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INFORMAL RESPONSES TO ACCESS TO HUMAN RIGHTS

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1. The notion of access to human rights embodies one controversial premise, two ideas in conflict with one another and two different contexts — the normative/universal context of rights formulation and the particular/experiential context of rights enjoyment and assertion — which are not necessarily mutually complementary.
2. Human Rights are supposed to be founded on the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.”² This accords to these rights a conceptual universality. The *conceptual or ethical universality* of the notion of intrinsic worth of the human person, which is what is embodied in the notion of human rights, does not, however, mean that there is universal agreement on the essential elements of this value or, even less, of the existing system of international human rights norms and institutions. Ethical universality does not equate with and is therefore to be distinguished from assertions of *normative or substantive universality* of human rights. About the latter, it has been said that “the present system of international human rights clearly evolved from Western cultural perspectives that were ‘universalised’ through colonial and post-colonial hegemonic processes.”³
3. The texts of the regional human rights systems of Africa, the Americas and Europe reflect in many ways hemispheric differences about the normative formulation and substantive content of human rights. Some prominent areas of difference include balancing between the agencies of the individual, the community or other groups and collectivities; the role of the family in the human

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² Universal Declaration of Human Rights, 1948, Article 1.

³ Abdullahi An-Na'im, “The Cultural Mediation of Human Rights: The *Al-Arquam* Case in Malaysia” in Joan R. Bauer and Daniel A. Bell (eds.), *The East Asian Challenge of Human Rights*, 147 at page 151 (1999). See also Makau Mutua, *Human Rights: A Political and Cultural Critique* (2002).

rights universe; attitudes to property and privacy as human rights; prioritisation between civil and political, and economic, social and cultural rights; and questions concerning responsibilities and duties correlative to human rights.

4. Among human rights advocates and scholars, ratification of international human rights instruments is the best evidence of far reaching acceptance of the normative universality of human rights. The existence of a legal obligation in international law, which is what ratification conveys, does not of itself create equal or equalise uneven capacities to fulfil the obligations thus assumed.⁴ Around the world, the gap between normative obligation and experience is filled by a diversity of formal and non-formal mechanisms organised around the contours of power in different societies. If there is thus broad agreement on the ethical universality of human rights; and the normative universality of human rights is dubious at best or contested, there can be no *experiential universality*.
5. The absence of experiential universality, in turn fuels disagreements on the *normative legitimacy* of human rights.⁵ The question of legitimacy of human rights addresses the psychological dimensions of human rights enjoyment and assertion and the conviction with which these are undertaken. This psychological dimension does not attract the kind of attention from human rights advocates that it deserves. Victims are not likely to expend their resources and emotions in framing or asserting a norm in which they do not believe. Nor are they any more likely to seek the assistance of bodies in whose credibility they historically have no confidence. Of course, it may well be true that human rights norms do not depend for their *legal validity* on recognition by victims or local communities, but *access* to human rights does.
6. Abdullahi An-Na'im is right when he argues that the psychological issue for the victim is "the availability of *effective* means of recourse for the victim, which the violator will find difficult to resist."⁶ In many cases, these means exist outside the formal structures of the State, or in spite of it. Effectiveness calls, on the part of the potential interlocutor, for awareness of the existence of the mechanism in question, reinforced by belief that it is approachable, relevant and able to address the problems posed. This psychological element is the most important and first step on the road to access.

ACCESS TO INTRINSIC ENTITLEMENTS?

7. Recalling, however, that human rights are inherent in human beings, how can we talk about *access to* that which we already supposedly have? The language of "*access to*" is on face value at least incompatible with the notion of "*intrinsic*" rights. To resolve this conundrum, it is necessary to distinguish human rights in different modes of enjoyment and assertion.
8. A human right, in legal as in social terms, is an entitlement, which its holder can enjoy. This entitlement also enables the holder of the right to expect other people or entities to respect that right or not interfere with its enjoyment. This describes human rights in their passive state. When

⁴ Writing about Africa, for instance, Abdullahi An-Na'im asserts: "[I]t is unrealistic to expect the postcolonial African state to effectively protect human rights." See Abdullahi An-Na'im, "The Legal Protection of Human Rights in Africa: How to do More with Less" in Austin Sarat and Thomas R. Kearns (eds.), *Human Rights: Concepts, Contexts, Contingencies*, 89 at page 90 (2001).

⁵ Issa Shivji dismisses "any debate conducted on the level of moral absolutes or universal humanity" as both fruitless and ideologically subversive of the interests of particular disadvantaged segments of the human society. See Issa G. Shivji, *The Concept Of Human Rights In Africa*, 69 (1989). For a similar view, see Norberto Bobbio, *The Age of Rights*, page 6 (1996).

