matolino (2009), Famakinwa (2010) and Oyowe (2013), where I argued that, although many of their criticisms prove unsuccessful, their argument that the Afro-communitarian rights theses of Menkiti and Gyekye do not meet the basic minimum of how rights function is ultimately successful. This argument is found in varying forms in each of their respective works. I noted that the key deficit of these criticisms is that they do not offer a clear enough theory of what rights are and how rights function which would help secure their criticisms. I set out in chapter four to solve that deficit by discussing Dworkin's theory of rights as trumps, as a good enough account of how rights are typically understood to function. In the last chapter, I compared the idea of what rights are, and how they function, in Dworkin's account of rights as trumps, with the accounts of rights put forward by Menkiti and Gyekye, and showed that the "rights" in Menkiti and Gyekye just do not measure up to how rights are typically understood to function, and that the result of this is that both radical and moderate communitarian rights theses has implications that are completely out of step with rights. Finally I considered and responded to some possible criticisms of my argument in this research.

Someone who reads this research might come away with at least one of two possible conclusions, viz, (i) that African cultural milieu (on whose central character of communalism, Afro-communitarianism is built) just cannot ground rights in the typical sense, or; (ii) that it is only African communitarians, or at any rate, only the particular African communitarians I considered, that have failed to offer a convincing account of right that is in line with the typical understanding of rights, and that therefore we might be able to devise an "African" account of rights that is sufficiently based on African

culture, but is also consistent with the typical understanding of how rights function. I will discuss the second of these first, since I have already touched on it in my response to one of the criticisms of my argument in chapter five.

It seems uncontroversial to claim that although radical and moderate Afro-communitarianism have failed at offering an account of rights that is in line with our general understanding of the way rights function, other communitarian, or quite simply other accounts based on African culture, can produce accounts consistent with African culture as well as the typical understanding of the way rights function. This is possible in two ways. On the one hand, other accounts of African communitarianism are possible. Although they are the most influential accounts of communitarianism in African philosophical literature, radical and moderate communitarianism do not close the book on communitarianism. Matolino's "limited communitarianism", expounded in his 2014 book, *Personhood in African Philosophy* is one relatively new communitarian account whose consistency with the way we typically think of rights, that is, as trumps, invites further study in the area. But new communitarian accounts are also possible. It is important to keep in mind that each of these communitarian accounts is an interpretation of the central tenet of African cultural milieu (the proclivity for communality). Almost by definition, interpretations are not hard and fast, they are typically susceptible to new information which might not have been unavailable when the original *interpretation* was made. Also, interpretations are typically made from specific perspectives. This means that one individual's interpretation of something, made from their specific vantage point, can often be expected to differ from another individual's interpretation of the same thing. So it is at least in theory possible for some African communitarian account to be consistent both with African culture and the way we typically understand rights to function.

On the other hand, it is likewise possible that some African thinker, or a cohort of African thinkers, might argue that the entire African communitarian paradigm for interpreting African culture is mistaken; that African culture is not communalistic but individualistic, or something not communitarian and not individualistic. While I recognize that this is counter-intuitive to the way we have learnt to think of African culture in

African philosophy, I do not see any reason to discount it as a possibility at this point. There are definitely pieces of evidence for a strong individualistic aspect in some African cultures, such as the Igbo culture. The figure of Okonkwo in Chinua Achebe's historical fiction *Things Fall Apart*, who prided himself on his achievements as a farmer and as a wrestler, and blamed himself personally for his failure as a family man, surely suggests that an individualist interpretation of Igbo culture would not be utterly baseless. In the event that some African philosopher stakes out this interpretation for themselves, it would remain to be seen whether such an account, although potentially consistent with African culture, would be able to produce an account of rights consistent with the typical understanding of the way rights function. We must assume, at this point, that it is at least potentially possible for such accounts to do so.

This leads into the first possible conclusion I noted above, namely, that African cultural milieu (on whose central character of communalism Afro-communitarianism is built) just cannot ground rights in the typical sense, as trumps. This conclusion only follows from my argument in this research, if we assumed that the radical and moderate communitarian accounts cover the full spectrum of interpretations of rights vis a vis African culture. As I have noted above, I do not make that claim, and I do not think that it would be correct to make that claim. Other interpretations of African culture are possible, which may be consistent with the way rights are typically understood to function as trumps.

