



Strathmore University

Law School

***TITLE: ASSESSING TROKOSI PRACTICE AND THE CLASH BETWEEN CULTURAL
EXPRESSION AND HUMAN RIGHTS***

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DECLARATION

I, Tracy Nduta Njogu, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

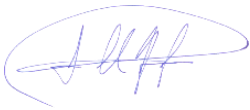
Signed:



Date: 7th January 2021

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed by,



Juan Carlos Riofrío.

List of legal instruments

National

Constitution of Ghana (1992)

Criminal Code (Amendment) Act (No. 646 of 2003)

Children's Act (No. 560 of 1998)

International

Universal Declaration of Human Rights

International Covenant on Civil and Political Rights

International Covenant on Economic Social and Cultural Rights

Convention on all forms of Discrimination Against Women

Convention on the Rights of the Child

The Indigenous and Tribal Peoples Convention No. 169 of 1989

African Charter of Human and Peoples' Rights

International Covenant on Economic Social and Cultural Rights

2003 Convention for the Safeguarding of the Intangible Cultural Heritage

The 2005 United Nations Educational, Scientific and Cultural Organization Convention on the Protection and Promotion of the Diversity of Cultural Expressions

Protocol to the African Charter on Human and Peoples Rights on the Rights of women in Africa

List of abbreviations

UDHR - Universal Declaration of Human Rights

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic Social and Cultural Rights

CHRAJ - The Ghana Commission for Human Rights and Administrative Justice

FGM - Female Genital Mutilation

SVS - Savage Victims Savior

TWAIL - Third World Approaches to International Law

CEDAW - Convention on all forms of Discrimination Against Women

CRC - Convention on the Rights of the Child

List of cases

Atomo v Tekpetey

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya.

Tano v Akosua Koko

Winterstein and Others v. France

Yanner v Eaton

ABSTRACT

This article examines the conflict that can sometimes arise between cultural expression and human rights. In engaging cultural violations, this article analyses the kind of discourse facilitated by human rights today by evaluating the approach taken by international human rights and the state when dealing with trokosi practice, a social control mechanism that raises some strong human rights concerns. This begs the question echoed in this article, is there a need to do more when dealing with cultural objectors and do human rights norms require to be reframed in light of cultural diversity.

1 CHAPTER 1: INTRODUCTION

1.1 BACKGROUND OF THE PROBLEM

The early 1900's was an era characterized by some of the greatest human rights atrocities ever seen. The year 1948 saw the ratification of the Universal Declaration of Human Rights whose creation was aimed at doing two things in particular; first, to protect the individuals by providing a basic rubric for human dignity entitled to all persons, such rights were inalienable and couldn't be overridden by any state, culture or religion and the second, to protect the individuals against the previously abused power of states and other supra-level organizations.¹ Today, it's no secret that the global hegemony of human rights shapes the dialogue on human dignity or at least, many argue, forms the most suitable grammar to battle injustices.² Its fundamental basis and foundation being the concept of universalism.³ Universalism simply means that human rights are valid irrespective of the social, political and cultural context in which they operate.⁴

With the birth of this idea of universalism came a debate on whether human rights should be considered universal or culturally relative.⁴ Many scholars running the decolonization discourse have questioned this concept of the universality of human rights arguing that the nature of claims of universality, often if not always are constructed by an interest to achieve a specific purpose.⁵ Such questioning of universality has been based on claims that culture has a role and moral capacity to determine priorities and with such, then the universal human rights are simply a prioritization of western systems, values and interests and a subordination of cultural diversity.⁶

¹ Santos B, 'Human Rights: a fragile hegemony' in Crepeau F and Sheppard C(eds) *Human Rights and Diverse Societies: Challenges and Possibilities*, Cambridge Scholars Publishing, 2013, 18.

² Santos B, 'Human Rights: a fragile hegemony' in Crepeau F and Sheppard C(eds) *Human Rights and Diverse Societies: Challenges and Possibilities*, Cambridge Scholars Publishing, 2013, 18.

³ Mountis B and Elene G, 'Cultural relativity and universalism: Reevaluating gender rights in a multicultural context' 15(1) *Penn State International Law Review*, 1996, 46. ⁴ Mountis B and Elene G, 'Cultural relativity and universalism: Reevaluating gender rights in a multicultural context' 15(1) *Penn State International Law Review*, 1996, 47.

⁴ Hey H, 'Universal human rights and cultural diversity' 1(2) *Human Rights and Human Welfare*, 2001, 17.

⁵ Mutua M, 'Human Rights in Africa: The limited promise of Liberalism' 51(1) *African Studies Review*, 2008, 16. ⁷ Fagan A, 'Cultural harm and engaging the limits of a right to cultural identity' 39(1) *Human Rights Quarterly*, 2017, 319.

⁶ Fagan A, 'Cultural harm and engaging the limits of a right to cultural identity' 39(1) *Human Rights Quarterly*, 2017, 319.

Challenges to International Human Rights Law have stemmed from this relativistic approach and this has formed the basis of the difficulty of human rights in engaging and attempting to eliminate cultural harm.⁷ Is it possible to take culture seriously without allowing it to be a justification for injustices?⁸ This question is echoed throughout the paper with an aim to find the point at which human rights and cultural diversity balance. It is a patent fact that the right to culture is integral in shaping the identities of those who subscribe to the said culture. With that said, over the years we have witnessed some great injustice and some very harmful practices carried out in the name of culture.

A documentary launched in 2018 by BBC Africa in partnership with International Needs Ghana known as *My Stolen Childhood* inspired this paper, highlighting how despite the strong legislative framework put in place, more than 5,000 girls still continue to serve as trokosi in the shrines today. To understand the debate surrounding trokosis, one must understand what the practice entails. Trokosi practice is a social control mechanism that involves sending young girls as an atonement for crimes committed by their family members.⁹ These young girls once given to the shrine serve the shrine priest are denied their rights and freedoms. This practice was criminalized in Ghana in the early 2000's, however, the practice as highlighted in *My Stolen Childhood* and other research papers continues to exist years after its criminalization. Why is this the case? How do we ensure the rights entitled to these girls are actualized while cultural expression and identity are still preserved?

1.2 STATEMENT OF THE PROBLEM

It is no secret that the girl child remains disproportionately a target of violence within the community and cultural frameworks have not been an exception in the furtherance of this

⁷ Fagan A, 'Cultural harm and engaging the limits of a right to cultural identity' 39(1) *Human Rights Quarterly*, 2017, 320.

⁸ An-naim A, 'Universality of human rights: Mediating paradox to enhance practice' in Jovanovic A and Krstic I (eds), *Human Rights today -60 years of the Universal Declaration*, Eleven International Publishing, Netherlands, 2010, 12.

⁹ Malacci O, 'Conflicting Discourses on the Trokosi Practice in Ghana: Exploring tensions in the Global and Local Human Rights Translations' Unpublished Development Studies Thesis, International Institute of Social Studies, Ghana, 2011, 8.

violence.¹⁰ From time immemorial, the human rights entitled to women have and continue to be infringed and cultural traditions and practice have often been invoked as a justification. This paper recognizes that culture plays a vital role in shaping the identities of persons and that there is a strong need today to continue to protect and provide for this kind of diversity. However, what happens when what is done ‘in the name of culture’ infringes on the rights of a certain minority group within the community. Do we get rid of the cultural traditions and practices all together? Or do we turn a blind eye to the violations in the name of protecting diversity?

In an ideal world, we would have cultural societies incorporating human rights concerns to ensure that the women do not constantly continue to be victims of oppressive cultural regimes because they are human beings deserving of a life of dignity. However, the current situation shows that culture and human rights haven’t always worked together harmoniously. With the debate on cultural violations anchored on two polar paradigms; one on universalism and the other on cultural relativism, how do we ensure a productive outcome is achieved when engaging cultural rights? This paper seeks to bridge this gap by suggesting a model that seeks to preserve culture while protecting the rights of these young girls so that human rights concerns can be considered in cultural societies.

1.3 HYPOTHESIS

This article hypothesizes that people often do not feel bound by norms they do not freely accept.¹¹ Therefore, as long as human rights discourse lacks legitimacy in cultural frameworks no productive outcome can truly be felt. When engaging cultural harm any discourse facilitated that does not place an active role on the involvement of cultural actors and institutions often is perceived as an imposition and often simply leads to backlash and resistance from the community despite the importance of that form of discourse.¹² For any true social change to take place, the

¹⁰ Human Rights Council, Report of the Special Rapporteur on violence against women, Mission to Ghana Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural, including the rights to Development, its causes and consequences A/HRC/7/6/Add.3, 21 February 2008.

¹¹ An-naim A, ‘Universality of human rights: Mediating paradox to enhance practice’ in Jovanovic A and Krstic I (eds), *Human Rights today -60 years of the Universal Declaration*, Eleven International Publishing, Netherlands, 2010, 10.

¹² Ameh R, ‘Child Bondage in Ghana: A contextual policy analysis of trokosi’ Published Thesis, Simon Fraser University, Ottawa, 245.

revolution must involve those very people in those cultural contexts and must not be a kind of discourse that others and excludes.

This paper argues that when it comes to evaluating and attempting to eliminate cultural violations, a legislative approach seldom leads to true social change. Often states simply enact legislation and do not go beyond the law to ensure that human rights and freedoms are granted to victims. The hypothesis this paper makes is that a balance between cultural rights and human rights must be achieved for a productive outcome, where cultural sensitivity is employed whilst human rights concerns are dealt with. The article serves as some sort of welcome rejection idea that there only two possible ways to looking at the problem 'either total elimination of the practice or total sustenance' and recommends the need for an alternative way of thinking that serves as some sort of tenuous accommodation of the acceptable elements of the practice while stripping the unacceptable one.

