The Learning Network on Health and Human Rights

The right to health in light of concepts of individual and collective human rights: What contribution can African theories and philosophies make?

SEMINAR REPORT

LEARNING NETWORK

PERC Seminar 1
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EXECUTIVE SUMMARY

The Health and Human Rights programme in the School of Public Health and Family Medicine at UCT, in conjunction with its partners in a Learning Network for Health and Human Rights[1] hosted a Seminar to explore the contribution of African theories and philosophies to better understanding the right to health – particularly the potential tension between concepts of individual and collective human rights. This was the first of two Seminars that are organised as part of a grant in terms of the African Knowledge Project under UCT's Programme for Enhancing Research Capacity (PERC).

The Seminar kicked off with a presentation of the results of a literature review, covering both published and unpublished materials, with a particular focus on regional African contributions. This was followed by responses from a panel of academics and civil society who highlighted key points for further discussion. The discussion which ensued from the wider audience covered several topics briefly outlined below:

1) Caution in the way we define key terms, such as "the people" or "the community" when we speak of "people's rights". Communities are not necessarily homogeneous and do not always share consensus on how best to achieve a goal. Collective action can therefore be exclusionary and concepts of ubuntu may be used to support actions which are oppressive or harmful to others.

2) How can ubuntu work at the level of health professionals when it is not enforced or supported at the health systems level? Ubuntu at the health systems level may be supported by an economic argument and can be explored through activity around the NHI. However, others suggest that if we consolidate African philosophy into something enforceable by law, we will remove this moral code. For example, ubuntu can be enforced in the courts through the right to human dignity.

3) The notion of ubuntu is problematized as we are reminded that people on the ground may use the term in ways that are very different to how it is defined in academia. It is suggested that we might not have a single, 'universal' definition but have many definitions in operation at once. We are also reminded that concepts of ubuntu have different meanings regionally and we are urged to consider the political origins of 'ubuntu' - who started the notion of 'ubuntu' in South Africa? Was it formulated for another purpose, potentially to shift from the activist-type language found in the Freedom Charter and the RDP towards 'fuzzier' concepts of togetherness?

4) CSO respondents suggest that individual agency must be achieved first for collective agency to be successful in addressing rights issues. Others argue that parallel processes are critical (working at the level of individuals, collectives and health systems

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[1] The Learning Network for Health and Human Rights includes the following partners: The Health and Human Rights Programme in the School of Public Health and Family Medicine, and the Department of Private Law in the Faculty of Law (Prof Chuma Himonga), UCT; The Division of Nursing at the University of the Western Cape; The Centre for Human Rights, University of Maastricht; The Institute for Health, University of Warwick, Epilepsy South Africa (W Cape); Ikamva Labantu, Ikhaya Labantu, the Metropolitan Health Care Forum, The Women's Circle (TWC) and Women on Farms Project (WFP).

simultaneously). It is further suggested that ubuntu can be used as a vehicle to communicate the right to human dignity and respect at a grassroots level.

5) Tensions between human rights and African philosophy are discussed; nevertheless, it is argued that we cannot only look at ways in which the human rights system is flawed. We are instead urged to consider the ways in which rights are operationalize on the ground. From case studies (e.g. Klapmuts) we can take away lessons on how rights are realized and attempt to incorporate these lessons into the human rights systems employed in our context. In spite of tensions, we must create a space for African philosophy in human rights discourse!

After tea, the key note address by Mr. Moses Mulumba explored understandings of the right to health from the African perspective amidst the current opportunities and challenges posed by globalization. Specific reference was made to the approaches adopted by African Union initiatives, including the Charter on Human and Peoples' Rights. The address also tackled current challenges on the right to health posed by capitalists and individualistic approaches to health.

Discussions from the wider audience following the keynote address covered the following key points:

1) Intellectual property rights and indigenous knowledge
   How do we use patent laws for the greater good, specifically, how do we use flexibilities in intellectual property laws to ensure maximum benefit in Africa and what safeguards exist in national laws to protect human rights in the face of trade liberalisation? How do we protect indigenous knowledge or ensure that Africa benefits from the use of this knowledge?

2) Cultural norms, women's rights, patriarchy and empowerment
   We were reminded of how collective action is not inherently good and beneficial for all and of how women are sometimes the violators of women's rights. How do we then bridge the issue of a women's duty to conform to cultural norms in African culture? One participant maintained hat we must challenge patriarchal systems and customary laws which have been distorted and sustained from colonial settings. With this in mind, we must rethink laws, both customary and those contained in international human rights instruments, in light of our contemporary realities.

3) Cultural relativism versus universalism
   From this discussion, there was general agreement that we have a need for both Western and African concepts of human rights. Moreover, it is emphasized that we need to reclaim a space for African knowledge and philosophies in human rights discourse and that a balance needs to be found between these two perspectives for optimal benefit in Africa. We are urged to challenge the blind 'transplantation' of international laws without interrogating how they apply to the African context and whether we can benefit from them. Still, there is no clear consensus on how to operationalize these rights and this is considered the most important issue of the discussion. Does operationalization flow from the inclusion of the African charter in national Constitutions? This may be unlikely in light of the low correlation between ratification of the Covenant on SEC rights

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and health status. It is also highlighted that national laws sometimes circumvent the enforcement of the right to health. Do we operationalize through social movements? Can we use African concepts, like unbuntu, for social solidarity? Does individual action make a difference? Do we operationalize by first trying to understand how people understand how and why people act and then try to shift these values towards action for the greater good? These are discussions we need to take forward.

A meeting was held following the Seminar and it was decided to take-forward key discussions in the following ways:

1) How to consolidate different African concepts (e.g. the ideas, proverbs, notions such as ubuntu) into a realisable human rights application is the focus of a paper by Chuma Hiomonga (Himonga C et al. The right to health in the African cultural context. *South African Law Journal)*

2) Agency in the collective versus the individual as essential to realising the right to health will be taken forward within PhD research. Understanding if agency resonates with individual values and the shifting of values will be explored through Learning Network case studies.

3) Applying 'ubuntu' in reality will be explored from an economic perspective through work around the NHI.

4) Investigation into the use of key concepts of "people" or "community" will be achieved through PhD research and through follow-up with Learning Network case studies.

5) An analysis of 'ubuntu' discourses will be investigated through post-graduate or intern research and in collaboration with R. Saunders or R. Mathus.

BACKGROUND TO THE SEMINAR

The right to health is increasingly recognised in national and international human rights law as one of a range of socio-economic entitlements. South Africa, in particular, has been the site of spectacular advances in operationalising the right to health, given the high standing afforded to socio-economic rights in its Constitution and a very vibrant and active civil society movement pushing rights of access to treatment for HIV.

However, health, like many socio-economic claims, remains a right challenged on the basis that it pits the public good and societal benefits against individualist claims to health care. For example, the right to health has been dismissed as "…creating an intolerable burden on the judicial system … benefiting those who can afford judicial review …" but, by implication, draining resources from those really in need. In other words, this logic argues that promoting a rights-based approach to health may, ironically, disadvantage the poorest of the poor and worsen health inequities because those who shout loudest, are advantaged by rights mechanisms and gain preference over those with greater need or disadvantage. Is this contradiction a matter of substance, or is it merely the result of a poor understanding of what human rights are and what the right to health entails? This is critically important because of the policy, programmatic and advocacy implications of how this question is answered.