A further question about my attitude to rights may need answering, for it may seem that in saying that radical and moderate communitarian accounts of rights are inconsistent with the way rights are typically understood to function, I am suggesting that they therefore are bad accounts *per se*. To be sure, they are bad accounts of rights. That is, as theories of rights, they miss the mark, as I have argued. But they are not necessarily bad moral or political accounts. They are not bad accounts of how people ought to live their lives, and how societies and communities ought to be organized. I have not taken up that question in this research, but my intuition is that there is much to recommend them as moral and political theories. It is not my view that a moral or political theory

needs to be one that guarantees rights to be a good theory, although a good theory might be one that guarantees rights.

I should note that I am not a rights-fanatic. I believe that while rights have definitely been a positive force in the world, at least since the end of World War II, protecting the weakest from the clutches of the most powerful, safeguarding the dignity of the human person against all sorts of abuse, their use has also occasioned multiple societal and world problems. There are at least two such problems. First, rights seem to have aided the destruction of any kind of social fraternity which might have existed in the modern world, and infused it with a certain degree of litigiousness, where everyone is quick to resort to claims of rights rather than appealing to the responsibility we have to each other as members of the same species, the same social family, and co-inhabitants of a world that is quickly falling apart. It is as though our commitment to rights amount to more or less the same thing as a commitment to staying out of each other's business, even if that means watching the hungry and wretched die needlessly. When we act toward each other solely on the basis of rights, or when the entire governing principle of the relationships between members of society is on the basis of rights, our ability to make demands of each other's sense of decency and humaneness is severely curtailed. For example, I may have the right to not be killed. On the basis of that right, no one should kill me. But without the additional sense of fellowship which others may feel with me, they may not wish to go beyond merely not killing me to making available to me the tools with which to build a good life, even though it is easily within their means to provide them. Moreover, a poor member of society may not have the right to the assistance of some of the richer members of society, but that is not to say that the richer members of society do not have some kind of responsibility to the poorer members of their society, a responsibility founded on their brotherhood/sisterhood, or their natural sense of decency and humaneness. We do not make much progress on the basis of rights alone. In a sense, much of what rights succeed in doing is bringing us to a stalemate, an impasse, where the only forms of human decency you can expect from your fellows is one which you (or, they) believe you have a right to.

Second, from an international point of view, one can argue that the idea of the rights of nations, which some have argued comes from an aggregation of the individual rights of people within nations, has allowed the more powerful nations to perpetuate all kinds of havoc in weaker, smaller nations, undermining their sovereignty under the pretext of humanitarian intervention, for example. This, I think, is one of the intuitions behind the general restiveness African leaders have exhibited toward the idea of rights. For example, most people probably believe that the US retains the right to pursue those who attacked it on September 11th 2001. However, the military activities that commenced as a result of that "right" have wrecked havocs against innocent civilians in Afghanistan, Iraq, Yemen, Somalia, Syria, and Libya. To be sure, I am not here suggesting that rights are not important, or that they are bad. They have undoubtedly proven important, and have been a positive force in human history. In fact, part of the case victims of US collateral damage in these countries can make against the US, will have to be on the basis of rights. But I do think that because of the way rights function, that is, because they function in such a way as to render every one responsive only to the rights-claims/demands of the rights-holder, it potentially can serve as a powerful tool in the hands of those who have an interest in holding others, society and the world at ransom.

Since this is my attitude toward rights, when I argue that the African communitarian rights theses are not theses about rights in the typical sense, I am not only suggesting that these rights theses cannot effectively do the job rights are supposed to do. Clearly, I believe they cannot, as I have argued in this research. Moreover, I am suggesting that precisely because the African communitarian accounts of rights cannot do the job rights are meant to do, or because they prioritize the values of communality, that they are exempt from some of the most damning social consequences of our obsession with rights.

Bibliography

"Act and Rule Utilitarianism," by Stephen Nathanson, *The Internet Encyclopedia of Philosophy*, ISSN 2161-0002, http://www.iep.utm.edu/, 12March2016

An-na'im A & Deng F, (eds.) 1990. *Human rights in Africa: Cross cultural perspectives.* New York: Brookings Institution Press.

Ashcraft, R 1994. "Locke's Political Philosophy", in Chappell, V (ed.), *The Cambridge Companion to Locke*, 226-251. New York: Cambridge University Press.

Baet, A 2001. History of Human Rights. *International Encyclopedia of the Social & Behavioral Sciences*, 7012-7018.

Bamgbose, A 2002. Mission and Vision of the African Academy of Languages. *Special Bulletin of ACALAN*.

Cobbah, J A 1987. African Values And The Human Rights Debate: An African Perspective. *Human Rights Quarterly*, Vol 9, No 3, 309-331.

Cooper, F & Stoler, A 1997. Tensions of Empire: colonial cultures in a bourgeois world. Berkeley: University of California Press.