1.4 PURPOSE AND AIMS OF THE STUDY

The following are the aims of this study;

- ✓ Evaluating the loopholes in frameworks and institutions both cultural and legal that have assisted in the sustenance of oppressive cultural practices such as trokosism despite its criminalization.
- ✓ Evaluating why the discourse facilitated by human rights has not led to the elimination of trokosism years down the line.
- ✓ Exploring what an alternative that accommodates human rights concerns in cultural frameworks looks like.

1.5 RESEARCH QUESTION

The paper sets out to answer the following questions;

- ✓ Whether there can be the protection of individual rights where collective welfarism is prioritized.
- ✓ Could the human rights mission be more sensitive and accommodative to non-western cultures and what would that require?

- ✓ Whether it is possible to balance between personal worth and cultural rights when evaluating cultural violations.

1.6 IMPORTANCE OR JUSTIFICATION OF THE STUDY

The importance of this study is to bridge the gap between the two existing frameworks of thinking with respect to addressing ‘oppressive’ cultural traditions and practices. The article serves as some sort of welcome rejection idea that there only two possible ways to looking at the problem and recommends the need for an alternative approach that serves as some sort of tenuous accommodation which preserves the acceptable elements of the practice while stripping the unacceptable one. One of the biggest arguments raised as a rebuttal to the human rights movement in the elimination of harmful practices is a need to preserve and value cultural diversity. Therefore, this paper suggests a paradigm that strives to balances between the personal worth dimension and the cultural dimension when dealing with cultural violations so as to have a more productive conversation.

1.7 SCOPE AND LIMITATIONS OF THE STUDY

In analyzing the conflict between the right to culture of ethnic communities and human rights, the research of the study is limited to trokosi culture practiced only amongst the Ewe people in the Volta region of Ghana. The article recognizes that trokosi culture is practiced in other states of West Africa such as Togo and Benin, however, for the purposes of this research, the paper confines its discourse to the practices in South West region of Ghana amongst the Southern Ewes.

1.8 METHODOLOGY

This paper is being written from an outsider-insider perspective, an outsider in that the writer is not a member of this community and exists outside the space in which the cultural, traditional and historical aspects of this community are in, but an insider in a very real sense too as a third world writer whose native ears are familiar to the central issues addressed in this case.¹³ With this said, the study uses a doctrinal methodology to inform the research. This involves the review of both

¹³ Mutua M, ‘Human Rights in Africa: The limited promise of liberalism’ 51(1) *African Studies Review*, 2008, 18.

primary and secondary resources, including books, journals, legislations, papers, cases and other online material. Films and documentary videos were also used in the qualitative research as sources of information on the practice of trokosism by the Southern Ewe Community.

1.9 LITERATURE REVIEW

The clash between cultural relativism and universal human rights has been a topic of great debate amongst many scholars. All these discussions, held with the aim of analyzing the dilemma that arises from applying a universal set of human rights standards to diverse multicultural societies.

D.Y. Danzi in his paper '*Trokosi: A slave of a fetish*' addresses this clash with the aim of answering the question 'is there room in today's world for cultural groups to adhere to a practice that the global community finds oppressive?' This question forms the foundation of a number of scholarly works.¹⁴

Eleme Mountis, similarly in the paper '*Cultural Relativity and Universalism*', analyses the tensions between the two analytical approaches with regard to the Trokosi debate; that of universalism and cultural relativism. In this paper, the author addresses the gap between the two perspectives. On the one hand, the Universalist approach fails as it does not seek to understand the norms and practices of these communities but seeks the complete eradication of culture through language can sometimes subordinates cultural system and on the other cultural relativism can be used to justify the continued subjugation of women.¹⁵ The author recommends that the way to resolve this conflict is by bridging the gap and looking at the potential the women in these communities to organize and achieve greater human rights for themselves. This article argues that such a resolution would be difficult to achieve as it ignores the indirect coercive nature that religion and culture or worse religious cultural practices play in influencing the mindset of the women in this community. The argument made by the author assumes that the women in this culture have not only free will but the capacity, as a marginalized group, to liberate themselves from the very community that oppresses them.

¹⁴ Dzansi Y and Biga P, 'Trokosi- slave of a fetish: An Empirical Study' 12(1) Central University of Technology Journal, 2014, 3.

¹⁵ Mountis B and Elene G, 'Cultural relativity and universalism: Reevaluating gender rights in a multicultural context' 15(1) *Penn State International Law Review*, 1996, 54.

Asomah Joseph and Megret bring similar arguments that the pursuit of universal human rights is almost synonymous with the furtherance of political liberalism and that universal human rights is cultural imperialism.¹⁶ This is further backed by TWAIL authors such as B.S. Chimni, who link the rise of certain political and economic ideologies with the spread of international law. This idea is important when analyzing the state's approach with respect to 'harmful traditional practices' of ethnic communities and the political ideologies these states carry under the influence of international law.¹⁷ In opposition, Erturk argues that women's human rights discourse has been entangled within this culture vs. human rights debate and argues that as much as universal human rights might be serving a western interest, cultural rights constitute a smokescreen for serving the interest of patriarchal culture.¹⁸ This article argues that patriarchy does not only exist in a cultural context and exist in world of western culture as well. Therefore, the correlation of patriarchy to tradition is a product of strategic human rights grammar when justifying their need to intervene in non-western cultural practices. This article argues that it is not the concept of 'individual protection of rights' that is western as such principles exist too in the African societies but the application of human right discourse that is marred with certain historical biases that enhance the marginalization and subordination of non-western cultures.

Moshe Halbertal uses her paper to discuss the right to cultural identity. In this paper, she looks at the enormously important role that culture plays in the lives of the member of this society and because of this, the dire need for its protection.¹⁹ The paper contrast those who are in favor the liberal idea of 'individualism' in universal human rights and argues that minority rights as a collective unit should be protect with the same intensity for them to thrive and continue. The author places the burden on the liberal state to ensure the provision of these rights to minority communities. The paper, however, fails to look at two main challenges; where there is a minority culture and minority group (women) whose protection should take precedent and why and secondly, what happens when those rights of minority communities go against human rights

¹⁶ Asomah Y 'Cultural rights versus human rights: A critical analysis of the Trokosi practice in Ghana and the role of civil society' 15(1) *African Human Rights Law Journal*, 2015, 129.

¹⁷ Chimni B, 'Customary International Law: A Third World Perspective' 112(1) *American Journal of International Law*, 2018, 13.

¹⁸ Erturk Y, 'Culture versus Rights Dualism: A myth or reality?' 55(3) *Palgrave Macmillan Society for International Development*, 2012, 274.

¹⁹ Halbertal M and Margalit A, 'Liberalism and the Right to Culture' 61(3) *Social Research*, 1994, 491.

provided in these global liberal societies. Sally Merry, in her paper, introduces an important idea of translation which is the process of taking universal human rights and vernacularizing them to make them applicable to local institutions.²⁰ An important aspect to this indigenization mission is the role of translators in refashioning the global human rights agenda to the local context, making it applicable to these communities.²¹ This paper agrees that this would be an important step, however, it argues that this step cannot be achieved if the goal of human rights remains the complete elimination of this so-called ‘oppressive’ cultural practices. This paper proposes there first needs to be a framework that deals with how to go about the evolution of such cultural practices.

However, Makau Mutua in his paper *Savages, Victims and Saviors: The metaphor of Human Rights* brings out the idea that even if this translation was to take place there still exist a damning metaphor that flaws the global human rights discourse today. In his paper he looks at the structuring of human rights discourse (SVS metaphor) and its effects on othering non-western states and cultures. According to him because the authors of conventional human rights discourse are of western origin, the human rights narrative is constructed to propagate racial divides and power.²² This brings in the greatest challenge of human rights can these groups and communities still rely on human rights as a tool for their protection. Boaventura de Sousa in his paper *If God was a Human Rights Activist*, also acknowledges the crisis of hegemony of human rights as a discourse for human dignity today and how this discourse is Eurocentric in nature.²³ The problem according to him is that we assume the existing model is where we can find the solutions to the relevant and difficult human rights questions that arise today.²⁴ This article agrees for the most part that there is a damning metaphor in the human rights metaphor, however, the biggest contribution this paper makes is suggesting an alternative that seeks the accommodation and sensitivity towards non-western culture whilst still protecting the individual rights of oppressed

²⁰ Merry S, ‘Transnational Human Rights and local activism: Mapping the middle’ 108(1) *American Anthropologist*, 2006, 16.

²¹ Merry S, ‘Transnational Human Rights and local activism: Mapping the middle’ 108(1) *American Anthropologist*, 2006, 18.

²² Mutua M, ‘Savages, Victims and Saviors: The metaphor of Human Rights’ 42(1) *Harvard International Law Journal*, 2001, 14-31.

²³ Santos B, ‘Human Rights: a fragile hegemony’ in Crepeau F and Sheppard C(eds) *Human Rights and Diverse Societies: Challenge s and Possibilities*, Cambridge Scholars Publishing, 2013, 18.

²⁴ Santos B, *If God was a Human Rights Activist*, Cambridge Scholars Publishing, Newcastle, 2013.

persons.²⁵ A rubric in which some elements of culture can be preserved and human dignity can be observed and protected.

1.10 OUTLINE OF THE DISSERTATION

Chapter 1 looks serves as an introduction to the paper giving a background and highlighting the gaps this paper seeks to evaluate with the aim of suggesting a somewhat resolution.