⁶ Abdullahi An-Na'im "Possibilities and Constraints of the Legal Protection of Human Rights under the Constitutions of African Countries", in Abdullahi An-Na'im (ed.), *Universal Rights: Local Remedies: Implementing Human Rights in the Legal Systems of Africa*, page 5 at page 14 (1999). Emphasis supplied.

the enjoyment of a right is threatened or interfered with, then it becomes necessary to seek the assistance of what may be loosely called right guarantor(s) to protect or enforce its enjoyment. The human rights situation in this state is in an active or kinetic mode, creating what has been described as “the possession paradox.”⁷ The explanation of this concept by Jack Donnelly is helpful here. He notes:

‘Having’ a right is therefore of most value precisely when one does not ‘have’ the object of the right — that is, when one is denied direct, objective enjoyment of the right. I call this ‘the possession paradox’ of rights: ‘having’ and ‘not having’ a right at the same time, the ‘having’ being particularly important precisely when one *does not* ‘have’ it. This possession paradox is characteristic of all rights....We must distinguish between *possession* of a right, the *respect* it receives and the ease or frequency of *enforcement*....It is the ability to claim the right if necessary — the special force this gives to the demand and the special social practices it brings into play — that make having rights so valuable and that distinguishes having a rights from simply enjoying the benefit of being the (right-less) beneficiary of someone else’s obligation.⁸

9. Put another way, the test of active enjoyment of a right lies in the forces that can be mustered to protect it when enjoyment of the right is endangered. In this sense (of assertion or enforcement) it is possible to speak of access to a right; meaning access to those authorities, institutions or entities that (can) guarantee enjoyment of the right or protect against interference with its enjoyment. In modern human rights thinking, this responsibility is directly or indirectly to be found in the state. When, therefore, we speak of access to human rights at the point of enforcement, we, in effect, mean access directly or indirectly to the state or, where the authority of the state does not exist as such, to quasi-state agencies, such as rebel movements,⁹ religious, age group and civic leaders, traditional “chiefs or rulers, headmen, the village council, headmen of clans, and company captains.”¹⁰
10. In many ways, contemporary human rights protection is essentially statist in character. To take a legal view of them, human rights norms constitute part of a body of standards in international law that regulate the conduct and responsibility of states to human beings and their communities.¹¹ States in their respective domestic jurisdictions, therefore, have primary responsibility in international law for ensuring protection of human rights.¹² The fulfilment of this basic responsibility anywhere requires a functional state able to provide basic protections to their inhabitants. In fact and experience, the authority of the state is the ultimate guarantor of the enjoyment of human rights.

⁷ Jack Donnelly, *Universal Human Rights in Theory and Practice*, 11 (1989).

⁸ *Ibid.* 11-12 (italics and parenthesis original).

⁹ See the decision of the Committee Against Torture (CAT) in Communication 120/1998, *Sadiq Shek Elmi v. Australia*, CAT/C/22/D/120/1998, paragraph 6.5, where the Committee holds that: “For a number of years, Somalia has been without a central government....The international community negotiates with the warring factions and some of the warring factions operating in Mogadishu have set up quasi-governmental institutions.... It follows then that, *de facto*, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention (Against Torture), within the phrase ‘public officials or other persons in an official capacity.’”

¹⁰ John Mensah Sarbah, *Fanti Customary Law*, page 24 (1897).

¹¹ Chaloka Beyani, “The Legal Premises for the International Protection of Human Rights” in Guy S. Goodwin-Gill and Stefan Talmon (eds.), *The Reality Of International Law: Essays In Honour Of Ian Brownlie* 21, 23 (1999); Rachel Murray, *The African Commission on Human and Peoples’ Rights and International Law*, 33 (2000) says: “[T]he notion of the state is central in any discussion of rights, given that international human rights law derives from public international law where, traditionally, the state is the central actor.”

¹² Michael Ignatieff makes this point rather dramatically when he argues that “the rights that a person has by virtue of membership in a law-abiding state are usually more valuable than the rights a person has by virtue of his membership in the human race, and the remedies that a citizen has by virtue of his citizenship are more effective than those which inhere in international human rights covenants.” See Michael Ignatieff, *Human Rights Culture: The Political And Spiritual Crisis*, 12 (2000).