Costa-Neto, J 2015. Rights as Trumps and Balancing: Reconciling the Reconcilable? *Revista Direito GV. Sao Paulo, 11(1),* 159-188.

Deng, F 2004. Human Rights in the African Context, in Wiredu, K (ed.), A Companion to African Philosophy. New York: Blackwell Publishing.

Donnelly, J 1982. "Human Rights and human dignity: an analytic critique of non-Western human rights conceptions", American Political Science Review, 76 (2):303-316.

Donnelly J, 1989. *Universal human rights in theory and practice.* Ithaca: Cornell University Press.

Donnelly J (2007) The Relative Universality of Human Rights. *Human Rights Quarterly*. 29:281–306.

Dworkin, R 1977. *Taking Rights Seriously.* Cambridge: Harvard University Press.

Dworkin, R 2011. *Justice for Hedgehogs.* Cambridge: The Belknap Press of Harvard University Press.

Edet, M I 2015. The Limitations Of Bernard Matolino's "Limited Communitarianism": Continuing The Conversations On Personhood In African Philosophy. *Filosofia Theoretica: Journal Of African Philosophy, Culture And Religions*, 4 (2015), 99-112.

Famakinwa JO (2010) The Moderate Communitarian Individual and the Primacy of Duties. Theoria. 76:152–166.

Fienberg, J 1970. The Nature and Value of Rights. *The journal of Value Inquiry*, Vol.4 (1970), pp.243-57.

Flamm, D & Kihl, P 2004. *Cash is not King in Every Country: The Effect of Culture on Compensation Systems*. Graduate Thesis, School of Economics and Commercial Law at the University of Gothenburg.

Gilson, R J & Miljaupt,C J 2010. Economically Benevolent Dictators: Lessons for Developing Democracies. Electronic copy: http://ssm.com/abstract=1564925.

Gyekye K (1997) Tradition and Modernity: Philosophical Reflections on the African Experience. Oxford University Press, New York.

Gyekye, K 2003. Person and Community in African Thought, in Coetzee, P & Roux, A, (eds.) 348-366. London: Routledge

Gyekye, Kwame, "African Ethics", *The Stanford Encyclopedia of Philosophy* (Fall 2011 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2011/entries/african-ethics/>.

Hart, L.A 1983. E*ssays in Jurisprudence and Philosophy.* Oxford: Clarendon Press.

Hayes, E 1911. The Classification of Social phenomena. *American Journal of Sociology.* Vol 17, No 1 (July), 90-118.

Herskovits, M. (1947). Statement on human rights. *American Anthropologist*, 49, 539-543.

Hohfeld, W N 1919. *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays.* London: Yale University Press.

Ibhawoh, B (2000). Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human rights in the African State. *Human Rights Quarterly*, 22 (3), 838-860.

Ibhahow, B 2002. Stronger than the Maxim Gun Law, Human Rights and British Colonial Hegemony in Nigeria. *Africa*, 72 (1), 55-82

Igbafen, M L 2004. The Concept of Person in African and Chinese Philosophies: A Comparative Inquiry. *International Journal of Philosophy and Theology,* Vol, No 3 (September) pp121-149.

Ikuenobe P (2006) The Idea of Personhood in Chinua Achebe's Things Fall Apart. Philosophia Africana. 9: 117–131.

International Covenant on Civil and Political Rights (ICCPR) 1966.

Kenyatta, J 1965. *Facing Mount Kenya: The Tribal Life of the Gikuyu*. New York: Vintage Books.

Kaphagawani, D (2006) African Conceptions of a Person: A Critical Survey. In Wiredu K (ed) A Companion to African Philosophy. Blackwell, Malden, 332–342.

Kiye, M E 2015. Conflict Between Customary Law And Human Right in Cameroon: The Role of The Courts in Fostering an Equitably Gendered Society. *African Study Monographs*, 36 (2): 75–100.

Letsepe, T M 2011. *The Philosophy of Human Rights and the Question of Good Governance in Africa.* Doctoral thesis, University of South Africa.

Locke, J. (1988) *Locke: Two treatises of government student edition*. Edited by Peter Laslett. New York: Cambridge University Press.

Lindholm, C 1990. *Charisma.* Oxford: Blackwell.

MacCormick, N 1977. "Rights in Legislation", in Hacker and Raz (eds.), Law, Morality, and Society. Baltimore: Clarendon Press.

Matolino, B 2009. *Radicals versus Moderates: A Critique of Gyekye's Moderate Communitarianism*. South African Journal of Philosophy 28:160–170.

Mbiti J (1969) African Religions and Philosophy. Praeger Publishers, New York.