Chapter 2 details the socio-cultural context of the practice in question '*trokosi practice*' with the aim of highlighting what cultural beliefs, frameworks and institutions have led to the sustenance of this practice years after its criminalization

Chapter 3 highlights the general notions surrounding the debate on the acceptability or lack thereof of trokosi practice by discussing the universalism v cultural relativism debate. This is done with the aim of analyzing the gaps in which both discourses have and the role that has played in sustaining trokosi practice. The second half of chapter 3 details the theoretical framework that this study employs to advance its arguments

Chapter 4 looks at trokosi practice as a human rights concern. This chapter highlights the concerns that this practice raises under human rights and also analyzes the domestic measure taken by the state in attempting to eliminate the practice. Lastly, the paper highlights the loopholes that the state approach to trokosis has with an aim of elaborating why the practice still exist years after its criminalization.

Chapter 5 asks the big question '*Is there a need for more*'. Despite all the measures taken, trokosi practice is a social control mechanism that continues to be employed. The entire paper looks at why is this the case and chapter 5 recommends a need for the state to do more.

²⁵ Mutua M, 'Savages, Victims and Saviors: The metaphor of Human Rights' 42(1) *Harvard International Law Journal*, 2001, 14-31.

2 CHAPTER 2: THE SOCIO-CULTURAL CONTEXT OF TROKOSI PRACTICE

This chapter sets out the socio-cultural context of *trokosis* with an aim to give background of this practice and the context that has supported its existence until today. The chapter highlights two main things. First, the tension that can exist between individual rights and ‘the collective identity’ in societies where communal welfarism is prioritized over individual freedom. The paper argues that thinking of rights in terms of obligations to the community often means that order will be emphasized and given precedence over freedoms and this is clearly brought out by the social control measure that is *trokosi* practice.²⁶ Second, this chapter introduces a unique lens of looking at such cultural practices that recognize that often when perpetuating human rights violations, communities deeply believe they are doing right by their community and simply following their culture. Understanding this unique nature of cultural objectors is important in trying to come up with a more productive conversation to ensure the true common good for the community is achieved.

This segment proposes that cultural practices, values and traditions are best understood by those who engage in them.²⁷ Therefore, this segment agrees with the concept proposed by Greene in her paper ‘*Family Concerns: Gender and Ethnicity in Pre-Colonial West Africa*’²⁸ which anchors its arguments in a third world perspective to feminism and proposes that the debate on cases of subordination and marginalization of women within ethnic societies in a third world context must move beyond a basic approach of ‘oppression and agency’ towards evaluating the larger context of that community socially, maybe even politically so as to understand the reason why these African men and women, as both individuals and as members of a collective ethnic community, make the choices they make, whether with intent or without.²⁹

²⁶ Anoba I, ‘The ambush of African philosophy: An exhumation of classical liberal principles in the evolution of Africa societies’ 3(1) *Journal of Liberty and International Affairs*, 2017, 31.

²⁷ Ameh R, ‘Child Bondage in Ghana: A contextual policy analysis of trokosi’ Published Thesis, Simon Fraser University, Ottawa, 129.

²⁸ Greene S, ‘Family concerns: Gender and ethnicity in pre-colonial West Africa’ 44(7) *International Review of Social History*, 1999.

²⁹ Greene S, ‘Family concerns: Gender and ethnicity in pre-colonial West Africa’ 44(7) *International Review of Social History*, 1999, 182.

With that in mind, this chapter employs this approach and seeks to look at this debate past the ‘subordination and agency approach’ towards understanding the place and value of this practice to the Southern Ewe. In the process, the chapter will seek to understand what this practice means for the community, what it means for the girls and what social or cultural factors have supported its continued existence despite the extensive frameworks put in place to outlaw the practice.

2.1 THE SOCIO-CULTURAL CONTEXT OF TROKOSI PRACTICE

To understand the universalist v cultural relativist debate surrounding trokosi practice, one must begin by understanding what trokosi practice is and what the practice means within the sociocultural set up of the Southern Ewe people. The social and political context of the Ewe society is built upon is on the principle of patrilineal descent, which is based on clans and lineages.³⁰ Attaining membership status in a clan comes with certain rights and duties; rights of individuals within this group to enjoy certain privileges and corresponding duties to perform certain obligations.³¹ Similar to several other traditional African societies whose social structures were communally designed, the Southern Ewe structure the functioning of their society on communal welfarism due to the existence of structures such as kinship, tribes and clans.³²

The principle of collective responsibility is especially important in the ordering of this community.³³ An individual’s acts or omissions have possible consequences for the family and the clan at large. This concept is seen with the way the community interacts with their land, with each other and even is seen in their traditional social control system. We see the concept of collective responsibility in both the cultural and religious field of the Southern Ewe, the two of which as we will see later seem to be symbiotically related.³⁴

³⁰ Nukunya G, *Tradition and change in Ghana: An introduction to sociology*, 2nd ed, Ghana University Press, Accra, 2003, 47.

³¹ Nukunya G, *Tradition and change in Ghana: An introduction to sociology*, 2nd ed, Ghana University Press, Accra, 2003, 47.

³² Anoba I, ‘The ambush of African philosophy: An exhumation of classical liberal principles in the evolution of Africa societies’ 3(1) *Journal of Liberty and International Affairs*, 2017, 37.

³³ Malacci O, ‘Conflicting Discourses on the Trokosi Practice in Ghana: Exploring tensions in the Global and Local Human Rights Translations’ Unpublished Development Studies Thesis, International Institute of Social Studies, Ghana, 2011, 15.

³⁴ Dzansi Y and Biga P, ‘Trokosi- slave of a fetish: An Empirical Study’ 12(1) *Central University of Technology Journal*, 2014, 5.

Like many other African societies, religion and spirituality play a huge role in the cultural set up of the Southern Ewe. The traditional religion practiced by the Ewe comprises of *Mawu* who is the Creator of everything in the universe and is the Supreme Being.³⁵ *Mawu* is believed by the people to operate through vicegerents such as gods (*trowo*) and ancestral spirits, who are considered intermediaries between human beings and *Mawu* their god.³⁶ *Mawu* also gives power to lesser gods like *Nyigbla* to judge people on earth and to communicate with the shrine priests to punish those who do wrongs against the gods.³⁸ In the quest to administer justice, the Ewe employ a social control mechanism commonly known as *trokosi* practice.

Trokosi stems from two Ewe words 'tro' to mean a god and 'kosi' to mean a wife or slave of the gods.³⁷ It is an ancient religious-cultural practice that dates back to around the 17th Century that was largely practiced in West Africa and is still exercised today amongst certain tribes in West Africa. This article will focus on *trokosi* culture amongst the Southern Ewe in the Volta Region of Ghana where the practice is still upheld.

The practice is tied to the spirituality and cultural beliefs of the Southern Ewe and it involves sending a young virgin girl as atonement for certain crimes (acts that are considered hateful to the gods) such as murder, adultery, assault, theft, rape, incest and witchcraft that have been committed by a family member.⁴⁰ It follows the aforementioned principle of collective responsibility as the gods order the punishment of a young girl for the crimes of her relatives and ancestors despite her not having played a role in the commission of the crime.³⁸ According to the Ewe people, *trokosi* practice was traditionally instituted by their ancestors to achieve two things in particular; to appease the deities '*the tro*' who embody virtue and morality and to serve as a deterrence

³⁵ Gedzi V, 'Field of power: A religio-cultural analysis of *trokosi* in Ghana' 1(1) *Political Science Journal*, 2016, 16.

³⁶ Gedzi V, 'Field of power: A religio-cultural analysis of *trokosi* in Ghana' 1(1) *Political Science Journal*, 2016, 17.

³⁸ Gedzi V, 'Field of power: A religio-cultural analysis of *trokosi* in Ghana' 1(1) *Political Science Journal*, 2016, 17.

³⁷ Malacci O, 'Conflicting Discourses on the *Trokosi* Practice in Ghana: Exploring tensions in the Global and Local Human Rights Translations' Unpublished Development Studies Thesis, International Institute of Social Studies, Ghana, 2011, 8. ⁴⁰ Nicholas A, 'The Relevance of National and International Laws for the Protection of the Rights of Women and Children in Ghana: A Critical Look at the *Trokosi* System in Ghana' 1(10) *OIDA International Journal of Sustainable Development*, 2011, 81-90.

³⁸ Malacci O, 'Conflicting Discourses on the *Trokosi* Practice in Ghana: Exploring tensions in the Global and Local Human Rights Translations' Unpublished Development Studies Thesis, International Institute of Social Studies, Ghana, 2011, 12.

mechanism for criminal acts by members of the community.³⁹ To the Ewe community, a criminal act is not only that which is socially harmful and morally blame-worthy but also that which constitutes an affront to the benevolent supernatural power on which the welfare and protection of the whole community is dependent on.⁴⁰ Essentially then, their interpretation of crime is based on a moral injury to three parties; the individual victim, the community at large and the gods.⁴¹

Where a crime has been committed, the victim of the crime could either seek a remedy from the public criminal justice system or use cultural mechanisms and appeal to the gods through the shrine priests for a remedy.⁴² For the latter solution, the wronged party approaches the shrine priest and either suggests for a specific sanction to be employed or leaves it to the deity's discretion to select what measure should be employed in rectifying the harm.⁴³ Amongst the punishments, is the offering of a young virgin girl by the faulted family to the shrine priest as an atonement for the crime committed.⁴⁴ Because of the strong role that spirituality plays amongst the Southern Ewe, the decision of the gods is accepted without question.⁴⁵ Both the wronged family and the family of the accused agree that this is the right thing to do for the gods, for the community and to remedy the injustice done to the individual harmed as it is believed that a failure to do so causes calamities such as death and sickness to the family at large.⁴⁶ It is important to note, that idea of family punishment from the gods as a consequence for not sacrificing one's life to serve in the shrine is

³⁹ Ameh R, 'Child Bondage in Ghana: A contextual policy analysis of trokosi' Published Thesis, Simon Fraser University, Ottawa, 146.