11. Yet it is the case that the modern state is a relatively recent form of organisation of human society that is less than four hundred years old. While its negative manifestations are fairly well agreed in the notion of domestic jurisdiction, the evolution of the form and authority of the modern state as a facilitator or guarantor of human rights around the world is uneven.¹³ In many parts of the world, the authority of the modern state is contested in various forms through civil conflict, ethno-cultural or religious enclaves, age group-based or status-based social formations and other forms of authority structures parallel to the state or competing actively with it for spatial and temporal authority. To the extent that they exercise authority over those that recognise them, these other forms of social and political formations are also capable of laying down norms of conduct, and deploying institutions to protect the internal integrity of their norms, processes, authority and members. These norms and processes may or may not be compatible with the norms of human rights as expressed in the formal sources of international human rights law as we know them. Far from making them irrelevant, this fact makes them worthy of closer attention.
12. It is necessary at this point to make two preliminary clarifications. First, the expression ‘non-formal’, is not used to mean or imply an absence of law or forms of organised political authority. Nor is it a study about “tribes....so low in the scale of social organisation that their usages and conception of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society.”¹⁴ Rather, it is merely a convenient label to describe forms of authority alternative to, competing or, in some situations, even co-extensive with the state. Under this rubric, this paper sets out to consider the networks and mechanisms used by excluded, marginalised or traditional communities to protect their basic values which may or may not conform with human rights norms as described in the formal sources we know.
13. Seen in this sense, non-formal authority is a global phenomenon. This includes primordial authority structures which can be found in the monarchies (and associated institutions) of the countries of Northern Europe and the authority networks of the Established Churches of Europe and beyond, including the Orthodox Church in such places such as Ethiopia, Greece, and Eastern Europe. Religious leaders of different faiths as well as the family respectively fit this role in different parts of Africa, Middle East, South and South-East Asia, and Latin America. Universally also, the phenomenon of custom as a source norms in both non-formal and formal society or, indeed, in international law, is well recognised.¹⁵ Any tendency towards thinking of customary law as essentially a phenomenon of ‘backward’ places is to be discouraged, even if the forms in which it is constituted or its contents differ from place to place.¹⁶
14. Second, it needs to be added that the forms of non-formal authority are diverse and not amenable to comprehensive taxonomy in this rather brief document. As such, it is essential to sound a note of caution against any temptation or tendency to generalise on the basis of this paper or of any illustrations used in it about societies organised otherwise than each of us would like to see. This paper only seeks to provide a method for approaching the problems of human rights in non-formal settlements. It is incapable of pretending to provide the last word on this issue.

¹³ For a discussion of this see, Gerard Kreijen, “The Transformation of Sovereignty and African Independence: No Shortcuts to Statehood” in Gerard Kreijen (ed.), *State, Sovereignty and International Governance*, 44 (2002).

¹⁴ The Judicial Committee of the Privy Council in *Re Southern Rhodesia* (1919) *Appeal Cases*, 211 at page 233.

¹⁵ Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique*, page 1 (2001).

¹⁶ Rie Odgaard and Agnete Weis Bentzon: “The Interplay between Collective Rights and Obligations and Individual Rights” in Christian Lund (ed.), *Development and Rights: Negotiating Justice in Changing Societies*, pages 105-108 (1999).

THE RELEVANCE OF CONTEXT

15. The enjoyment of human rights is context- and capacity-specific and so is their protection. As Francis Deng rightly argues:

In a world that is paradoxically shrinking and proliferating at the same time, it is by seeing human rights concretely manifested in a particular context that we can fully appreciate their form and content in a comparative framework. To understand the diversity of cultural contexts and their relevance to the conceptualisation and protection of human rights is to enhance prospects for cross-cultural enrichment in defending and promoting human rights.¹⁷

16. Freedom of expression means different things to two different persons, one of whom has gone to school and speaks several languages and another who is illiterate in any language. Similarly, the right to counsel means different things in Mozambique, a country with barely five hundred lawyers and the United States where the population of lawyers is closer to one million. When talking about access to human rights, it is, therefore, not enough to understand them as norms of domestic or international law or as universal ethics. It is equally important to seek “full knowledge of the facts of the life of the community, against which the law must play.”¹⁸ The temptation to dismiss this position as relativists’ charter must be tempered by the reality that access, being an experience, cannot be universalised.
17. The contexts relevant to access to human rights are as diverse as humanity itself. It is relevant, for instance, whether the person or persons seeking protection of their rights live in a *political context* of elected/accountable government or a dictatorship. The context of *political economy* is in many cases determinative of the institutional guarantees for the enjoyment of human rights that can be provided. The *rural-urban divide* is another context that is relevant and related also to the *infrastructural context* in which rights are asserted.
18. Victims of or other witnesses to violence may be able to summon protection with a telephone call where it exists (and works) to the emergency services (where they exist and function). In communities where these facilities are missing such persons are condemned, to begin with, to resort to self-help, if at all they are minded to do anything about it. The police capacity to investigate, apprehend and ensure prosecution of perpetrators of such violations cannot be taken for granted. Rural communities around the world are in many places physically too remote from the police, courts and similar institutions of state.
19. In many other areas, those that have access to these institutions are justifiably afraid of resorting to them. In places like Colombia or Southern Sudan where successive generations have lived under armed conflict, the infrastructural, institutional and attitudinal assumptions that underpin access to human rights must accommodate differences of orientation. Similarly, the evaluation of compliance with fair trial standards in a country like Rwanda, emerging from genocide, must adapt the standards to the context. Criticisms of Rwanda’s *Gacaca* system — an adaptation of a traditional justice system designed to enable local communities to determine responsibility and ultimately integrate low level perpetrators of the genocide back into the community — introduced at the national level to assist in managing the genocide-related caseload have not always recognised this.¹⁹

¹⁷ Francis M. Deng, “A Cultural Approach to Human Rights Among the Dinka”, in Abdullahi A. An-Na’im and Francis M. Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives*, page 261 (1990).