In this context, is there a body of knowledge located in non-Western scholarly traditions that can provide us with new insights into this issue and potentially resolve this seeming contradiction through creating new understanding of human rights and its relationship to health? In particular, do the philosophies and traditions of indigenous communities in African settings, rooted in communitarian models of social relationships, offer useful alternative approaches to resolving this dilemma of individual rights being pitted against the public good in the health context?

The Learning Network on Health and Human Rights is a forum of 6 Civil Society Organisations in the Western Cape engaging with four Universities to explore best practices for operationalising the Right to Health at community level. As part of the Network's efforts to expand our knowledge and understanding of how to further the right to health, the project will be convening two seminars in the course of 2010 to explore these dilemmas relating to individual and collective conceptions of rights. The seminars form part of a broader project at the University of Cape Town set up as a Programme to Enhance Research Capacity (PERC) with a particular focus on indigenous knowledge creation.

The is a report from the first seminar which presents the results of a review of the literature, both published and unpublished, with a particular focus on regional African contributions. Through reviewing the contribution of intellectuals from Africa, drawing on traditions more rooted in collective social identities, we hope to explore and develop new understandings that can help resolve the seeming contradiction between individual claims to health rights and the evident importance of measures to protect and enhance the public good.

REVIEW OF THE LITERATURE

Ms Kezziah Mestry, Health and Human Rights programme, UCT

Presentation of paper entitled, 'Rethinking collective rights: Some preliminary perspectives'

Kezziah highlighted some positions and issues with respect to collective rights and African philosophies of collective rights to guide and stimulate our discussion (see paper attached in annexes).

PANNEL RESPONSE

Professor Nomafrench Mbombo, Division of Nursing, University of W Cape

Mbombo highlights some points/issues for discussion:

- Human rights as a Western construct

Mbombo provides examples of where the creators of the Bill of Rights borrowed from the East and from African rule of law. Mbombo acknowledges the overwhelming amount of literature arguing that Human rights has its origins in the West; however, she says that this argument is not convincing enough to prevent us from reclaiming a space for African concepts in human rights discourse.

- Argument of existence of collective rights (Freeman) – is there any space for collective rights?

Mbombo makes reference to Freeman's claim that the individual separated from a social context is paramount. Mbombo refutes this argument in the African context, stating that a person cannot exist of himself, by himself, for himself. Rather, in the African context, a person exists in a social cluster and defines him/herself in the way that the cluster defines itself ("I am because we are, we are because I am" – African proverb). From this, Mbombo argues that there *is* a space for the collective in the African context.

- Collective rights for public health, individual rights to access health

Mbombo acknowledges that the constitution and international bill of rights only refer to the individual. Still, Mbombo maintains that the argument made by Meier and Mori (2005-2006) is flawed and wont work in the African context because of the communal nature of Africa and South Africa's history of struggle. Mbombo contends that this distinction cannot be made in our context where the collective is important for both public health and individual access to health

- 'People's rights' – who are we talking about?

What do we mean when we talk about 'the people' - the state of the people or the people within the community? Mbombo highlights that when a person is not regarded as belonging to the community (i.e. an immigrant), that person may not be protected under 'people's rights'. Human rights inhere in a person by virtue of being human;

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however, Mbombo brings to light the fact that different ways of interpreting 'people's rights' can have negative consequences by enabling the exclusion of certain vulnerable or marginalised persons. Mbombo suggests that we unpack this further – "what do we mean by the state of the people or the community when we talk about people's rights?"

- Holistic versus contemporary schools of human rights in African context

Appiagyei-Atua favours the "holistic school" versus "contemporarist school" which draws upon colonial and post-colonial experience. Mbombo states that we cannot ignore colonial and post-colonial experiences in context of Africa, that we must embrace both. Mbombo explains that, in light of what we have gained from these experiences (i.e. pan Africanism in the post-colonial period) and for this reason, we need to embrace both.

- The struggle: How to link the emancipatory struggle with human rights

  The international Bill of Rights is based on concepts and principles that are, to some degree, accepted through their use in judicial processes. Mbombo highlights that there is not the same consensus surrounding the concepts and principles underlying African philosophy with respect to human rights and that this may cause some to perceive African philosophy as mere rhetoric. How can we consolidate African concepts (proverbs, notions (ubuntu), ideas) and lessons from the struggle into an African philosophy that can be used to support human rights arguments in a judicial forum? How to make a space in the courts for African philosophy that can be combined with existing human rights law?

Ruth Nugent, social worker, Epilepsy South Africa

Nugent provided insights on how a civil society organisation uses a human rights approach to build agency on a grassroots level. She explains how the Western Cape division of Epilepsy South Africa has decided to move away from the medical model towards a developmental approach which is focused upon using concepts of the individual and collective in order to realize disability rights. Nugent describes how working within the LN has changed her CSO's perspective and has caused them to incorporate aspects of human rights into their programmes. The Western Cape division of Epilepsy SA is working to empower individuals in the community through the provision of education on rights and disability rights with an aim to assist grassroots members in claiming their right to health as a collective. Nugent is currently preparing to launch a human rights campaign in the Western Cape.

Wendy Nefdt, Regional director, Epilepsy South Africa

Nefdt adds to Nugent's response by stating that Epilepsy SA believes that both individual and collective rights are critical to the disability movement. Nefdt states that parallel processes are happening within Epilepsy South Africa, since they are working to build agency within individuals in order to strengthen collective action by communities.

Glynnis Rhodes, Women's Health and Empowerment (WHEP) Programme Coordinator, Women on Farms Project (WFP)

Rhodes responded to issues highlighted by Kezziah's paper from the perspective of civil society and WFP. Rhodes states WFP's belief that an individual must be aware of his/her right and their ability to take action first, before that individual can take action on a rights issue. Rhodes highlights a scenario where traditional beliefs appear to contract broad concepts of human rights and suggests that, for this reason, the individual must first be aware of his/her rights before collective agency can occur in a way that addresses human rights issues.

DISCUSSION

Chuma Himonga suggests that for further discussion on individualistic rights, Kezziah should look at work by Anna Ing who writes extensively on the origins of individualistic rights. Ing makes the point that it is important to look at the historical context in which rights were framed and ask "who was represented in terms of different legal traditions at the conferences where human rights law was being constructed?"

Second, **Himonga** returns to Mbombo's comment on the definition of 'people's rights'. Himonga highlights p.4 in the paper and suggests Kezziah revisits why it was considered to be a progressive decision that the Ogani people did not equate to the state in light of what Nomafrench has said regarding the different ways that 'people's rights' are defined?"
Johannah Keikelame gives us an example of how people of a particular community do not consider those not born in the community to be 'of the community' or one of 'the people'. In this way, Keikelame reinforces the significance of how key concepts, such as "people" and "community", are defined. **Patty Morrel** cautions us against false perceptions that the community is a homogenous entity and highlights tension that is often present in collective action. Can concepts like ubuntu, reinforce negative collective action?

Himonga reiterates Mbombo's suggestion that we need to find a way to consolidate African ideas, proverbs and notions into an African philosophy and an African idea of human rights that can be enforced. Himonga feels that this is a critical question for the research project and suggests as a starting point that one look at how the court uses the concept of ubuntu. For example, the Port Elizabeth Municipality case and state v Makwanyane [2] equated ubuntu to human dignity. In this case, ubuntu was equated to a human right to dignity and thereby held legal content. Himonga suggests that once we take African concepts to this level, they can become justicable. Our task is to think about how to consolidate African ideas and proverbs in a way that they communicate human rights. Himonga also makes mention of the Port Elizabeth case[3] – how the court considered the concept of ubuntu in trying to harmonise between the concept of collective and individual rights.