⁴⁰ Abotchie C, *Social control in traditional Southern Eweland of Ghana: Relevance for modern crime prevention*, Ghana University Press, Accra, 1997, 65.

⁴¹ Abotchie C, *Social control in traditional Southern Eweland of Ghana: Relevance for modern crime prevention*, Ghana University Press, Accra, 1997, 65.

⁴² Malacci O, 'Conflicting Discourses on the Trokosi Practice in Ghana: Exploring tensions in the Global and Local Human Rights Translations' Unpublished Development Studies Thesis, International Institute of Social Studies, Ghana, 2011, 14.

⁴³ Abotchie C, *Social control in traditional Southern Eweland of Ghana: Relevance for modern crime prevention*, Ghana University Press, Accra, 1997, 79.

⁴⁴ Malacci O, 'Conflicting Discourses on the Trokosi Practice in Ghana: Exploring tensions in the Global and Local Human Rights Translations' Unpublished Development Studies Thesis, International Institute of Social Studies, Ghana, 2011, 15.

⁴⁵ Malacci O, 'Conflicting Discourses on the Trokosi Practice in Ghana: Exploring tensions in the Global and Local Human Rights Translations' Unpublished Development Studies Thesis, International Institute of Social Studies, Ghana, 2011, 15.

⁴⁶ Asomah Y 'Cultural rights versus human rights: A critical analysis of the Trokosi practice in Ghana and the role of civil society' 15(1) *African Human Rights Law Journal*, 2015, 12.

what coerces many girls to go serve as *trokosis* in the shrine as a refusal to save their often means that they want their family to suffer and comes with great backlash from the community.

The virgin is latter initiated into this system and bonded into a spiritual marriage with the deity becoming a wife of the gods ‘a kosi’. While in the shrine, these girls who are as young as 7 years old work, serve and when they reach puberty, provide sexual favors to the priest and bear his children.⁴⁷ The girls who are too young to understand are simply given out by their families to the shrine priests and abandoned to serve the shrine priests without an explanation of what is taking place. These young girls lose their right to make their own choices once made a *trokosi* and work in service of the priest for years and, in extreme cases, for the rest of their lives.⁴⁸ They live in isolation away from the rest, are not allowed to play outside with other children and are denied their right to education once deemed a *trokosi*.⁴⁹

2.2 TROKOSI PRACTICE; JUSTIFIED OR UNJUSTIFIED?

Many scholars of ethics largely assume that cultures manifest certain preferences, certain inclinations and even certain motivations and that the variety is so chaotic and extreme that no particular values or principles can be said to be common to us collectively as humans.⁵⁰ However, with research, this assumption has been rebutted showing the existence of some form of harmony.⁵¹ That all human societies show certain key concerns with regard to their fulfillment and happiness; from the society in the heart of Ghana to the one in the heart of China, certain key concepts seem to be consistent.

The Southern Ewe are not an exception as we see similar rational concepts in the ordering of their society. With great value placed on the community, on justice, on individual rights and obligations for the collective good of the society, the cultural social control mechanism of *trokosi* seems to be considered a product of these rational ideas of community welfarism. However, this paper

⁴⁷ Dzansi Y and Biga P, ‘Trokosi- slave of a fetish: An Empirical Study’ 12(1) Central University of Technology Journal, 2014, 3.

⁴⁸ Report of the Special Rapporteur on violence against women, Mission to Ghana, Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural, including the rights to Development, its causes and consequences A/HRC/7/6/Add.3, 21 February 2008.

⁴⁹ E Dovlo and K Adzoyi, *Report on Trokosi Institution: Commissioned by International Needs for Department for Studies of Religions*, University of Ghana Press, Ghana, 1995, 19.

⁵⁰ Finnis J, *Natural law and Natural Rights*, 2nd ed, Oxford University Press, Oxford, 2011, 83.

⁵¹ Finnis J, *Natural law and Natural Rights*, 2nd ed, Oxford University Press, Oxford, 2011, 83.

acknowledges that even the most well-meaning institutions, mechanisms and frameworks can propagate great injustices. Raising the question, can this truly be the good of all 'the true common good' if it leads to suffering and unhappiness of a certain marginalized group in the community.

Or is it simply a rationalization of injustice in the name of culture?

3 CHAPTER 3: GENERAL NOTIONS AND THEORETICAL FRAMEWORK

The debate on the acceptability or lack thereof of trokosi practice over the years has been engaged from two main paradigms; on one side, we have the universalists approach whose foundations are in international human rights offering arguments anchored on the personal worth dimension and arguing for the complete elimination of the practice and on the other, we have the cultural relativist approach which runs the cultural dimension argument and is anchored on relativism arguing for the complete sustainment of the practice.⁵² The two approaches look at the debate in two polar extremes, which will be discussed in the first segment of this chapter under ‘general notions surrounding the debate’ with the aim of showing how both frameworks, though they carry certain important elements in their own right, do not entirely redress the injustices that can be occasioned by what we would consider ‘problematic’ cultural practices.

This paper argues that debates on issues associated with cultural relativism such as female genital cutting, honor killings, and in this case, trokosi practice are often cast into this idea of the western perception of rights under universalism vs the non-western resistance making the conversation surrounding cultural violations often unproductive.⁵³ With the human rights corpus lacking cultural legitimacy and cultural relativism serving as a rationalization of human rights violations within cultural paradigms, how do we acknowledge the importance of culture in shaping the identity of persons in African societies, while still maintaining the stance that the self-worth, dignity and rights of these young girls must be fiercely protected?

⁵² Nicholas A, ‘The Relevance of National and International Laws for the Protection of the Rights of Women and Children in Ghana: A Critical Look at the Trokosi System in Ghana’ 1(10) *OIDA International Journal of Sustainable Development*, 2011, 87.

⁵³ An-naim A, ‘Universality of human rights: Mediating paradox to enhance practice’ in Jovanovic A and Krstic I (eds), *Human Rights today -60 years of the Universal Declaration*, Eleven International Publishing, Netherlands, 2010, 29.

3.1 GENERAL NOTIONS SURROUNDING THE DEBATE

In this first section, this paper will look at the concept of universality, the thoughts behind this idea, the criticisms and the realities and thereafter, a discussion on the concept of cultural relativism.

3.1.1 THE UNIVERSALIST APPROACH

Any discussion on universalism necessitates a discussion on the Universal Declaration of Human Rights as efforts towards making the human rights corpus universal came into greater prominence after the Second World War with the adoption of the Universal Declaration of Human Rights (UDHR). When the Universal Declaration of Human Rights was ratified in 1948, it established a series of rights that were supposed to be, as the document calls it ‘universal.’ The Second World War saw some of the greatest human rights atrocities, Nazi Germany brought into light an unprecedented cruelty through Hitler's own extravagant form of cultural exceptionalism.⁵⁴ And like any other huge atrocity, this came with the deep necessity and desire for social and political agreements to prevent the lows that humanity experienced during this period. True to word, the year 1948 saw the creation of the Universal Declaration of Human Rights (UDHR) which served as a commitment by the international community to ensure that such a conflict never happened again and that the community would always seek to guarantee and protect certain rights of individual everywhere.⁵⁵

The declaration was drafted with the desire to ensure that a certain minimum package of rights are granted to all without discrimination. Today, the principle of universality of human rights is or at least seems to be one of the most important principles in International Human Rights Law.⁵⁶ This concept of universalism simply proclaims that human rights are valid irrespective of the social, political and cultural context in which they operate.⁵⁷ The Universal Declaration of Human Rights and the several subsequent treaties setting out civil, political, cultural, and economic rights as well

⁵⁴ Franck T, ‘Are Human Rights Universal?’ 80(1) *Foreign Affairs*, 2001, 193.

⁵⁵ Madigan J, ‘Being Human, being good: The source and submit of universal human rights’ Unpublished Doctorate of Philosophy Thesis, University of Maryland, College Park, 2004, 16.

⁵⁶ Madigan J, ‘Being Human, being good: The source and submit of universal human rights’ Unpublished Doctorate of Philosophy Thesis, University of Maryland, College Park, 2004, 16.

⁵⁷ Mountis B and Elene G ‘Cultural Relativity and Universalism: Reevaluating Gender Rights in a Multicultural Context’ 15(1) *Penn State International Law Review*, 1996, 12.

as the rights of children, women, ethnic groups, and religious groups, were meant to create this global safety net of rights applicable to all persons, everywhere.⁵⁸ The international human rights regime focuses on the personal worth dimension with its key principle being; that all individuals, irrespective of the societies in which they exist in, are equal in rights and freedoms simply because they are beings.⁵⁹ As a political philosophy, the idea of certain rights being universal and entitled to persons simply because they are human beings dates back to philosopher John Locke who proposed that human beings were endowed with a series of inalienable rights at birth that cannot and should not be taken away. Today, a similar proposition is made by the UDHR.

However, over the years, proponents of relativism have attempted to challenge the universality and intention of the declaration. It is no secret that the post-world war human rights model featured two dynamic elements: globalization and individualism.⁶⁰ And with both backlashes emerged. Relativists today question the theoretical and practical underpinning of the concept of universality of human rights asking whether universality is even viable in a world with realities of such extreme and profound cultural difference.⁶¹

Such arguments question the primary development of the modern-day human rights regime, as proclaimed by the Universal Declaration of Human Rights and other subsequent treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), arguing that historically these rights deemed as universal are simply a product of a particular society or group and in this case the western society.

In addition to this, cultural relativist question the human rights regime by arguing that nothing can be universal as all rights and all values are defined and controlled by our cultural perceptions and realities.⁶² Therefore, if there is no singular culture there cannot be a universal human right regime as these concepts vary with the different contexts.⁶³ They argue that as a discourse of emancipation,

⁵⁸ Franck T, 'Are Human Rights Universal?' 80(1) *Foreign Affairs*, 2001, 194.