¹⁸ Karl Llewellyn, *The Bramble Bush*, page 16 (1930).

¹⁹ “Littéralement, *Gacaca* fait référence à une “petite herbe” métonymie désignant un espace physique qui sert d’espace social dans une communauté donnée, de lieu de rencontre des personnes, en particulier des mâles d’un certain âge considérés comme des notables d’une contrées donnée. A l’occasion, cet espace sert de lieu où se discutent les questions qui préoccupent la dite communauté et se prennent les décisions concernant cette communauté. C’est ainsi qu’à l’occasion d’un conflit, les parties sont conviées pour être entendues et jugées par les

20. *Cultural context*, including experiences of and skills and attitudes imbibed through socialisation mediates both the understanding of human rights and their protection. Attitudes to domestic violence are determined in many places by patriarchal, culturally specific norms that not only define the man as the head of the family but also militate against outsider intrusion into the family unit. The influence of religion or *the context of faith-based value systems* is also another strong factor. Religious leaders are in many places also regarded by their followers as powerful community leaders, often having a force of authority that civic leaders can only envy.
21. It is clear from this variety of scenarios that not all contexts are facilitative of human rights enjoyment or protection. Yet differences between formal and non-formal mechanisms are not symmetrical with variations between human rights-friendly and human rights-subversive systems. Formal contexts are as capable as non-formal ones of violating or facilitating human rights.

THE RELATIONSHIP OF FORMAL TO NON-FORMAL SYSTEMS

22. There is a triumphalist and confusing ambivalence in the relationship of formal human rights systems and mechanisms to non-formal systems. This ambivalence has its origins in an erroneously racialised understanding of non-formal authorities as only existing in non-Western, ‘under-developed’ societies of the hemispheric South, or among ‘indigenous’ minorities of the Northern half. Rooted in the patterns of universalisation of colonial occupation, this ambivalence oscillates between, abolitionist, integrationist and conservationist tendencies. About the abolitionist tendency, the French colonial authorities in West Africa are reported, for instance, to have required under a law passed in 1912 that those customary norms that were “contrary to the norms of French civilisation” should be replaced with newly minted colonial norms.²⁰
23. The integrationist tendency is exemplified in the legal provisions regulating the application of customary law in post-colonial common law countries. Customary law is part of the body of norms applicable by both formal and informal mechanisms in these societies. It is indeed the dominant system for the regulation of matrimonial and inheritance rights. Entities that apply norms of custom are enjoined by law to ensure that the custom asserted passes a test of normative content — the so-called “repugnancy test.” The exact wording of this test varies between jurisdictions.
24. In Papua New Guinea, for instance, Section 3(1) of the Customs Recognition Act²¹ precludes the recognition and application of customs that are not in the public interest, create injustice or are contrary to general principles of humanity. Section 2(1) of the Constitution of Papua New Guinea similarly precludes customs from being enforced if they are inconsistent with the Constitution.²² In South Africa, Section 1(1) of the Law of Evidence Amendment Act of 1988²³ requires that “indigenous law shall not be opposed to the principles of public policy or natural justice.” Similarly, the Nigerian Evidence Act requires customary law in each case in which its application is asserted to be compatible with natural justice, equity and good conscience, and

membres de l’assemblée réunie à cette fin. La dite assemblée est composée essentiellement des personnes désignées comme *Inyangamugayo* acceptées par tous comme des individus *détestant l’opprobre*. A l’analyse, il s’agit des personnes d’influence pour des raisons diverses: leur probité, leur grand âge, leur érudition, la sagesse de leurs décisions, l’atruisme ou encore leur puissance politique et économique.” See *Les Juridictions Gacaca et les Processus de Réconciliation Nationale*, Cahiers du Centre de Gestion des Conflits (No. 3), Université Nationale du Rwanda, page 31 (2001).

²⁰ Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, page 115, (1996).

²¹ Chapter No. 19, Laws of Papua New Guinea.

²² See *In Re Miriam Willingal* [1997] 2 *C’Wealth Human Rights Law Digest*, 57.