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[2] See *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR (CC) at para 308.

[3] See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR (CC).

Andile Zimba highlights that often service providers don't respond to health concerns in a way that expresses the principles ubuntu. He therefore questions how we can manage the disjuncture between philosophical term of ubuntu and what actually happens from the side of service providers. If there's no concept of ubuntu in the health system (i.e. the health system divides public from private services and thereby does not operate on principles of ubuntu), does it really matter if a health professional fails to display ubuntu? Zimba suggests that rendering services in the sense of ubuntu is optional as the health system does not reinforce these principles and there is little else to enforce this 'moral code'.

Glynnis Rhodes says that the service provider is intended to deliver services on the principles of ubuntu and batho pele; however, if the health system does not support the principles of ubuntu, we cannot expect this type of service delivery to occur on the ground. The service provider is taken out of the equation from making decisions based on principles of ubuntu, preventing the provider from having to operate on these principles.

Chuma Himonga suggests how ubuntu can be used in law to reconcile clashes between different individualistic rights in a way that doesn't rely on ubuntu as a moral order. For example, the clash between the right of an individual who pays for a service to be put first and right of another individual who doesn't pay but who has an emergency medical situation. How do we reconcile this clash and argue for the service provider giving preference to people who are dying but who haven't paid without the moral order of ubuntu? Himonga argues that on the basis of ubuntu as a right to respect humanity, the court can argue for prioritizing health for people who are in an emergency medical situation.

Ramugondo highlights another tension which arises at the interface between ubuntu and human rights. Ramugondo explains that while it is helpful to think of ubuntu as human dignity and respect, not all are afforded the same level of respect within African communities, (i.e. distinctions by age, royal lineage, etc.). It is therefore an interesting challenge when ubuntu interfaces with human rights because human rights speak of equality of outcomes. Ramugondo suggests that we revisit definitions of ubuntu if we are going to try to use it to try and advance human rights.

Marsha Orgill wonders how we can use African philosophy to support arguments to promote equal access to health services in terms of economic re-distribution? In other words, can African philosophy support economic arguments to create a health fund to support national health insurance (i.e. NHI)? Also, how does African philosophy respond to using an economic system, as well as a judicial system, to confront issues of local capitalism?

Elelwani Ramugondo asserts that the definition of ubuntu presented in the paper may be very different to how people in the community think about ubuntu. **Sindiso Minsi** agrees that ubuntu is a concept people use on the ground but that it takes on multiple meanings depending on the setting. Minsi therefore suggests that we might think of ubuntu as being context-specific rather than having a universal definition.

Richard Saunders highlights that ubuntu has very different meanings and interpretations in the context of different African countries. Saunders provides the example of Zimbabwe

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where historical social justice language has been used to mobilize collective action for regressive social outcomes and where ubuntu is viewed negatively. From our discussion, confusion and tension arises because of lack of clarity on exactly what ubuntu is. Saunders suggests that one way into clarify this and add sharpness to the debate is to look at the political origins of ubuntu - where did it come from? Who initiated it? For what strategic purpose? How is it being mobilised politically in SA? How does it act as a filter for the way rights are read? It appears that the people who have initiated the concept of ubuntu in South Africa are the same ones who are enforcing the marketisation of health; similar issue in Zimbabwe; thus the question arises: Can ubuntu be used to absolve the state of responsibility?

Secondly, Saunders suggest that we conduct a regional investigation as there is a long discourse of mobilizing communities around social justice in other African countries. How have some states and CSOs have drawn upon the legacy of the liberation struggle and question, 'for what purpose?' To begin to answer some of these questions, Saunders suggests looking at the community working group on health, environmental groups on health and others in the region; what are their experiences mobilizing language around social justice and human rights in practice.

In response to the panel presentation in which CSO respondents suggest the significance of individual agency, **Liz Gwyther** argues that parallel processes are essential in seeking to address rights issues and rights violations. In practical application, Gwyther says that we must work with individuals, collectives *and* the health system. Gwyther suggests that ubuntu can be conceived as a vehicle to speak to people about an individual right to dignity and respect.

Kezziah Mestry responds to say that her paper recognizes how the human rights system does not operate optimally, it is often contradictory and loaded with problems. However, Mestry maintains that we should not put human rights aside, just because the system is problematic. She suggests that we should do not start at the level of the human rights system, but start at the level at which people are reclaiming their rights in Africa and use African philosophy to support these claims. Mestry suggests that we look at the point where people start reclaiming human rights, examples where human rights are asserted at a grassroots level as these give insights into ways that ubuntu is operationalized. **Leslie London** explains that the Learning Network is trying to develop a better understanding of human rights by looking at examples where rights violations have been turned around due to mutual solidarity. In this manner, the LN is trying to reinterpret examples where rights have been realized and provides the Klapmuts case[4] as an example.

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[4] WFP works with women that live and work on farms. One of programs is Women's Health and Empowerment programmes, working around the right to be treated with dignity and respect in relation to health. Klapmuts is an agrivillage outside of Stellenbosch with low-cost housing for people who have been evicted from farms. At the Klapmuts clinic, two separate doors were being used, both were unmarked but everyone knew that one of the doors was used only for HIV-related services. As a result of the stigma associated with going through one of the doors, people began to refrain from seeking HIV-related services. A women's group from WFP approached centre management and raised

Nomafrench Mbombo also acknowledges tensions in using African philosophy on health and highlights tensions between human rights and other paradigms (South African feminist theory, human rights in Islam, gender, etc.) but these also have a space in rights discourse. Mbombo asserts that it is time to reclaim a space for the African philosophy in the context of human rights.

KEYNOTE ADDRESS

'Towards an African understanding of the right to health: Prospects & challenges'
Guest speaker: Mr Moses Mulumba, human rights lawyer with HEPS-Uganda

Mulumba's presentation explored understandings of the right to health from the African perspective in light of current opportunities and challenges posed by globalisation. Mulumba began his presentation with a critical evaluation of the debate between universalist and cultural relativist camps, making specific reference to the African Charter on Human and People's Rights. He questioned, "What does the African Charter bring that is unique from other international human rights instruments?" The Charter includes concepts of family and community as being important from the African perspective, as well as duties that apply at the level of individuals and communities. Mulumba then questioned whether we can argue that, because of these unique contributions, the African Charter is sufficiently different from other human rights instruments and whether we can disregard other instruments?

Mulumba suggests that the Charter incorporated aspects of family, community, state and duties in trying to consider the social context in which it was intended to apply; however, Mulumba highlights some of its shortcomings:

- The Charter mentions rights of 'the people'. In a globalised Africa, not all that are considered 'people' are human, as Multinational Corporations (MNCs) are entitled to act as persons and claim rights. There is a problem when MNCs exercise rights as a person and thereby infringe upon the rights of individuals. We therefore need to rethink the concept of people as it applies in the Charter.
- The Charter talks about the African civilization, the need to look at traditions, values and history of people in Africa. But does this mean that African cultures and traditions which violate rights are justified? Do we use the debate of cultural relativism to justify these rights violations (i.e. FGM – female genital mutilation)?
- Preamble to the Charter discusses need for inclusion and dialogue and Mulumba acknowledges dialogue as a considerable aspect of the African community and of traditional courts. However, although dialogue is important, Mulumba highlights the infringement of rules sometimes has little consequence. Should we continue with

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the issue. As a result of their collective action, the use of separate doors for separate services as ceased and community's right to dignity and privacy when seeking HIV services at the clinic is protected.

dialogue without sanctions in the face of human rights violations? Mulumba urges us to rethink this in the African context.