⁵⁹ UNGA, *Universality, cultural diversity and cultural rights*, UN A/73/227 (25 July 2018).

⁶⁰ Franck T, 'Are Human Rights Universal?' 80(1) *Foreign Affairs*, 2001, 194.

⁶¹ Abdullahi A, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, University of Pennsylvania Press, Philadelphia, 1992, 438.

⁶² Tharoor S, 'Are Human Rights Universal?' 16(4) *World Policy Journal*, 2000, 1.

⁶³ Tharoor S, 'Are Human Rights Universal?' 16(4) *World Policy Journal*, 2000, 1.

human rights were inclined to prevail for one side of the abyssal line, that of western modernity, and that the other side of the abyssal line (cultural communities in third world states) could not possibly challenge the universality of theories already in force and established on the metropolitan side.⁶⁴ Therefore, can such human rights truly benefit the very people it others and excludes?⁶⁵

This paper argues that the declaration's concepts, foundations and goals, unlike what is painted by the relativist approach, are not particularly alien to non-western realities.⁶⁶ It is at this point that this paper distinguishes between the declarations that encompass the human rights corpus and the values enshrined from universal natural law; the former is simply a product of a society with its own merits and demerits, the latter however speaks certain principles, a set concept fundamental to human nature that we see within the declaration. More importantly, this paper question whether the protection of persons from grave intrusions and violations of their rights and freedoms is truly 'western hegemony' or the declaration's way of pushing a western agenda?

The principles enshrined in the human rights regime are not alien and the protection of individual rights and freedoms is not antithetical to African morality.⁷⁰ Although some traditional African societies had social and economic structures that were communally designed, this was only because social welfarism was seen as the most effective ordering system due to frameworks such as tribes, kinship and clans.⁷¹ On a larger spectrum lies concepts of individual happiness, interests and freedoms which were equally prioritized and valued.

On the argument that there exists different realities in the different cultural context, the human rights regime aware of this diversity in realities grants a margin of appreciation to states. All the states that agree to certain international human rights commitments sign a treaty agree to abide by the provisions in that treaty. Within these commitments, some margin is granted to each state to give some interpretation that would be more adequate to the circumstance and history of each state.

⁶⁴ Santos B, 'Human Rights: A fragile hegemony' in Crepeau F and Sheppard C(eds) *Human Rights and Diverse Societies: Challenges and Possibilities*, Cambridge Scholars Publishing, 2013, 18.

⁶⁵ Santos B, 'Human Rights: A fragile hegemony' in Crepeau F and Sheppard C(eds) *Human Rights and Diverse Societies: Challenges and Possibilities*, Cambridge Scholars Publishing, 2013, 18.

⁶⁶ Anoba I, 'The ambush of African philosophy: An exhumation of classical liberal principles in the evolution of Africa societies' 3(1) *Journal of Liberty and International Affairs*, 2017, 37. ⁷⁰ Anoba I, 'The ambush of African philosophy: An exhumation of classical liberal principles in the evolution of Africa societies' 3(1) *Journal of Liberty and International Affairs*, 2017, 38. ⁷¹ Anoba I, 'The ambush of African philosophy: An exhumation of classical liberal principles in the evolution of Africa societies' 3(1) *Journal of Liberty and International Affairs*, 2017, 38.

Though implementation of the rights can vary, the overall spirit must remain the same. Having that global dedication and acceptance of the idea of human rights is fundamental. As for the commitment set out by the international human rights corpus, after decolonization and several other fundamental developments there has been more involvement of non-western states and more contributions made to the UDHR to accommodate and incorporate non-western realities.⁶⁷

However, this paper acknowledges that indeed there is a distinction between the ratification of human rights treaties by states and the acceptance and internalization of the human rights corpus by cultural societies that exists within those state.⁶⁸ Though signatories of these treaties include very many states both western and non-western, the paper acknowledges that ratification and state acceptance does not directly translate to an acceptance of such values within cultural communities. The biggest problem with human rights corpus and especially with regard to their approach to cultural violations, is that the human rights movement in a very real sense lacks cross cultural legitimacy and people often will not feel bound by norms they have not freely accepted.⁶⁹

Where the human rights movement fails to acknowledge that culture is dynamic and constantly evolving and therefore open to evolution without coercion and that the discourse facilitated by the human rights corpus can, due to certain historical biases, sometimes subordinate, marginalize and undermine cultural systems through their grammar and representation of certain non-western societies as barbaric⁷⁵ then a productive conversation would be difficult to achieve.

3.2 THE CULTURAL RELATIVIST APPROACH

Cultural relativism is a theory that there exist no absolute truths be it moral, social or ethical and therefore every moral reality is shaped by the socio-cultural contexts one exists in.⁷⁰ What this

⁶⁷ An-naim A, 'Universality of human rights: Mediating paradox to enhance practice' in Jovanovic A and Krstic I (eds), *Human Rights today -60 years of the Universal Declaration*, Eleven International Publishing, Netherlands, 2010, 29.

⁶⁸ Mutua M, 'Human Rights in Africa: The limited promise of liberalism' 51(1) *African Studies Review*, 2008, 20.

⁶⁹ An-naim A, 'Universality of human rights: Mediating paradox to enhance practice' in Jovanovic A and Krstic I (eds), *Human Rights today -60 years of the Universal Declaration*, Eleven International Publishing, Netherlands, 2010, 29. ⁷⁵Mutua M, 'Savages, Victims and Saviors: The metaphor of Human Rights' 42(1) *Harvard International Law Journal*, 2001, 14.

⁷⁰ Zechenter E, 'In the name of culture: Cultural relativism and the abuse of the individual' 53(3) *Journal of Anthropological Research*, 1997, 319.

proposes is that there is no one scale that can judge different cultures as all judgments are ethnocentric.⁷¹ To judge one culture using another would be to assume the superiority of one over the other.⁷² This has formed one of the biggest resistance to this concept of universalism as it argues that what universalism does is acknowledge a superiority of western modernity over the non-western, both of which are cultures and therefore both of which should be equal in their own right.⁷³ The concept of cultural relativism has taken different shapes and has several different variants. These variants range from what would be considered as weak relativism which simply acknowledges that cultures vary and that accepting that diversity is imperative to radical relativism which argues the complete absence of objective truths as all standards are culture-bound, therefore there can be no transcultural moral or ethical standards.⁷⁴ The most extreme form of relativism is the epistemological relativism which argues that there exist no standards against which cultural practices may be judged as acceptable or unacceptable because all cultures are mutually incomprehensible therefore all cultures must be tolerated as they are.⁷⁵ To them, all morality and knowledge is culture bound therefore even the attempt to suggest a concept of universality is meaningless and certainly the propagation of a certain agenda, in this case western.⁷⁶ However, where do we draw the line on that? As such an approach can validate even genocidal practices and rituals such as ethnic cleansing which very much go against the entire spirit of human rights.

What relativism seems to propose is that the problem with the human rights regime is that it speaks on universal truth and universal reasons when in reality it is something that has come about as result of a cultural modernity and really what the human rights corpus is doing is imposing a particular world view on people for whom it may not be good for because they exist in different

⁷¹ Zechenter E, 'In the name of culture: Cultural relativism and the abuse of the individual' 53(3) *Journal of Anthropological Research*, 1997, 319.

⁷² Mutua M, 'Savages, Victims and Saviors: The metaphor of Human Rights' 42(1) *Harvard International Law Journal*, 2001, 14.

⁷³ UNGA, *Universality, cultural diversity and cultural rights*, UN A/73/227 (25 July 2018).

⁷⁴ Zechenter E, 'In the name of culture: Cultural relativism and the abuse of the individual' 53(3) *Journal of Anthropological Research*, 1997, 320.

⁷⁵ Zechenter E, 'In the name of culture: Cultural relativism and the abuse of the individual' 53(3) *Journal of Anthropological Research*, 1997, 320.

⁷⁶ Howard R, 'Human rights and the cultural wars: Globalization and the universality of human rights' 53(1) *International Journal*, 1998, 101.

circumstance. The solution? The abolition of universality so as to not suffocate particularity and diversity. What therefore the relativist argues we should foster is the existence of different values.

Several conceptual flaws with this concept of relativism. To begin with, by adopting cultural relativism and proclaiming a tolerance of all cultures without interference, especially where the community takes a group-centered perspective, you live little room for any rational discussion about the rights of vulnerable individuals within those cultural frameworks.⁷⁷ This is aptly brought out in trokosism as relativistic approaches taken by the Afrikania mission and other community leaders in the Ewe Community has made it severely difficult for any serious and productive change to be occasioned despite all the frameworks put in place.

Second, the relativist approach is based on the static view of culture. It leaves no room for the transformation of cultural practices and therefore often forms a justification for dysfunctional practices within cultural frameworks.⁷⁸ This is because if there exists no objective standard for judging the acceptability of human rights and each socio-cultural context defines and shapes human rights for themselves, there is no legitimate basis for condemning the practices of communities and states as they shape their own realities. The existence and scope of human rights enjoyed by individuals in a given society are shaped by that society and this can easily lead to the oppression of many within this society without question.

Though it has some goods in it, to the extent that it allows us to accept that cultures are diverse and dynamic, one of the problems this theory brings forth is that it suggests that there is no reality because there is no universal agreement. But if we make the aim not agreement in so far as we know a particular universal reality or truth, but truth in so far as there is an agreement, then the truth we adopt will be based on 'what do we all agree on' and therefore we could never claim to truth at all. This paper argues that certain truths and realities exist whether or not there is cross cultural agreement and the lack of acknowledgment of such truths does not invalidate their existence.

⁷⁷ Zechenter E, 'In the name of culture: Cultural relativism and the abuse of the individual' 53(3) *Journal of Anthropological Research*, 1997, 321.