²³ Act 45, 1988.

with existing law and public policy.²⁴ Evolved by the legal regimes of post-Renaissance colonialism, the repugnancy test could today easily approximate to a test of compatibility with human rights norms and the values of participatory citizenship in constitutional democracies.²⁵ In South Africa, for example, the Law Commission argued in 1998 for the repeal of the repugnancy test, suggesting that it had been superseded by the Bill of Rights.²⁶

25. The conservationist tendency exists in many African countries such as The Gambia, Sierra Leone, and Zimbabwe where customary law is exempt from the reach of constitutional rights standards. In Zimbabwe, for instance, under the amended 1980 Constitution, “subss (3)(a) and (3)(b) of s. 23 of the Constitution exempt customary law from the application of the provisions forbidding discrimination.”²⁷ In Canada, “the Canadian Government, through the Indian Act of 1970 and Treaty 8 of June 1899 (concerning aboriginal land rights in Northern Alberta), recognised the right of the original inhabitants of the area to continue their traditional way of life.”²⁸ The Treaty of Waitangi concluded in 1840 between occupying British colonial authorities in New Zealand and the leaders of the Maori community was founded on a similar philosophy.
26. This ambivalence is both racially constructed and paternalistic. Non-formal systems of protection of human rights are associated with non-Caucasian, traditional or indigenous settlements. They are defined by race not by culture, although it is usually more politically acceptable to couch the racial definition in cultural terms. Even in countries with significantly mixed racial composition such as Namibia, South Africa, and Zimbabwe, non-formal or customary systems, are applicable only to people described in expatriate-speak as “natives” or “locals”.
27. The paternalism of this ambivalence, reflecting the ambivalence of the human rights movement to both culture and non-formal systems for social organisation based on it, is embodied in Article 27 of the International Covenant on Civil and Political Rights which provides “[I]n those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” Implied in Article 27 is a triumphalist tendency that proceeds on the premise that only endangered “ethnic, religious or linguistic” minorities have need to “enjoy their own culture”, when in fact this is a basic entitlement of every human person and every human community. Its language is unapologetically conservationist. Also in the language of Article 27, the entitlement of such people to their way of life is an irritation to be tolerated or permitted, not necessarily an entitlement to be asserted and habitually respected. It is in the form of a concession granted by the triumphant to the annihilated.
28. There is an underlying reluctance in the language of Article 27 of the ICCPR that is barely restrained in its hegemonism. This is to be contrasted with the approach of Article 27(1) of the Universal Declaration of Human Rights (1948) and of Article XIII of the American Declaration of the Rights and Duties of Man (1948), each of which affirms the entitlement of every person to participate in the cultural life of their community. Among human rights treaties, the African Charter on Human and Peoples’ Rights guarantees for every person the right to “freely take part in the cultural life of his community”,²⁹ and requires states to promote and protect “morals and

²⁴ Cap 112 *Laws of the Federation of Nigeria*, 1990, S. 14.

²⁵ *Ryland v. Edros*, 1997 (2) S.A. 690 (C).

²⁶ South African Law Commission Discussion Paper 76 of Project 90, *The Harmonisation of the Common Law and the Indigenous Law Conflicts of Law*, pages 39-43 (1998).

²⁷ *Venia Magaya v. Nakayi Shonina Magaya*, decision of the Supreme Court of Zimbabwe, Harare, November 2, 1998 and February 16, 1999, [1999] 3 *Law Reports of the Commonwealth* 35 at page 42, per Judge Mucshetere.

²⁸ Communication 167/1984, *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, CCPR/C/38/D/167/1984 of 10 May, 1990, paragraph 2.3.

²⁹ African Charter on Human and Peoples’ Rights, Article 17(2).

traditional values recognised by the community.”³⁰ To ensure a reconciliation of the tension between tradition, culture and rights, the Charter requires the Commission to apply only “...African practices *consistent with international norms of human and peoples’ rights.*”³¹