- The Charter has several global clauses which enable national laws to override certain rights provided for in the Charter;
- The Charter has major omissions, such as provisions for trial in absentia, legal aid or the right to an interpreter, or prohibitions against arbitrary detention, being subject to research without consent.
- The Charter makes very limited mention of women's rights (Article 18) and Mulumba questions whether this is sufficient to encompass all issues around women's rights in Africa.
- There are gaps in the Charter with respect to certain Social, Economic and cultural rights, including the right to social security, the right to an adequate standard of living, freedom from hunger and the right to strike. On what basis can we argue for these rights?

Mulumba questions whether these omissions compel us to consider international human rights instruments that fill-in some of the gaps; "Can we still argue from a cultural relativists approach and abandon international human rights instruments?" Further limitations and shortcomings in the cultural relativist debate were identified by Mulumba:

- African society has a patriarchal structure – does this mean that an emphasis on cultural relativism supports the continuation of patriarchal traditions, even when aspects of this structure have negative implications for health (particularly in relation to women's reproductive health)? Mulumba also cites instances where arguments use culture to enforce oppressive legislation (i.e. laws on homosexuality, female genital mutilation). He therefore suggests that we consider how to bridge this divide between human rights and cultural practices that are harmful. Do we have safe guards to protect against the negative aspects of tradition?
- The Charter has some aspects which are consistent with universality of some human rights, such as non-discrimination and provisions for the equality of all persons.
- Despite arguments that many human rights instruments have their origins in the West, many African constitutions make reference to these instruments or incorporate aspects of international human rights law.

Despite its shortcomings, Mulumba identifies areas where the Charter creates new opportunities for human rights:

- Article 22 speaks of the right to development as a collective right and Mulumba says that this may be considered an African approach to development. Still, development in Africa is impacted on by other factors, such as the action by non-state actors and intellectual property rights. Mulumba asks us to consider how we can employ the Charter and other legal systems to curtail these practices.
- The Charter further includes the right to existence and struggle against colonialism (Article 20), the right to a general satisfaction with the environment (also a collective right, Article 24), the right to harmonisation of development of family and the promotion of African unity.

- Unlike other human rights instruments, the Charter incorporates both social, economic and cultural rights with civil and political rights. The Charter thereby speaks to the indivisibility of human rights and the need to combine both first and second generation rights if we are to realize human rights.

Concluding statements:

The UDHR (Universal Declaration of Human Rights) came about at a time of colonization at conferences where Africa was not represented and as a result, some important rights were not included, such as the right to self-determination. However, Mulumba questions whether we can stick to a cultural relativist approach and whether we can continue to approach issues in a 'traditional' way. Culture evolves and the post-colonial state of Africa is considerably different that it was in the past. For instance, today's Africa consists of many women-headed households, with urbanisation and labour migration causing the decline of African kinships. Mulumba maintains that as much as culture is important, we must be realistic and realize the present context in which African and African communities operate.

Lastly, new challenges exist in a globalised Africa, including barriers created by intellectual property rights to accessing to medicines, education and food, structural adjustment programmes which reinforce privatisation and prevent collective access and benefit. How do we use best apply African and western philosophies on human rights in our context to bridge gaps in each and overcome these challenges?

DISCUSSION: QUESTIONS & ANSWERS

Leslie London raises the issue of government using intellectual property rights for what appears to be in the collective interest, but questions "the collective interest of whom?" The South African government has passed a new law on intellectual property in SA which mandates all researchers using public moneys to patent their findings. Unless researchers apply for an exemption, the government will take the liberty of patenting their findings. Some argue that the government passed this law to prevent the stealing of intellectual property by the West. On the other hand, an unintended consequence is the clamping-down of research for public interest. This Act is seemingly to protect the collective interest, but is the State's interest in intellectual property the same as 'the people's' interest?

In response to London, **Moses Mulumba** says that there is an imbalance in terms of the benefits we receive from our investments and notes two challenges facing developing countries in terms of intellectual property: (1) protection of traditional knowledge, and (2) Geographical indicators. Mulumba says that in many cases we are not the 'innovators' so intellectual property rights do not benefit us, particularly when it comes to the restriction of access to educational materials, medicines and plant varieties. However, Mulumba notes there are flexibilities in these laws and we need to ensure that we benefit by using these flexibilities.

Gary Gabriels is interested in the impact that trade liberalisation and the infiltration of Chinese markets into Africa has had on human rights. **Mulumba** responds to say that there is a certain exploitation of natural resources without much benefit for local markets. In addition, there are insufficient safeguards for human rights when MNCs make use of local labour.

Gabriels also raises the point that we have a wealth of indigenous knowledge and African plant materials which have been developed into medicines by the West. In many instances, indigenous knowledge is exported and used in developed countries but the reverse-motion of knowledge translation (from the West to Africa) does not happen easily (or without costs). Often due to our lack of resources for R & D which is needed to transform plant materials into a marketable product, pharmaceutical companies use African plant materials with active ingredients, patent their product, and sell it back to Africa at high prices. Gabriels questions how we can devise mechanisms and laws to prevent this reverse-flow of knowledge, the exit African indigenous knowledge without benefit for people on the continent.

Veronica Mitchell raises the concept of duties, particularly for women in a cultural environment. Mitchell asks whether there is a duty to conform to the cultural norms (i.e. FGM, subordination) and wonders how we can bridge this gap between cultural duties and empowerment. **Patty Morrel** highlights that often human rights violations that occur in the name of 'culture' are at the hands of other women. Morrel reiterates that things done in the name of the collective are not necessarily for the common good and questions, "How do we transform collective action for the common good politically and not just assume that everyone will default to the common good?" **Nomafrench Mbombo** reminds us to also look at the role of women in these patriarchal African systems and **Johanna Keikelame** responds to say that we urgently need more dialogue around how women in Africa exercise power to act, support or destroy each other.

On the subject of patriarchy in Africa, **Chuma Himonga** says we must situate the issue in its historical/political context. In particular, looking at how power relations were constructed of within the colonial settings of our past. Himonga contends that these relations have been carried over into post-colonial times without us challenging where they came from, but rather accepting them as custom. Himonga says that 'customs' and customary law were constructed and distorted in colonial times. Therefore we should question these constructed notions and fashion policy based on our realities.

Himonga challenges the argument that we should accept international human rights law in Africa on the basis that some of its components have been incorporated into national Constitutions. In other words, we cannot accept the transplantation of foreign legal systems and laws into African contexts where they often have no basis. Himonga says that failing to challenge these laws is an evasion our responsibilities and she urges us to look at these rights in light of our own realities – how can these laws be effectively implemented in the African context? Himonga maintains that we must challenge the universalist approach to get best from international law and use these instruments in a way that will benefit the African people.

In response, **Mulumba** says that even when African countries want to develop a law, governments often need to seek resources from developed countries and obtain foreign consultants. This is a double-edged sword because the law becomes distorted in the process until the local benefit of the law is lost. Mulumba gives the example of counterfeit medicines in Uganda, where medicines in defiance of intellectual property rights are labelled substandard and considered 'counterfeit'. This has negative implications for those who cannot afford the high cost of 'branded' medications (i.e. ARVs).