⁷⁸ Zechenter E, 'In the name of culture: Cultural relativism and the abuse of the individual' 53(3) *Journal of Anthropological Research*, 1997, 328.

3.3 THEORETICAL FRAMEWORK

3.3.1 NATURAL LAW AND NATURAL RIGHTS

So how can we identify what we can and cannot allow in the name of culture? With the understanding that indeed there exists some universal truth common to us all simply because we share the same human nature and irrespective of one's cultural setting, the question is therefore what metaphorical lantern do we use to identify that which is right and that which is not without being getting caught up in the binary debate of 'the west vs. the rest'. Natural law and Natural Rights theory as advanced by Finnis forms the best transition to the theoretical framework that this paper seeks to employ for two reasons; first, serve as a lantern in our analysis of that which is right and wrong and second, to advance the idea that these girls are entitled to their rights simply because they are human being worthy of value and dignity.

It is important to understand that human actions and practices are usually a means to a certain end and therefore, all actions and practices can only fully be understood by understanding their point, their objective or better yet their significance.⁷⁹ This can often only be conceived by the people who perform or engage in these acts or practices.⁸⁰ So how do we evaluate what practices are right where concepts and practices vary from person to person, from community to community?

The metaphorical lantern that this paper argues is best, is the set of basic principles that distinguish sound from unsound, moral from immoral and right from wrong; the point of view of natural law.⁸¹ Natural law introduces this concept of common good which is simply the good for all.⁸² This assists us in evaluating the fit of an action or practice with the goal of community's fulfillment or happiness and the proportionality of the means (actions) to the end so as to help us evaluate what is just and reasonable and what is not.⁸⁹ According to Aquinas, the way to discover what is morally

⁷⁹ Finnis J, *Natural law and Natural Rights*, 2nd ed, Oxford University Press, Oxford, 2011, 3.

⁸⁰ Finnis J, *Natural law and Natural Rights*, 2nd ed, Oxford University Press, Oxford, 2011, 3.

⁸¹ Finnis J, *Natural law and Natural Rights*, 2nd ed, Oxford University Press, Oxford, 2011, 6.

⁸² Madigan J, 'Being Human, being good: The source and submit of universal human rights' Unpublished Doctorate of Philosophy Thesis, University of Maryland, College Park, 2004, 28. ⁸⁹ Madigan J, 'Being Human, being good: The source and submit of universal human rights' Unpublished Doctorate of Philosophy Thesis, University of Maryland, College Park, 2004, 28.

right (virtue) and what is a vice is to ask, what is practically reasonable?⁸³ The point of view of natural law distinguishes the purposes of states of affairs but echoing this question

Some parts of legal systems and positive law commonly do, and certainly should consist of rules and principles that closely correspond to the requirements of practical reason.⁸⁴ For Aquinas the law consists in part of rules derived from natural law by way of conclusion deduced from general principles and by way of determination.⁸⁵ This not to say that all laws and regulations are derived from natural law as certainly often, more often than it should happen, legislature can create laws that are unjust or unfair and that do not stem from natural law. However, this paper argues that within the human rights corpus and within state legislation exist principles of justice, fairness and of the protection of the human person that stem from these universal concepts of natural law.

In looking at the practice of trokosism, we will first have to understand what this practice means for the authors or the persons who engage in it so as to understand its intended purpose. Only by understanding what trokosism is intended to do can we evaluate using the moral lantern; first whether it serves the intended purpose in a manner that is just and proportional and second, whether it ultimately leads to the ultimate fulfillment of the community at large.

3.3.2 SOCIAL CONVENTION THEORY

The social convention theory as proposed by Mackie and LeJeune is also an important foundation for the arguments put forward in this paper. The theory provides that the continuation, alteration or even abandonment of a practice operates as what is known in social science as a social norm.⁸⁶ The theory argues that each practice is a community practice therefore can only be altered by the whole community coordinating on its alteration. This means that overcoming self-enforcing beliefs surrounding the practice requires new information, including about the feasibility and desirability of attaining the uncut alternative.⁸⁷ This article suggests that culture is not static; over

⁸³ Finnis J, *Natural law and Natural Rights*, 2nd ed, Oxford University Press, Oxford, 2011, 36.

⁸⁴ Finnis J, *Natural law and Natural Rights*, 2nd ed, Oxford University Press, Oxford, 2011, 11.

⁸⁵ Finnis J, *Natural law and Natural Rights*, 2nd ed, Oxford University Press, Oxford, 2011, 11.

⁸⁶ Mackie G and LeJeune J, 'Social dynamics of abandonment of harmful practices: A new look at the theory' Innocenti Working Paper Number 6, 2009, 1 -< https://www.unicef-irc.org/publications/pdf/iwp_2009_06.pdf > on 20 March 2020.

⁸⁷ Mackie G and LeJeune J, 'Social dynamics of abandonment of harmful practices: A new look at the theory' Innocenti Working Paper Number 6, 2009, 1 -< https://www.unicef-irc.org/publications/pdf/iwp_2009_06.pdf > on 20 March 2020.

the years culture evolves. Where there exists a tradition that infringes on the rights of certain persons, then certain alterations can be made to ensure the protection of conflicting rights. This will be important when recommending cultural reengineering as an alternative that attempts to preserve the culture and protect the rights of the victims of harmful cultural practices.

3.3.3 A CROSS CULTURAL PERSPECTIVE

This portion seeks to answer the question in what ways we can have a more productive conversation surrounding cultural practices such as trokosism. Is it possible to accommodate religio-cultural concerns where human rights are concerned and what would that need from the current human rights model? Secondly, how do we create a scenario where these natural law concerns within the human rights regime gain a cultural legitimacy so as to enhance the will to act towards these ideals of a happier and more fulfilled society? How do we do this without suggesting that the community has no right to engage in cultural-based social control mechanism? A cross cultural approach argues that some form of cultural sensitivity must be employed for any productive discourse. This forms the fundamental basis for any discussion on cultural transformation.

The cross cultural approach suggested by Abdullahi Ahmed An-Na'im proposes three things in particular; first that people are more likely to observe norms that they freely accept, second that culture is dynamic and lastly, that only with this sensitive cultural discourse with the culture over human right norms can we take steps towards a more productive conversation.⁸⁸ This approach will be heavily employed in the arguments run by this paper of creating some come of tenuous accommodation where; first the human rights system attempts to accommodate culture without necessarily pushing for complete elimination and eradication where practices raise some serious human rights concerns and second the cultural dimension seeks to accommodate these natural law concerns by stripping away the unacceptable cultural manifestations while allowing the expression of the acceptable elements of the culture.

⁸⁸ Abdullahi A, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, University of Pennsylvania Press, Philadelphia, 1992, 438

4 CHAPTER 4: TROKOSI PRACTICE AS A HUMAN RIGHTS CONCERN

Throughout the paper, we see several systems that have supported the continued existence of this practice, from the deep cultural and religious foundations of this social control mechanism and the coercive nature of religious-cultural practices that make the victims continue to take part in it, to the universalism v relativism debate that does not entirely address the complexities of cultural violations. This chapter reiterates the question ‘what supports the continued existence of this practice years down the line, despite the extensive frameworks and steps taken by Ghana in its aim to eliminate the practice’.

‘It is not just Trokosi, it is the eradication of the remnants of our traditional system. So their objective is not the liberation of any kind, they just have to get some ways of destroying our cultural religious practice’

-An elder of the Afrikania Mission.⁸⁹

The Afrikania Mission, a political-cultural and religious movement in Ghana, has formed one of the most significant resistance to the anti-trokosi movement.⁹⁰ The first wave that sort to abolish and eliminate trokosism began in the late 1990’s led by the Christian church and in the subsequent years has been facilitated by National and International Human Rights Organizations such as International Needs Ghana.⁹¹ In 1998, International Needs Ghana launched an initiative to assist in the elimination of trokosi practice. Today, the organization has rescued over 2800 girls from this practice and provided education and shelter to these young girls who cannot go back home due to the local stigma. Today, more than 5,000 girls still continue to serve as trokosi in the shrines.

⁸⁹ Malacci O, ‘Conflicting Discourses on the Trokosi Practice in Ghana: Exploring tensions in the Global and Local Human Rights Translations’ Unpublished Development Studies Thesis, International Institute of Social Studies, Ghana, 2011, 31.

⁹⁰ Witte M, ‘Spirit Media: Charismatics traditionalist and mediation practice in Ghana’ Published PhD Thesis, Amsterdam Institute for Social Science Research, Amsterdam, 2008, 303.

⁹¹ Ameh R, ‘Child Bondage in Ghana: A contextual policy analysis of trokosi’ Published Thesis, Simon Fraser University, Ottawa, 146

The Afrikania Mission has voiced its rebuttals to the anti-trokosi movement, arguing that the attempt to eliminate this practice is a form of Christian indoctrination and an attempt of the west to carry on with colonialism and of the state to perpetuate western values.⁹² They further argued that this seeks to subordinate African culture and to eradicate the remnants of African tradition.¹⁰⁰ The Afrikania Mission has played a great role in advocating for the continuation of this practice stating that the Ewe people have a right not only to set up mechanisms in line with their traditions, culture and religion without external interference but also to the equal protection and prioritization of their culture.⁹³

This chapter seeks to disprove these claims by showing the steps that the international community and the state have taken to protect and provide for the right to culture. The paper will look at whether this social control mechanism of trokosi practice can be acceptable under the right to culture, whether this right that is granted to persons and communities is absolute and whether the right to participate in a communities' customs, traditions and to retain their culture and institutions includes a right to non-interference. The paper argues that there are certain limitations to such a right in the balance between cultural diversity and women's human rights and seeks to look at the issues arising from trokosi practice, the obligation of the state and the domestic measure taken.