NON-FORMAL MECHANISMS AS FACILITATORS OF ACCESS TO HUMAN RIGHTS

29. At the normative level, there are differences in the formulation or articulation of human rights between non-formal/traditional systems on the one hand and formal systems on the other. Formal systems of human rights are based on written Bills of Rights or international agreements applicable across diverse communities, amongst whose different units they usually enjoy uneven legitimacy. On the other hand, non-formal mechanisms are based on age-old communal values passed down through traditional authority structures and elders and preserved in many communities through such tools of communication as symbols, epigrams and proverbs. While their exact terms may often confound the modern day empiricist, these norms enjoy the kind of legitimacy that is not accorded formal sources of human rights norms in the communities to which they are applicable. The pivotal role of elders as repositories and guarantors of communal values in turn ensures value systems that emphasise inter-generational duties and responsibilities.
30. Among the Akan of Ghana, for instance, this is reflected in the foundational value placed on a human right to be nursed with a correlative inter-generational duty to nurse, expressed in the Akan saying “[I]f your mother nurses you to grow your teeth, you nurse her to lose hers.”³² Among formal human rights sources, the American Declaration of the Rights and Duties of Man similarly recognises a “duty of every person to aid, support, educate and protect his minor children” to be reciprocated with “the duty of children to honour their parents always and to aid, support and protect them when they need it.”³³
31. The emphasis on duty and responsibility as an organising framework for entitlements in traditional and non-formal settings has consequences for the agency of the individual as the primary mechanism for protection of human rights. As obvious as it sounds, the most pervasive and effective of non-formal mechanisms of access to human rights is self-help founded on the timeless instincts of self-preservation and values of good neighbourliness. Self-help in this context may be a counsel of serendipity — as in the example of the Biblical story of the Good Samaritan.³⁴ Or of pragmatism, as in the example of a community driven by physical remoteness from and neglect by governmental infrastructure to establishing vigilante mechanisms in order to guarantee safety and security of its members. The extended family is the basic unit for delivery of these rights-related guarantees.³⁵ In this connection, there is convergence between the positions of non-formal societies and formal human rights norms expressed in the recognition of the family in Article 23(1) of the International Covenant on Civil and Political Rights (ICCPR) as “the natural and fundamental *group* unit of society”, entitled, therefore, to protection by both the community and the state.³⁶

³⁰ Ibid., Article 18(3).

³¹ Ibid., Article 61 (emphasis supplied).

³² Kwasi Wiredu, “An Akan Perspective on Human Rights”, in Abdullahi A. An-Na’im and Francis M. Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives*, page 243 at page 245 (1990).

³³ American Declaration of the Rights and Duties of Man (1948), Article XXX

³⁴ Gospel of St. Luke, Chapter 10, 25-57.

³⁵ The extended family is different from the nuclear family. It is an institutionalised structure of organisation in non-formal society based on ties of blood traceable to a relatively recent forebear. It should not be confused with more recent and cross-culturally controversial evolutions in the concept of family.

³⁶ Emphasis supplied. This provision is repeated without variation in Article 17(1) of the American Convention on Human Rights. The equivalent provision in 18(1) of the African Charter on Human and Peoples’ Rights (1981) reads slightly differently as follows: “The family shall be the natural unit and basis of society.”

32. In traditional communities, the extended family provides a system of socialisation, and transmission of values, control and discipline, access to property, mediation and arbitration of conflict, and a safety net in times of economic or other difficulty. The land-holding and management functions of the family in particular are well documented across traditional communities in different parts of the world.³⁷ There are remarkable similarities in this regard between the indigenous Indian communities of the Americas,³⁸ traditional African communities,³⁹ and the Maoris of New Zealand under the Treaty of Waitangi,⁴⁰ to cite three examples. With land thus held in trust by the family for generations both living and unborn, family members are guaranteed access to a basis of subsistence and shelter based on need. The protection of family property in this way may be viewed as supremely unsuited to the enterprise imperatives of a globalised world. Where it works, however, family land holding is the basis of a quite redoubtable set of protections of economic, social and cultural rights, providing a bulwark against forced eviction, homelessness, and sundry denials of livelihood and human dignity in economies, in which ties to the land determine status as well as human well being.
33. The family and, beyond it, the community is also the basic institution for protecting the physical integrity of its members. In some parts of West Africa, for instance, the existence of domestic violence is a basis for the termination of the marital relationship. This norm is enforced by the male kin of the woman returning the dowry to their in-laws and physically returning their sister/daughter, her personal effects and her children under the age of majority with them back to her filial community.⁴¹
34. Writing about the role of the family in a traditional African context, S.N.C. Obi says it is “an important plenipotential organ which might be described as a miniature local government council, improvement society, court of law, and Privy Council all rolled into one.”⁴² Membership of the extended family with the kinship ties it brings is itself, therefore, considered a basic human right. Its loss is the highest sanction against a significant infraction of communal or family values and results in loss of among other things “emotional ties to home, family, friends and neighbours, and the loss of identity.”⁴³ The protections afforded by the family in traditional settings are dependent on membership and defined as membership rights not necessarily as human rights as such. In many places, these rights of membership exclude women or are limited in their application to them, especially to women married into the family.
35. Almost every other traditional community has its own system of resolution of disputes. Relative to the formal mechanisms of dispute resolution and right protection as we know them, these traditional systems are to their users cost effective, time efficient and liable to cause the least disruption in their lives. Traditional mechanisms of dispute resolution everywhere tend to involve community leaders, howsoever called, applying traditional norms of due process. Unlike mechanisms of the common law legal systems, however, traditional adjudication is not adversarial although it is well capable, in some places of exercising criminal jurisdiction and,

³⁷ See, for instance, *The Family of the Former High Chief of Butaritari v. The Old Men of Butaritari*, 1979 *Kiribati Law Reports*, 124; *Amodu Tijani v Secretary of Southern Nigeria* 1[1921] 2 AC 399; *Guerin v. The Queen* [1984] 2 S.C.R. 335; Evelyn Stokes, *Maori Customary Tenure of Land* (1997).