Wendy Nefdt highlights the disjuncture between funder, the state and Civil society. Nefdt contends that this is one of the largest blockages to service provision as budget constraints impact the ability of CSOs to implement programs, even when the need originates from what people are saying on ground-level.

Mbombo reminds us that it is not unusual for their to be contradictions (e.g. between universalist and cultural relativist viewpoints) nor is it unusual for the African Charter to have limitations as there are limitations in other human rights instruments (e.g. UNDHR). These limitations and gaps are partially filled through the construction of protocols (i.e. Beijing protocol, African protocol on women's rights) and general comments. Mbombo argues that in spite of these limitations, we must still claim a space for African philosophy in human rights discourse and says that we must embrace aspects of both Western and African philosophies on human rights. Mbombo notes the importance of trying to operationalize the African Charter, for example, through its inclusion in the Constitutions of African countries.

Mulumba agrees with Mbombo, that we need to strike a balance between Western and African concepts of human rights since both have weaknesses and strengths. However, we still need to consider how best to realize rights on the ground. Mulumba cites examples where the right to health has been included in national Constitutions but either does not enable individuals to hold of state to account as a duty-bearer, excludes non-citizens from having rights or restricts rights in circumstances which are not entirely justified. So how do we strike a balance between what is missing in the Constitution of African states and how human rights are adopted at the national level?

London highlights a study which found no correlation between state ratification of the Covenant on SEC rights and health status. London suggests that this illustrates how the realization of the right to health needs an institutional framework but also relies on other factors, such as strong social movements and social solidarity. For example, the strong social movement driven by TAC enabled access to treatment for people living with HIV/AIDS. London says that this is relevant to our discussion on how we should be using African concepts, like ubuntu, for social solidarity, since rights on paper need to be translated into reality in various ways, but one way is through collective action. Does individual action help?

Back on the topic of customary law, **Himonga** says that we are not short of instruments to protect the rights of women (African protocol addresses issues of inheritance, forced into marriage of marriage, etc.). The real problem, she says, is how to enforce these rights on the ground. Himonga suggests that we need dialogue and engagement in order to begin to understand what rights mean to people on the ground. With this knowledge, we can then

see how to shift ideas around women's rights. **London** goes back to earlier discussions, where we spoke about the need to base agency on people's values, but values and culture are not static. We must also work to change values, so that people can realize how things can be done differently. This can be facilitated if support for change is obtained through a collective.

London also highlights that many socio-economic rights can only be delivered to a group (i.e. housing rights). He makes reference to a DVD called 'Law and Freedom' by Zackie Achmat which is available at the 'beat-it' website. This DVD includes 4 case studies and one about pensions in the E Cape. The case study on pensions illustrates how one person's choice to stay and struggle benefited a wider group of people. We need to try and understand and strengthen in civil society, how can we cause people to act in a way that is for the greater good and which strengthens civil society?

Gabriela Glattstein-Young refers back to earlier discussions around the tensions between African and Western philosophies of human rights and also tensions between human rights and gender, race and religion. Glattstein-Young points to frameworks developed by Gostin & Mann (1999) and FXBC HR (the Francois-Xavier-Bagound Centre for Human Rights) for the evaluation of health policies. These frameworks can be applied when there is conflict between rights, such as tensions between individual and collective rights in the public health domain. However, these frameworks are based on Syracusa principles and may also be thought of as having their origins in the West. So how does African philosophy view these frameworks and how can we develop a framework from the African perspective which can be used to resolve some of the conflicts that were discussed earlier? **Mulumba** agrees that a framework and principles for evaluating tensions between rights should be looked at from an African perspective and suggests that we need to move in this direction. Still, Mulumba questions whether we have the capacity to develop such instruments when we often find ourselves reliant on the governments of developed countries. Will we find ourselves in the same position and adopt something that is not well suited to our own context?

Sindiso Mnisi problematizes the concept of ubuntu when considering issues of decentralisation and MNCs acting as persons. Mnisi questions what rights corporations are entitled to as persons and whether concepts of ubuntu apply to these entities? Mnisi gives the example of the Bafukeng who have used an ethnic identity to amass great wealth on the basis of their collectivity. The downside has been selective exclusion of certain groups from the collective and therefore the selective benefit of a small group of people.

Richard Saunders also returns to concepts of ubuntu and the political work that needs to be done in order to flesh-out the basic concepts of this term. Saunders suggests that we return to previous discourses on rights in SA, such as the Freedom Charter and the RDP, which have been replaced by 'fuzzier' concepts, like 'ubuntu'. Saunders suggests that we revisit these earlier rights documents and investigate what they mean for people's right to health and how they resonate with 'ubuntu.' **Mbombo** highlights how several African presidents have used concepts of 'ubuntu' and 'african conciousness' in recent years and suggests that we extend this to consider regional documents, not just those relevant to SA.

Damaris Fritz & Andile Zimba speak on the issue task-shifting / task-sharing and the rights implications this has. A case is highlighted which involved a 15 year old girl who committed suicide after being turned-away from the health services. How are rights affected by the shifting of duties away from government?

CONCLUDING REMARKS

Several key themes emerged from our discussions over the course of the seminar:

1) How do we consolidate different ideas about African philosophical roots, ideas , rbs, notions (like ubuntu), terms, etc, to have a realizable application?

Chuma Himonga felt it was realizable through the right to dignity, but we were also cautioned by Richard Saunders who reminded us that concepts, such as ubuntu, often have a political purpose and that they can be co-opted to enforce repressive policies. Mbombo then responded to say that although this might be true, there are other paradigms that have tensions with human rights and many areas of contestation - this shouldn't mean that we do not try to carve a space for African philosophy in human rights discourse.

2) Agency is critical to realising rights. But there are two aspects to this agency that are particularly important.

a. Agency requires that capacity is realised in the individual first (reflection and awareness of one's own capacity ala Freirian approaches) in order to build collective agency. Does this imply that you only realise collective agency through individual agency?

b. Agency has to be based on people's own values, and in processes that reinforce what they believe is important to be effective. In the second part of the seminar, Himonga suggested that we need to better understand how rights are conceived on the ground and then attempt to shift this for the collective good.

3) Applying ubuntu – theory vs practice

a. Law / enforcement is a very powerful social structure (you do what you have to do because of fear of retribution) whereas currently 'ubuntu' exists in a realm of nice to do. Nothing accountable about it.

b. Even if responsiveness were possible in the health services at local level (not easy but it is possible), at policy level or where the service interface is 1, 2 or more levels removed from decision-making, then it becomes much more difficult to conceive of responsiveness linked to right, since neither the decision-maker nor user have any contact or even awareness of each other, and the decision-maker does not see the consequences of the decision.

c. Ubuntu must first be reinforced at the health systems level if we are to expect individuals to uphold its principles (e.g. remove divide between private and public health systems to consolidate into NHI)

4) Key concepts of "peoples" and "communities" in terms of "people's rights" need to be deconstructed.

There can be tremendously oppressive processes within communities, within collectives; the collective is not always 'good'. Is it possible that 'ubuntu' can reinforce such oppression? Or is it the unquestioning embrace of that which is called 'ubuntu' that is the problem?

5) How do we understand 'ubuntu'?

We need similarly to analyse what is understood by 'ubuntu'. Are there multiple meanings or do we need a single definition? Have previous discourses (e.g. the Freedom Charter, the RDP) been displaced by an 'ubuntu' discourse? How do these newer discourses relate to ubuntu and to human rights and the right to health. Can look at this in South Africa as well as regionally.