4.1 RECOGNITION OF THE RIGHT TO CULTURE

With an aim to be more accommodative to the diversity of the realities in existence, today's human rights regime incorporates cultural diversity and provides for the protection of the right to culture now more than ever before.⁹⁴ An important feature in the universalist reconciliation of human rights and cultural diversity is the inclusion and renewed interest in cultural rights and, on a broader

⁹² Witte M, 'Spirit Media: Charismatics traditionalist and mediation practice in Ghana' Published PhD Thesis, Amsterdam Institute for Social Science Research, Amsterdam, 2008, 306. ¹⁰⁰ Witte M, 'Spirit Media: Charismatics traditionalist and mediation practice in Ghana' Published PhD Thesis, Amsterdam Institute for Social Science Research, Amsterdam, 2008, 306.

⁹³ Witte M, 'Afrikania's dilemma: Reframing African authenticity in the public sphere' 17(2) *University of Amsterdam*, 139.

⁹⁴ Fagan A, 'Cultural harm and engaging the limits of a right to cultural identity' 39(1) *Human Rights Quarterly*, 2017, 319.

scale, the right to cultural identity and collective cultural expression.⁹⁵ Under human rights law, such rights are categorized under third generation rights.

Culture manifest itself in very many forms such as historical sites, land, language, history, practices, traditions, ornaments and all things, both physical and spiritual, that form an important component in a peoples' way of life.⁹⁶ International frameworks such as The 2005 United Nations Educational, Scientific and Cultural Organization Convention on the Protection and Promotion of the Diversity of Cultural Expressions have acknowledged the conflict that has previously existed between states and indigenous and tribal communities over the protection of their rights and how certain states have over the years intentionally failed to recognize the status of these communities and therefore their rights.⁹⁷ In a quest to remedy this and to ensure that states acknowledge and respect the rights of tribal and indigenous communities, all these things that are integral to a communities' culture have been increasingly acknowledged and protected by regional courts and in international frameworks with the aim to be more accommodative to the rights of indigenous and tribal peoples'.⁹⁸

The case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* aptly brings the commitment of the African Commission on Human and Peoples' Rights to recognize and protect this right as the commission acknowledged not only indigenous peoples' rights over their lands but the right to culture and cultural expression that is closely tied to the access to their traditional lands.⁹⁹ Reaffirming the importance of safeguarding the cultural rights of these communities.

We see the same being reiterated by the European Court of Human Rights, which acknowledges and protects the right to cultural identity as well in the case *Winterstein and Others v. France*, recognizing how the occupation of a caravan is an integral part of the identity of a community of

⁹⁵ Fagan A, 'Cultural harm and engaging the limits of a right to cultural identity' 39(1) *Human Rights Quarterly*, 2017, 320.

⁹⁶ Kühn B, 'Universal Human Rights vs Traditional Rights' *Human Rights in Sub-Saharan Africa*, 2009, 59 -< <https://www.du.edu/korbel/hrhw/researchdigest/africa/UniversalHumanRights.pdf> > on 15 December 2020.

⁹⁷ Xanthaki A, 'Cultural rights and their implications for minorities and indigenous communities' *Minority Rights Group International*, 2016, 17.

⁹⁸ Article 17, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3.

⁹⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACmHPR Comm. 276/2003.

travelers and therefore an important element of a peoples' right to culture and cultural expression.¹⁰⁰

When looking at regional frameworks, the African Charter of Human and Peoples' Rights is a good place to start as it provides under Article 17(2) and (3) the express protection of the right to culture and cultural expression by stating that 'every individual may freely take part in the cultural life of his community and that the state has a duty to promote and protect the morals and traditional values recognized by the community'.¹⁰¹

When looking at international human rights frameworks that Ghana is a signatory, the International Covenant on Economic Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) play an important role in the protection of the right to culture.

The right to culture and as an extension the right to take part in cultural expression, is recognized as purely an individual right whose content is tied to group exercise, as is seen in Article 15 of the ICESCR.¹⁰² Article 15 of the ICESCR can be read in conjunction with Article 27 of the International Covenant on Civil and Political Rights (ICCPR) which affirm that persons of **ethnic**, religious or linguistic minorities 'shall not be denied the right, in community with other members of their group, to enjoy their own culture'.¹⁰³

The ILO as well has adopted an important legal instruments that pertain specifically to indigenous and tribal peoples with an aim to prevent discrimination of any kind. The Indigenous and Tribal Peoples Convention Number 169 of 1989 represents the strides of the international community to adopt new international standards that remove the assimilationist orientation of the previous frameworks with respect to the rights of indigenous and tribal persons. The Indigenous and Tribal Peoples Convention of 1989 in its preamble states that it applies to tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of

¹⁰⁰ *Winterstein and Others v. France*, ECtHR Judgement of 17 October 2013.

¹⁰¹ Article 17, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3.

¹⁰² Article 15, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS 993.

¹⁰³ Article 27, *International Covenant on Civil and Political Rights*, 16 December 1966, UNTS 993.

the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.¹⁰⁴

Though Ghana is not a party to the convention, it reveals the international community's commitment to protect and provides for the right to culture, cultural expression and cultural institutions that are integral to a peoples' way of life, including the respect of customary mechanisms practiced by the community in dealing with offenses committed by their members.¹⁰⁵ However, it is important to note that the convention places a caveat on these rights and protections as the customs, institutions, traditional social control mechanisms and practices will only be protected to the extent compatible with national legal systems and international fundamental human rights recognized.¹⁰⁶

The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage has also been integral in safeguard the intangible cultural heritage of a people. The Convention defines 'intangible cultural heritage' to include practices and customs that communities recognize as part of their heritage and provides for the preservation, protection and promotion of these practices by state parties, Ghana being one of them.

We see the explicit consideration for culture in human rights and its promotion and protection in today's human rights regime.¹⁰⁷ This brings out the commitment of the international community to recognize, protect and cater for the cultural rights of ethnic communities and rebuts arguments by the Afrikania Mission on the eradication of diversity.

4.2 CONDITIONALITY OF THE RIGHT TO CULTURE

As is previously seen, international law places an obligation on states, both positive and negative, to ensure the protection of the right to culture.¹⁰⁸ However, as reflected in the international human rights frameworks and as is the case with many other rights, the right to culture is not an absolute

¹⁰⁴ Preamble, *Indigenous and Tribal Peoples Convention*, 27 June 1989, C169.

¹⁰⁵ Article 9, *Indigenous and Tribal Peoples Convention*.

¹⁰⁶ Article 8(2), *Indigenous and Tribal Peoples Convention*.

¹⁰⁷ Mojisola E and Udoh S, 'Cultural re-engineering: the way out of human rights subversion in Sub-Saharan Africa, Nigeria as a case study' 3(4) *Global Journal of Politics and Law Research*, 74.

¹⁰⁸ Xanthaki A, 'Cultural rights and their implications for minorities and indigenous communities' *Minority Rights Group International*, 2016, 17.

right. Unlike *jus cogen* norms, which cannot be limited at any cost, there are certain instances where the right to culture can be limited.¹⁰⁹ However, this requires a certain balance. The language and framing of the human rights instruments have been general in nature, leaving a margin of appreciation for states to determine how and to what extent they will protect these rights bearing in mind their social, historical and cultural contexts.¹¹⁰ However, even in protecting the right to culture the spirit of the instrument and the provisions within the treaty which the state is a signatory of must all be upheld.

Culture and cultural expression rights have sometimes conflicted with other rights and obligations set out in the law.¹¹¹ This is seen with practices such as female genital cutting where the practice has been argued to clash with human rights or is seen with the clash between cultural rights and environmental rights reflected in *Yanner v Eaton* where an aboriginal communities' exercise of cultural rights went against environmental rights and commitments set out in the Fauna Conservation Act.¹¹² Aware of this conflict, the human rights regime allows for a limitation of the rights to culture. It is important to note that limitations must still be guided by principles of legitimacy, proportionality and necessity and must be done to fulfil the overall goals of the human rights regime.¹¹³

With respect to cultural practices that may have harmful effects to members of its community, CEDAW places an obligation on state parties to take all appropriate measure to modify cultural patterns with an aim to eliminate prejudicial customary practices.¹¹⁴ This is also reaffirmed in the Protocol to the African Charter on Human and Peoples Rights on the Rights of women in Africa which also allows state parties to enact legislation limiting culture where a cultural practice is discriminatory or endangers the health or well-being of women. The right to cultural expression can therefore be limited on several grounds; if the expression of that practices goes against the

¹⁰⁹ Fagan A, 'Cultural harm and engaging the limits of a right to cultural identity' 39(1) *Human Rights Quarterly*, 2017, 319.

¹¹⁰ Letsas G, 'Two concepts of margin of appreciation' 26(4) *Oxford Journal of Legal Studies*, 2006, 707.

¹¹¹ Donder Y, 'Do cultural diversity and human rights make a good match?' 61(199) *International Social Science Journal*, 2010, 18.

¹¹² *Yanner v Eaton* (1999), High Court of Australia.

¹¹³ Xanthaki A, 'Cultural rights and their implications for minorities and indigenous communities' *Minority Rights Group International*, 2016, 17.