³⁸ See Communication 24/1977, *Sandra Lovelace v. Canada*, Doc. CCPR/C/OP/1 at 83 (1984).

³⁹ Lakshman Marasinghe, “Traditional Conceptions of Human Rights in Africa”, in Claude Welch Jr. and Ronald Meltzer (eds.), *Human Rights and Development in Africa*, 32, at pages 41-42 (1984).

⁴⁰ See, for instance, Communication 547/1993, *Apirana Mahuika et al v. New Zealand*, Communication 547/1993 CCPR/C/70/D/547/1993 of 15 November 2000. Also, Alex Frame, “Property and the Treaty of Waitangi: A Tragedy of the Commodities” in Janet Mclean, (ed.), *Property and the Constitution*, page 234 (1999).

⁴¹ S.N.C. Obi, *Manual of Ibo Customary Law* (1974).

⁴² S.N.C. Obi, *Modern Family Law in Nigeria*, 32 (1966).

⁴³ *Sandra Lovelace v. Canada*, *supra*, paragraph 13.1. Identity in human rights law is a composite and complex concept implicating different rights such as protections of nationality, gender, legal, social, and marital status. In the context used here, it also includes the right, recognised in Article 18 of the American Convention on Human Rights (1969) of every person to “a given name and to the surnames of his parents or one of them.”

where necessary, imposing punishment including banishment,⁴⁴ ostracism, and fines.⁴⁵ The reality that people have to live with one another in the same family or community after a case is concluded eschews adversarialism. Traditional adjudication does not generally have need for lawyers.

36. Traditional systems of adjudication exist in various forms across the world and, in many places, have been adapted and integrated into the formal Court systems. The Emir's Court in Northern Nigeria exercised temporal, spiritual and judicial functions until 1967 when it was stripped of its judicial powers which were then transferred to the Area or *Alkali* Courts.⁴⁶ The *Libandla*, a quasi-legislative/judicial national council in Swaziland, the *Gacaca* in traditional Rwanda, and the *Kgotla* in Botswana are similar examples of such institutions. In Botswana, the *Kgotla*, which is the Court of the traditional Chief, retains significant civil jurisdiction as well as criminal jurisdiction for offences punishable in some cases with up to four years imprisonment.⁴⁷ In most other post-colonial systems, by contrast, the criminal jurisdiction of traditional systems was abolished by a post-independence Bill of Rights, under which crimes were only recognised as such if they were defined by written law which also prescribed the punishment for them.⁴⁸

NON-FORMAL MECHANISMS AS CONSTRAINTS ON ACCESS TO HUMAN RIGHTS

37. Non-formal mechanisms in traditional systems are better known as constraints on the enjoyment of human rights than as facilitators of their enforcement. The major strengths of such non-formal systems also embody their most notable weaknesses. Given the primacy of the family in the structures of non-formal protection of human rights, it is easy to conceive of contexts in which the protection of individual agency or well being may be subordinated to the preservation of the perceived interests of the family and the conservation of its authority. This is precisely the rationale for crimes of honour.⁴⁹
38. Custom is a major pillar of non-formal systems. By definition, both custom and procedures built on it are atomised and often inadequately, if at all, documented. The efficacy of traditional systems is ultimately underwritten by the personal honesty and integrity of elders and by continued legitimacy in the eyes of the community. There is no institutionalised oversight as such. Where the essential interests of the formal state sector are concerned, it is also quite easy to turn traditional institutions against their host communities as was done by the colonial⁵⁰ and

⁴⁴ In the case of *Salvatori Abuki v. Attorney-General of Uganda*, 3 *Butterworths Human Rights Cases*, 199 (1998), the Constitutional Court of Uganda declared the traditional punishment of banishment for Witchcraft incompatible with the guarantees of economic, social and cultural rights in the Uganda's Constitution.

⁴⁵ In Papua New Guinea, the High Court refused in the case of *In Re Miriam Willingal* [1997] 2 *C'wealth Human Rights Law Digest*, 57 to recognise that the custom of "head pay" as customary compensation for unlawful killing included the forced transfer of a young woman, in marriage to the aggrieved community.

⁴⁶ See Chidi Anselm Odinkalu, *Justice Denied: The Area Courts System in the Northern States of Nigeria*, pages 32-35 (1992).

⁴⁷ L.D. Ngcongco, "Tswana Political Tradition: How Democratic?", in John D. Holm and Patrick P. Molutsi (eds.), *Democracy in Botswana*, 46 (1989); Also, Mogopode H. Lekorwe, "The *Kgotla* and the Freedom Square: One-Way or Two-Way Communication?", *Ibid.*, 117.