6) Task shifting / task sharing as a dual edged phenomenon.
On the one hand, expanding lay workers could assist responsiveness to the community, on the other, may erode trust or facilitate exploitation or oppression (example of young women who committed suicide after turned-away by lay counsellor). Raised issues of accreditation, professionalization and the Health Services responsibilities for rights. Similar discussion to that we have had regarding roles of health committees.

THE WAY FORWARD

The way forward was planned at a separate meeting held with members of the Learning Network research team. The following outline our plans to incorporate key themes that arose at the seminar into our work:

1) **How to consolidate different African concepts (e.g. the ideas, proverbs, notions such as ubuntu) into a realisable human rights application?**
   This is a very important concept and is the focus of Chuma's paper (Himonga C et al. The right to health in the African cultural context. *South African Law Journal)*

2) **Agency is critical to realising rights but there are 2 aspects to this agency that are particularly important:**
   i. Agency requires that capacity is realised in the individual first and awareness of one's own capacity ala Freirian approaches) in order to build collective agency. Does this imply that you only realise collective agency through individual agency?
      ▪ This is the topic of JT's research;
      ▪ WN and EN might want to explore this in their theses;
      ▪ try to have timelines of JT, WN, EN theses overlap

   ii. Agency has to start at people's own values and try to shift these values (if only interest in the individual) to values for collective good
      ▪ Nicole' to include questions in the case studies to explore this further

3) **Applying 'ubuntu' in reality**
   - How are 'ubuntu'-like principles incorporated and supported at the health systems level to reinforce these notions and related practices at the level of health professionals?
   - i.e. NHI – requires a form of solidarity that is values-based; how to make people willing to express solidarity with others for the collective good
   - We can scaffold this point on the NHI – about the 'ubuntuing' of the health system
   - Agreed that information around the ANC policy on the NHI is very vague; PHASA website has a good summary of the arguments (Di McIntrye and Alex van den Heever) in the form of a newsletter
   - Black Sash has an education campaign around the NHI and the HEU is wanting to produce more popular materials around the NHI; we will talk to Black Sash and HEU regarding social solidarity, 'ubuntu' and NHI
   - PFMA (Public Finance Management Act – used to limit organisational activities; IDASA has some money for work around this and we could look into it as a case; LN to partner w/ SANGOCO if other opportunities arise re: PFMA
   - Rights versus responsibilities – argument is made that we cannot ask people to be responsible when their rights are not being realized; flag this as an issue to come back to at a later stage;

4) **Key concepts of "people" or "community" need to be deconstructed**
   - Does the work of LN CSOs change the understanding of communities in an 'ubuntu' sort of way?
   - Discussed that HCs should take-on this issue very seriously as it speaks to representation from minority groups; still, we felt that we have too much work do more with HCs on this
   - Incorporate this into our work in the following ways:
     - WN can explore this in her thesis – how do people in the LN consider 'community'; relates to issues of power
     - Case study with Epilepsy – how does their work change community attitudes towards epileptic patients?
     - Case studies with WFP (Rawsonville & Klapmuts) – follow-up with questions of group identity and prejudice, social solidarity, etc.
     - Toolkit – can add questions to follow-up / evaluation based on this

5) **Analysis 'ubuntu' discourses**
   - High-level potential research projects
   - Can investigate this point through collaboration with R. Saunders (post-graduate student or intern from York) or with Robert Mathus (political science student)

6) **Task shifting / task sharing as a dual-edged phenomenon**
   - Decided that this was not a great fit with PERC objectives; will pursue if links to things already spoken on above

AGENDA FOR SEMINAR

Friday, 19th March 2010
9h00 – 13:00

Level 2 Seminar Room, UCT Research & Innovation,
2 Rhodes Avenue, Mowbray

The right to health in light of concepts of individual and collective human rights: What contribution can African theories and philosophies make?

09:00	Registration and tea/coffee
09:20	Welcome
09:30	Presentation on the review on individual and collective conceptions of rights and African theory and philosophy: Ms Kezziah Mestry, Health and Human Rights programme, UCT Response from the panel: ▪ Professor Nomafrench Mbombo, Division of Nursing, University of W Cape ▪ Civil society participants in the Learning Network Discussion: Questions and answers from the wider audience
11:00	Tea/coffee
11:30	What do African theories and philosophies say about human rights, individual and collective rights and the right to health? Guest speaker: Mr Moses Mulumba, human rights lawyer with HEPS-Uganda
12:00	Discussion: Questions and answers
12:30	Concluding remarks, identification of future research directions, and thanks
13:00	Lunch and informal networking

Participant List

Name	Organisation
Liz Gwyther	UCT – Palliative medicine
Nomafrench Mbombo	UWC – Nursing, , Learning Network
Leslie London	UCT – Public Health, Learning Network
Ruth Nugent	Epilepsy South Africa, Learning Network
Wendy Nefdt	Epilepsy South Africa, Learning Network
Marsha Orgill	UCT – Health Economics
Gary Gabriel	UCT - Pharmacology
Moses Mulumba	HEPS – Uganda
Andile Zimba	City of Cape Town (COCT) – Health
Johannah Keikelame	UCT – Primary Health Care
Richard Saunders	York University (Toronto)
Penny Morrell	-
Hanne Haricharan	UCT – Public Health, Learning Network
Glynis Rhodes	Women on Farms Project, Learning Network
Damaris Fritz	Cape Metro Health Forum, SANGOCO, Learning Network
Elelwani Ramugondo	UCT- Occupational Therapy
Chuma Himonga	UCT – Faculty of Law
Gabriela Glattstein-Young	UCT – Public Health, Learning Network
Veronica Mitchell	UCT – Higher Education
Kezziah Mestry	UCT – Public Health, Learning Network
Jackie Hintenaus	COCT – Health
Vincent Woolward	COCT – Health
Gerrit Van Wyk	COCT – Health
Yolisa Duley	UCT -
Sindiso Mnisi	UCT, LRG
Annalise Weckesser	UCT, Childrens
Rose Zulliger	RADAR (Rural Aids Development)– Witswatersrand
K. Sewchurran	UCT – Faculty of Commerce, Information Systems

RETHINKING COLLECTIVE RIGHTS: SOME PRELIMINARY PERSPECTIVES

By: Kezziah Mestry

This brief overview on collective rights was conducted in terms of the aims of the Programme for Enhancement of Research Capacity (PERC) to stimulate research on African theories about human rights, individual and collective rights and the right to health. The overview outlines, in broad strokes, the problematic of collective rights. It is by no means a comprehensive review of the literature but rather highlights some of the positions and issues to encourage further discussion that will inter alia enable a more informed and comprehensive approach to the subject.

METHOD

The literature contained in this review was sourced, utilizing a keyword search, from Africa-Wide: NiPAD, Academic OneFile , Academic Search Premier and African Journals Online(AJOL). A keyword search was conducted using combinations of collective rights; African collective rights; collective action; African collective action; solidarity; third generation rights and health. No restrictions on year or language were prescribed as the results from the search engines were organized from the most recent literature which were then selected for inclusion based on relevance for this review. The purpose for this review was to capture the most recent literature that specifically referred to "collective rights" to keep this stage of the review manageable. A broader search would also include "peoples' rights", the "African Charter/Commission as well a "group/minority/ ethnic/indigenous rights".