Menkiti I (1984) Person and Community in African Traditional Thought. In: Wright R (ed) African Philosophy: An Introduction. United Press of America, New York, 171–181.

Metz, T 2012a. *Developing African Political Philosophy: Moral-Theoretic Strategies.* Philosophia Africana, 14 (September), 61-83

Metz, T 2012b. African Conceptions of Human Dignity: Vitality and Community as the Ground of Human Rights. Human Rights Review, 13 (2012), 19-37.

Molefe, M 2016. Revisiting the Menkiti-Gyekye Debate: Who is a radical Communitarian. *Theoria.* 63 (149), 37-54.

Murove, M F (ed.) 2009. African Ethics: An Anthology of Comparative and Applied Ethics. Pietermaritzburg: University of Kwazulu Natal Press.

Mutua M, 'The African human rights system: A critical Evaluation' Paper provided by Human Development Report Office (HDRO), United Nations Development Programme (UNDP) in its series Human Development Occasional Papers (1992-2007) with number HDOCPA-2000-15, (2005)

Nhlapo, T (2012). *The African Customary Law of Marriage and the Rights Conundrum.* Cape Town: Orbis Books.

Nhlapo T (1989). International Protection of Human Rights and the Family: African Variations on a Common Theme. *International Journal of Law and the Family*. 3:1–20.

Nyerere, J 1968. *Ujamaa: Essays on Socialism.* Nairobi: Oxford University Press.

Olowu, D 2009. *An Integrative Rights-based Approach to Human Development in Africa.* Pretoria: Pretoria University Law Press.

Oyowe, A 2014. An African Conception of Human Rights? Comments on the Challenges of Relativism. Hum Rights Rev (2014) 15:329–347.

Oyowe, A 2013. Strange Bedfellows: Rethinking Ubuntu and Human Rights in South Africa. *African Human Rights Law Journal,* 13: 103-124.

Pollis, A. and Schwab, P. (1979) *Human rights: Cultural and ideological perspectives*. New York: Praeger Publishers.

Preis A (1996). Human Rights as Cultural Practice: An Anthropological Critique. *Human Rights Quarterly*, Vol. 18, No. 2 (May, 1996), pp. 286-315.

Rawls, J 1987. The Idea of an Overlapping Consensus, In John Rawls: Collected Papers, pp421-448. London: Harvard University Press.

Raz, J 1986. *The Morality of Freedom.* Oxford: Clarendon Press.

Ripstein, A (ed.) 2007. *Ronald Dworkin*. New York: Cambridge University Press.

Robinson, M 1993. *Rebuilding Societies Emerging From Conflict: A Shared Responsibility.* 55TH Annual DPI/NGO Conference.

Senghor, L S 1964. On African Socialism. New York: Praeger.

Shestack J, 2003. 'The philosophic foundations of human rights', in McCorquodale R, "H*uman rights"*. London: Ashgate.

Steward, Julian H 1948. Comments on the Statement on Human Rights. American Anthropologist, 50 (2), 351-352.

Strauss, L 1953. *Natural Right and History.* Chicago: University of Chicago Press.

Strawson, G 2003. On Free Will. Richmond Journal of Philosophy, 4 (Summer), 1-7.

Tempels P (1959) Bantu Philosophy. Présence Africaine, Paris.

The African Charter on Human and Peoples' Rights (ACHPR) 1981.

The American Declaration of independence, 1776.

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979.

The Convention on the Rights of the Child (CRC) 1989.

The Declaration of the rights of Man and the Citizen, 1789.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966.

Tierney, B 2004. The Idea of Natural Rights-Origins and Persistence. Northwestern Journal of International Human Rights, 2 (1), 2-13.

Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res 217A (III), U.N. GAOR, 3rd Sess., (Rosolution, part 1) 71, U.N. Doc A/810 (1948).

van Dun, F 2001. Human Dignity: Reason Or Desire? Natural Rights versus Human Rights*. Journal of Libertarian Studies***,** 15 (Fall), 1–28.

Waldron, J (ed.) 1984. *Theories of Rights*. Oxford: Oxford University Press.

Waldron, J 1987. *Nonsense Upon Stilts: Bentham, Burke and Marx, on the Rights of Man.* London: Methuen.

Waldron, J 1989. *Rights in Conflict*, *Ethics,* (1989), 503-19.

Wiredu, K. 1990. Are there cultural universals?. *Quest: Philosophical Discussions, 4.*

Waldron, J 1993a. Special Ties and Natural Duties. *Philosophy and Public Affairs, 22(1),* 3-30.

Waldron, J 1993b. *Liberal Rights: Collected Papers 1981-1991*. Cambridge: Cambridge University Press.