⁴⁸ S. 3(2) of the Criminal Procedure Code of Northern Nigeria (1960), for instance, provides "[a]fter the commencement of this law, no person shall be liable to punishment under native law and custom." Thus, in *Aoko v. Fagbemi*, (1961) 1 *All Nigerian Law Reports*, 400, the claimant who was tried and found guilty by a family council for the customary law crime of adultery, following which she was expelled and ostracised from the family. The High Court found the purported trial, conviction and sentence by the family council was without basis in law and in violation of her human rights.

⁴⁹ For literature on crimes of honour, visit <http://women3rdworld.about.com/cs/honorkillings/index.htm>; http://libwww.essex.ac.uk/Human_Rights/honourcrimes.htm; and <http://www.interights.org/about/Projects.asp#INTERIGHTS/CIMEL's>

⁵⁰ Commenting on Africa, Mahmood Mamdani asserts that "Britain, more than any other power, keenly glimpsed authoritarian possibilities in culture. Not simply content with salvaging every authoritarian tendency from the

post-colonial regimes in many parts of Africa, the Americas, South and South-East Asia and the Pacific. Non-formal systems are thus easily turned into effective instruments of inordinate impunity.

39. Non-formal systems have notoriously limited spatial coverage. Built as they are on ties of kinship, they are suited for small communities. Their efficacy is founded on their exclusivity to persons bound by ties of kinship and identity rather than by their inclusiveness. The rights that accrue to persons related in this way are may as well be seen as entitlements flowing from kinship rather than entitlements attached to their humanity. Put another way, active discrimination is effectively the foundation of traditional, non-formal systems. Women are often major victims of such discrimination.
40. Perhaps the most far-reaching constraint is the widespread tendency of non-formal systems to proprietorise the human person. Status-based discrimination, including slavery and caste systems, is an example of this tendency. Another example is the tendency to commodify women in some communities whether as objects of inheritance, or as compulsory sources of wealth through bridal endowment⁵¹ or as compensation through “head pay” for the customary crime of unlawful killing. Apart from being violations of human rights in themselves, the traditional practices associated with the proprietorisation of the human person in non-formal societies are vectors of other violations too.
41. Contemporary human rights work and talk mask fundamental assumptions about how human society is organised. In reality, there is a natural variety to how human society is organised, and, therefore, to how human rights are understood and experienced in different societies. These differences should necessitate a humble and informed cross-cultural dialogue about human rights. Non-formal systems of social organisation have for long received the attention of anthropologists as some kind of exotic field of interest. Yet, they constitute a substantial part of that majority of the human community that exists outside the actual authority of the state sector, on whom the credibility of contemporary human rights protection is hinged. There is much that the human rights movement can learn from and give to norms and structures evolved in these settings.
42. Ultimately, the major strength and weakness of non-formal systems lies in the manner of their transmission across generations. These systems, whether founded on ethnicity, spirituality, or religion, are fundamentally identity-based communities. They are implicated in the *corpus* of the skills, passions and prejudices imparted to people through socialisation and are not easily contested, or legislated against from without. States or other entities that want to reform them have to approach this task carefully. Advocates for their transformation cannot afford to alienate the communities in which reform is sought. Bound up as they are in the construction of personal

heterogeneous historical flow that was pre-colonial Africa, Britain creatively sculpted tradition and custom as and when the need arose.” Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, page 49 (1996).

⁵¹ It is essential here to differentiate between the altogether healthy practice of inter-family exchange of gifts and endowment of bride’s new home by her filial folks and the perversions that exact violence on the woman unless she is accompanied to her marital home by a wealth of property. The simplifications of “bride price” and so forth found in the literature caricature a much more complex form of cultural symbolisms that take place during traditional marriage. It has been said that: “[T]he colonial authorities adopted various English language terms of a non-legal nature such as ‘brideprice’ ‘bridewealth’ ‘marriage payments’ to describe the practice of some exchange of goods, livestock or the like being made upon, or ancillary to, a customary marriage. Of course vernacular terms for the institution existed but these were incomprehensible to the Western mind. Consequently, a recasting of them in fresh terminology was essential for the administration to contend with what they observed. This remoulding of the tradition in alien terms evokes in the western mind the lucid picture of wife buying and demotes the institution to the level of a commercial transaction. Undoubtedly the adoption of imported terminology has misconstrued and distorted the true nature of the institution.” See Kenneth Brown, “The Language of Land: Look Before You Leap”, 4 *Journal of South Pacific Law*, (2000).

and communal identities, attempts to reform informal systems or the norms on which they are founded, could easily become both combustible and counter-productive if not managed with care.