LOCATING CONCEPTUAL ISSUES

There is a high level of consensus within the human rights discourse including amongst African theorists that the genesis of human rights has its origins in Western theory and political tradition (Shivji, 1989 p.10). In terms of this tradition collective rights arise from within the idea of the nation-state through the principle of the rule of the majority and are used as a mechanism to accommodate the inclusion of the legitimate interests of minority groups or persons bound by common values such as ethnic groups, immigrant populations and those who require special rights as a result of structural disadvantage such as women and persons with disabilities (Freeman 2001, p. 26). On a philosophical basis the notion of the atomistic individual separated from a social context is pre-eminent. Therefore, current

debates are vigorous around whether collective rights exist at all, whether the rights of the collective derive from individual rights or that they coexist independently with individual rights. Freeman comprehensively outlines both positions to conclude that collective rights may be conceived of separately to individual rights based on the value that individuals and collectives attach to the quality of their lives. Rather than locating their argument in this debate, Meier and Mori (2005-2006) propose the interdependence of the collective right to public health and the individual right to health. The authors argue , in light of the globalised nature of disease and inadequate government and regional responses, necessitates that public health be framed as a collective right so that governments are monitored and held accountable by international mechanisms and bodies on the basis of communal good.

At an international level the collective nature of rights, known as peoples rights, are observed in the generation of rights, a term coined by Karl Vasak in 1984, these being civil and political as well as second generation socioeconomic rights. The International Convention on Economic, Social and Cultural Rights (ICESR) and the International Convention on Civil and Political Rights (ICCPR) both provide for the rights of all peoples to self-determination in respect of their political status, the pursuance of their economic, social and cultural development and the disposal of their natural wealth and resources without being prejudiced by any obligations arising out of international economic co-operation. Solidarity rights, the third generation rights following Vasak, express mutual international concerns around development, peace and a clean environment and their realization accordingly depends upon international co-operation.

The right to development has gained increasing prominence since its formal adoption by the United Nations Commission on Human Rights [Resolution 4(xxxiii)] and General Assembly Resolution, 41/128 4 (UN 1986). Article 8 (1) of the Declaration on the Right to Development provides that states…should undertake…all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources , education, health services, food, housing, employment and the fair distribution of income (Niemann,1994 p. 109). Niemann (1994) contends that the right to development originally conceived of by Kéba M'Baye from existing human rights documents, is an individual right in principle and in its ends and is therefore realizable or implementable by individuals acting in concert, the collective, as the right-

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holders. It therefore vests in the institution of government tasked with furthering the goals of the group and the enforcement of the right. Conceptual debates on the right to development therefore reflect the broader contestation between the derivation and separate existence of collective rights. However the right is also one under constant scrutiny for its limited impact in promoting development. Alexander, 2000 p. 22 points out that this is a consequence of the "elite" of African states appropriating the right to development to leverage foreign aid from western donor countries. Moreover this forms part of a broader rationale to justify their demands for a New International Economic Order; to deflect attention from violations of political/ civil rights and to smuggle in the priority of the economic/social-rights argument through the back-door Donnelly, cited by Shivji,1989 pp. 32-33 and further cited by Alexander, 2000, p. 20.

The creators of the African Charter on Peoples and Human Rights, 1986, adopted the rationale of acknowledging Africa's colonial history, the struggles of the African peoples in coming to terms therewith and the communal nature of African society to conceive of peoples rights more comprehensively as not only the right to self determination but the right to equality, the right to existence, the right to development, the right to national and international peace and the right to the environment. The protection of the family, women, children and persons with disabilities are also prioritized. The right to development in particular reflected the concerns of post- independent African states to protect their national interest and their weakened position in the global economic system. However, underdevelopment issues such as poverty, the HIV and AIDS pandemic are pervasive and worsening (Mubangizi 2006, pp 160- 162) and this coupled with the complicity of African states in neoliberal global partnerships that perverts development (Alexander 2000, pp 19- 22) highlights the need for other possible rights based approaches that may counter and erode the status quo.

At a judicial level conceptual issues encumber the concept of 'peoples', since from inception, it has lacked definitional clarity and has been variously interpreted by the African Commission. Dersso (2006, pp 365-373) provides a comprehensive overview of the case law to illustrate this position. In interpreting the right to self-determination in the cases of Katangese People' Congress v Zaire and the Casamance peoples' case, the Commission upheld that sections of the population of the state comprise a people and that they could

exercise their right to self-determination in forms (self government, local government, federalism, confederalism etc.) that fall within the territorial limits of the state. But in the Katangese case the Commission offered no determination of the circumstances that would comprise a common identity for diverse ethnic groups so that they constitute a people. With regard to human violations against sub-state groups (e.g. in a case of discrimination against a subgroup of Mauritanians by the dominant "Arab" group) although the Section in the African Charter on non-discrimination (Article 23) refers to the population of a state, the Commission interpreted it to include part of the population of a state which has relevance in an African context for inter-state and sub-group conflicts. In the Social and Economic Rights Action Center (SERAC) case with reference to the violations of the collective rights to freely dispose of wealth and national resources (Article 21) and to a satisfactory environment (Article 24) the Commission addressed the tension between the whole people of a state and people as a distinct community. The court confirmed in a progressive decision, thereby overriding the liberal nation-state approach, that the Ogoni people did not equate to the state, that peoples' rights applied to the Ogoni people and that the reference to minorities, ethnic, indigenous groups were found to be irrelevant to the interpretation of peoples'.

Dersso (2006 pp 361-364), concludes by proposing five meanings discernable from both the text of the Charter and subsequent judicial interpretation through case law, these include: peoples subject to colonial or alien domination, the population of a state as a whole, the people of Africa in general, the state and lastly ethnic groups or inhabitants of a territory within the state who have historically, culturally or on account of discrimination carved out a separate identity to the population of the state. Criticisms around the lack of clarity of the concept question the adoption of a statist approach in which the people are equated with the state on the basis that that they could be subjugated by those in power while others point out that sub-state groups may be excluded by restrictive interpretations. Dersso concludes that a clear pronouncement on "peoples" rights is needed and opines that it should be away from a state centered approach.

The above is one of the many problems amongst the positive attributes of the African Charter which are more fully elaborated upon by Mubangizi (2006). In the author's overview, some of the strengths of the African human rights system include the stronger enforcement mechanisms of the African Court compared with the Commission, the role of

the African Union and NEPAD in ensuring the conditions for the realization of human rights and greater commitment to democracy by African countries.

THE UNIVERSALIST AND CULTURAL RELATAVIST DEBATE

The overarching contestation between universal and cultural-relativist conceptions of human rights is the point at which the concept of collective rights becomes problematic from an African perspective. The two camps are divided around the question of whether human rights, as a Western liberal conceptualization, are universally valid and applicable. Shivji (1989) provides a succinct synopsis of the positions. Supporters of the West-centric position claim hold that African countries have become modernized through the notion of the state with individuals accordingly having claims and entitlements against the state and so it follows that the Western notion of human rights is universally applicable. Individualistic and atomistic rights bearers are however foreign to the communal nature of rights, social harmony and the obligations and duties to the family in African contexts. Therefore the cultural relativists maintain that cross-cultural understandings of human rights ought to contribute to the development of international human right norms in order to challenge the dominant human rights paradigm.

A sub-debate of this discourse turns on whether African traditions conceive of human *rights* or human dignity the latter being asserted by Rhoda Howard (Shivji, 1989 pp. 10-11) on the basis that communal organization afforded individuals privileges not rights (Ilesanmi 2001, p 308). Appiagyei- Atua (2005, p.354) refers to Quashigah's (1992, cited in Appiagyei-Atua p. 337) position that the idea of rights have existed in the various developmental stages of all human societies and by inference also existed in African traditional society. While Quashigah claims that human rights lacks an African philosophical basis, Appiagyei- Atua (2005 p. 355) disputes this contention and cites the example of Akan proverbs as philosophical, in that they reflect collective wisdom and the acceptance of a particular culture or way of life. In addition they also express notions of rights such as the right to freedom in the proverb "if you deny me my right to express myself, you are a murderer" and equality in the proverb "the mosquito, however tiny, is a significant part of the animal kingdom".

Appiagyei-Atua (2005 p. 351) asserts that the "holistic school" of African philosophy which embraces the existence of traditional philosophy, such as the Akan philosophy of rights,

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rather than the "contemporarist school" of philosophy which disputes a notion of African philosophy but draws its philosophical basis form the colonial and post- colonial experience (p.340), is more preferable as a guide to addressing Africa's problems. However, Appiagyei-Atua leaves open the role that Akan philosophy can play in this respect. The author concludes by expanding the sentiments of Paul Hountondji and restates that the outstanding task for African philosophers is the formulation of concrete and comprehensive concepts for the emancipation of the peoples of Africa from the hegemony of global capitalism (p. 352). Alexander (2000, p 15) takes another view of this approach by stating that current African societies have different sociological configurations to traditional African societies and that accordingly the cultural relativist position of "pristine African core values" becomes rhetorical. Alexander (2000, p15) suggests that rather than positing evidence of the existence of a collective African human rights system against individualistic systems the more apropos task would be to actually examine whether these cultural values are capable of conferring human dignity in addressing contemporary human rights violations in African society.

RECONCEPTUALISING COLLECTIVE RIGHTS THROUGH STRUGGLE

If one accepts as Shivji (1989 p.71) asserts that rights are a means of struggle around which people struggle from below and which Ake (1987 p.12) confirms as being attained through the struggle for democracy (Ake, 1987, p .12) then the logical inference, following Alexander (2000, p. 65), is that human rights and emancipatory struggles must be linked to make a meaningful difference to the realities of people, to have meaningful judicial outcomes and to enrich the jurisprudence and philosophy of human rights. This is what happened in the Treatment Action Campaign case which notably drew upon a social movement at a national and international level and then combined it with legal strategy to assure solidarity that translated into a judicial order (Johnson 2006, pp. 663- 670). Forman, (2008, pp. 667-683) picks ups this theme and outlines the emergence of an African jurisprudence akin to ubuntu vis-a- the decisions in Grootboom, TAC, Khosa and New Clicks. The author also cautions of the hampering effect that may be forthcoming from the judiciary in applying the distinction between state's positive and negative obligations in respect of socioeconomic and civil rights

as well as the underlying ideological liberal tradition of minimal state intervention in the welfare of citizens and redistribution of resources by way of the neoliberal economy.

Therefore the question becomes how to link struggle to human rights without replicating the problematic outlined above. It must be one which is congruent with the value of the individual and the collective and which is permitted to evolve organically. In both respects the value of ubuntu is one which can present the underlying principle for such a project, in the words of Cornell and van Marle (2005, p206):

"ubuntu…implies an interactive ethic, or an ontic orientation in which who and how we can be as human beings, is always being shaped in our interaction with each other. This ethic is not then a simple form of communalism or communitarianism, if one means by those terms the privileging of the community over the individual. For what is at stake here is the process of becoming a person or, more strongly put, how one is given the chance to become a person at all. The community is not something 'outside', some static entity that stands against individuals. The community *is* only as it is continuously brought into being by those who 'make it up'…the community then is always being formed through an ethic of being with others and this ethic is in turn evaluated by how it empowers people. In a dynamic process the individual and community are always in the process of coming into being. Individuals become individuated through their engagement with others and their ability to live in line with their capability is at the heart of how ethical interactions are judged."

Ubuntu, rooted in African conceptual framework, lends itself to Onuma's (2000 p. 49 and p.6)1 proposition in calling for an intercivilizational approach to human rights to obviate the hegemony of Western perspectives and such dichotomous discourse as that between universal and collective rights which follows. An intercivilizational approach pays attention to the living sociality of groups through culture and religion and therefore "transcends" nations. The approach acknowledges plural value systems and views of humans in the search for commonness of humanness. It therefore resonates with the struggles of the African peoples towards a meaningful rights-based system.

CONCLUSIONS: A WAY FORWARD

Because human rights is the quest, on the one level for humane values, but also for democracy amongst the people, how do we proceed with nurturing an approach that is anchored in the struggles of the people and which can simultaneously contribute to theoretical development. Alexander (2000, p. 26) is instructive on this point when he asserts

that we pitch our investigation and our efforts at micro-political level structures within communities and the workplace which he views as the continuation of the human rights struggle for freedom, equality and solidarity. Additionally, it will require that researchers support these structures and institutions without taking-over that role from the members. If we are to use the approach then co-operatives, child-care as well as women, men and youth groups become the focus for how collectives are forming and reforming in a process of realizing their human rights and how human rights are being articulated within these processes. Research commences at a formative level to inform a bottom-up approach and will supplement those macro-level efforts which are progressively making space for the collective voice of appeal for democracy.

LIMITATIONS OF LITERATURE REVIEW

As the above review is preliminary the issues concerning collective rights were not examined in depth and further review will be necessary to expand the concept in the following areas: the debate on communalism and individual rights, cross-cultural approaches to human rights, the idea of liberation and human rights; humanism and African humanism, African jurisprudence on peoples rights as well as health and development.

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TOWARDS AN AFRICAN UNDERSTANDING OF THE RIGHT TO HEALTH: PROSPECTS AND CHALLENGES

The origin of human rights can be traced from the need to address the atrocities of World War II in which over six million people lost lives. Governments then committed to ensure that never again would anyone be unjustly denied life, freedom and other basics such as food, shelter, health care and nationality. This called for human rights standards against which nations could be held accountable for the treatment of those living within their borders. Since then, human rights have set out code by which the intrinsic humanity of every individual is recognised and protected.

Two schools of thoughts have dominated the debate around human rights, which include the universality and cultural relativity of human rights. On one hand, the Universalists of Human Rights believe that International human rights law proclaims universal moral standards and that these standards are realized through respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion. To them, talking about human rights means talking about universal human rights grounded in some conception of universal human nature.

One the other hand, critics of this approach who are cultural relativists view it as having its foundation in Western political history and culture. To them, this conception of human rights places the protection of the independent individual at the centre, and the individual is assumed to be a self-sufficient entity which may have serious implications in an African setting where the value is placed in family and society. According to them, an individual has little latitude outside the context of the African family and community.

From these perspectives, it becomes very important to place the right to health in the debate. Understanding the right to health from the African perspective is critical since this perspective highlights the principles of accountability to the community and the fact that the individual's success and welfare, is attributable to political and social structure. While universal approaches such as adopting UN instruments on the right to health are welcome as positive moves towards realization of the right to health, specific cultural settings need to be considered in using a human rights based approach to addressing issues of Health Rights in African societies.

This key note address will explore the understanding of the right to health from the African perspective amidst the current opportunities and challenges posed by globalization. Specific reference will be made to the approaches adopted by the African Union initiatives including the Charter on Human and Peoples' Rights on the Rights of Women in Africa, the African Commission on Human and People's Rights Decisions including resolutions passed at EU. The address will also tackle current challenges on the right to health posed by capitalists and individualistic approaches to health.