¹¹⁴ Article 5(a), *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 38/180.

rights of others, in the protection of public health, for national security reasons and in the protection of public morals.¹¹⁵

This means that any state limitation by Ghana on the manifestation of the right to culture by the Ewe community with respect to trokosism is valid and justified as this social control mechanism goes against the overall standards and aims of the human rights movement.¹¹⁶

4.3 HUMAN RIGHTS CONCERNS EMANATING FROM TROKOSISM

Over the years, some have defined Trokosi practice as a form of modern-day slavery and servitude.¹¹⁷ The young girls deemed as ‘trokosi’ lose their liberty to determine their course of life and are considered wives of the shrine priests who are expected to work and serve the gods for the rest of their lives.¹¹⁸ It is no secret that such a punishment mechanism raises several human rights concerns. To begin with such a practice is inherently discriminatory, though some defenders of the practice argue that it does not undermine women and that instead it places honor on them; this paper argues that this is a form of manipulation of these young girls to justify punishing young girls who have played no role in the commission of the said crime. Second, it entails subjecting these young girls and women to servitude and denies them basic rights; to education, to liberty, to self-determination and in extreme cases to medical assistance.¹¹⁹ Lastly, it exposes these young girls to sexual exploitation by the shrine priest as many are expected to provide sexual favors to the shrine priest as they are viewed as ‘the wives of the gods.’¹²⁰

This goes against several international human right treaties and commitments:

¹¹⁵ Ahmed D and Bulmer E, *Limitation Clauses*, 2nd ed, International Institute for Democracy and Electoral Assistance, Stockholm, 2017, 10.

¹¹⁶ Ahmed D and Bulmer E, *Limitation Clauses*, 2nd ed, International Institute for Democracy and Electoral Assistance, Stockholm, 2017, 10.

¹¹⁷ Dzansi Y and Biga P, ‘Trokosi- slave of a fetish: An Empirical Study’ 12(1) *Central University of Technology Journal*, 2014, 29.

¹¹⁸ Ameh R, ‘Child Bondage in Ghana: A contextual policy analysis of trokosi’ Published Thesis, Simon Fraser University, Ottawa, 14.

¹¹⁹ Kwame R, Fafa D and Araba N, ‘Children Rights in Ghana: Reality or Rhetoric?’ 21(4) *Journal of Community Practice*, 2013, 487.

¹²⁰ Kwame R, Fafa D and Araba N, ‘Children Rights in Ghana: Reality or Rhetoric?’ 21(4) *Journal of Community Practice*, 2013, 487.

a. Protection of the rights of women and the rights of the child

The human rights regime has been intentional in protecting the rights of two specific vulnerable groups; women and children. It is no secret that women have often been at the receiving end of a disproportionate amount of discrimination and violence and culture has sometimes further perpetuated this. Children have also been victims of great exploitation, violence and manipulation due to their susceptible nature. Trokosi practice as a social control mechanism goes against the rights enshrined in the Convention on the Rights of the Child (CRC) and the rights provided under the Convention on all forms of Discrimination Against Women (CEDAW), both of which Ghana is a signatory to.

The practice denies the young girls access to education and denies the child the right to a standard of living that is adequate for the child's development mentally, socially, spiritually and morally.¹²¹ It also violates their right to equality and freedom from discrimination as provided in CEDAW which acknowledges that culture may often be misused as a basis for discrimination of a particular gender. In this case, this practice clearly discriminates against these young girls. Article 3 of the Convention on all forms of Discrimination against Women also provides for the protection of the full development and advancement of women for the purpose of guaranteeing them the enjoyment of their human rights, all of which trokosi practice violates.

Article 24(3) of the CRC places an obligation on state parties to put up measures to abolish traditional practices that are unjust and prejudicial to the well-being and health of the child. Similarly, Article 21(1) of The African Charter on the Rights and Welfare of the Child addresses the elimination of harmful social and cultural practices affecting the welfare, dignity and normal growth of the child or that may be detrimental to the health or life of the child and practices that discriminate against a particular sex. This framework places an obligation on the state of Ghana to attempt to eliminate a practice such as trokosis due to the fact that it goes against the rights of these young girls.

¹²¹ Article 27, *Convention on the Rights of the Child*, 20 November 1989, UNTS 157.

b. Right to human dignity

This punishment mechanism goes against the human dignity of the girls subjected to this practice. The practice involves the giving out of these young girls as atonement for crimes committed and some of these girls, as mentioned previously, are completely unaware of the exchange taking place.¹²² Without any choice or to opt-out, the freedoms and rights of these girls are exchanged for the forgiveness of a crime committed. This goes against the human dignity of these girls, a right which is protected under the UDHR and many other international frameworks.

4.4 AN ANALYSIS OF THE DOMESTIC MEASURES TAKEN BY GHANA

Aware of the human rights concerns raised by Trokosism, Ghana in an attempt to fulfil its obligations under international law aimed at ensuring the elimination of this practice. The approach Ghana has taken has been a legislative approach where the state has enacted several laws criminalizing and outlawing the practice.¹²³ This segment highlights the legislative measures put in place by the state in its attempt to eliminate trokosi practice and though these measures have been play an important role, this paper argues that the enactment of legislation cannot be sufficient to eliminate the harmful aspects of this practice and protect the rights of these young girls.

Ghana has enacted several important legislations and set up various commission in its attempt to eradicate trokosism. This segment will highlight them and later discuss the challenges that have been experienced in implementation.

a. The Constitution of Ghana

As previously mentioned, today the human rights regime seeks to recognize and protect cultural diversity with the aim of reconciling universalism and cultural relativism. The general obligation set out in these treaties grants states a margin of appreciation to adopt domestic legislation bearing in mind their states' cultural and historical landscape so as to enable states to set up laws suitable and in consideration of their society.¹²⁴

¹²² Kwame R, Fafa D and Araba N, 'Children Rights in Ghana: Reality or Rhetoric?' 21(4) *Journal of Community Practice*, 2013, 481.

¹²³ Ameh R, 'Child Bondage in Ghana: A contextual policy analysis of trokosi' Published Thesis, Simon Fraser University, Ottawa, 150-172.

¹²⁴ Parras F, 'Democracy, diversity and the margin of appreciation: A theoretical analysis from the international and

With this in mind, the Ghanaian Constitution broadly recognizes the right to culture aware of the great influence culture plays within the state and the different tribal communities that exist in Ghana whose customs and institutions play a fundamental role in their livelihood. Article 26 provides for that every person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion.¹²⁵ However, it places a caveat that by prohibiting all customary practices which dehumanize or are injurious to the physical and mental well-being of a person.¹²⁶ This means that the Constitution protects the right to culture insofar as the practice, traditions and customs do not dehumanize or are not injurious to any person.

The Constitution also goes ahead to recognize the place of customary law and its application in Ghana through Article 11 of the Constitution and also recognizes the place of chiefs and other cultural institutions throughout the Constitution. The Constitution allows for customary law to be applied and acknowledges the validity of traditional institutions and mechanisms.¹³⁵ Prior to 1960, customary law was only acceptable if it was deemed not to be repugnant to natural justice, equity and morality.¹²⁷ In a quest to undo the historical subordination of customary laws to common law, Article 11 of the Constitution does not contain the repugnancy clause and simply permits the application of customary law.

However, when looking at case law, though the courts have recognized customary law and a communities' right to set up their own social control mechanism as is seen in the case *Tano v Akosua Koko* where courts upheld the punishment of ostracizing and banishing Korobo women who get pregnant before undergoing the customary rite of initiation, the application of customary law is not absolute.¹²⁸ We see the court taking a keen interest in what the moral objective of the custom is. The case *Atomo v Tekpetey* best illustrates this as in this case the court in evaluating a custom considering all children born at a certain time as belonging to the priest hence not allowed

constitutional function of the European Court of Human Rights' 29(1) *Revista Electronica de Estudio Internationales*, 2016, 9.

¹²⁵ Article 26(1), *Constitution of Ghana* (1992).

¹²⁶ Article 26(2), *Constitution of Ghana* (1992). ¹³⁵ Article 11, *Constitution of Ghana* (1992).

¹²⁷ Kwame R, Fafa D and Araba N, 'Children Rights in Ghana: Reality or Rhetoric?' 21(4) *Journal of Community Practice*, 2013, 487.

¹²⁸ Ameh R, 'Child Bondage in Ghana: A contextual policy analysis of trokosi' Published Thesis, Simon Fraser University, Ottawa, 247. ¹³⁸ Ameh R, 'Child Bondage in Ghana: A contextual policy analysis of trokosi' Published Thesis, Simon Fraser University, Ottawa, 247.

to inherit their biological parents deemed that such a practice cannot be upheld on the basis that it is ‘unreasonable and repugnant to natural justice, equity and good conscience.’¹³⁸

Chapter five of the Constitution also sets out fundamental rights and freedoms that must always be respected even in the group exercise of the right to culture. Article 12 sets out the protection of fundamental rights and freedoms and states that every person in Ghana, regardless of his race, place of origin, political opinion, color, religion, creed or gender, shall be entitled to the fundamental human rights and freedoms of the individual contained in Chapter five but subject to respect for the rights and freedoms of others and for the public interest.¹²⁹

Article 14 protects every person’s right to personal liberty and only allows limited circumstances in which this right can be limited and does not provide the application of customary social control mechanisms as one of them.¹³⁰ Article 15 protects the dignity of the human person and states that the dignity of all persons is inviolable.¹³¹ Understanding that every person is entitled to be treated with dignity, Article 16 provides that no person shall be held in slavery or servitude and prohibits forced labor.¹³² Lastly, Article 18 enshrines children’s rights and protects the rights and well-being of children.¹³³

These expansive bill of rights and the protections set out in the Constitution create great protections for vulnerable groups who are victims of cultural practices such as trokosism.

b. Criminal Code (Amendment) Act 1998

Over the years, after recommendations on the importance of the criminalization of trokosism from the Ghana Commission for Human Rights and Administrative Justice, which was set up to study, evaluate and report on trokosism, Ghana updated the 1960 Criminal Code and introduced the Criminal Code (Amendment) Act of which amongst other things outlaws the practice of sexual slavery by including the criminalization of sexual slavery and customary servitude.

¹²⁹ Article 12, *Constitution of Ghana* (1992).

¹³⁰ Article 14, *Constitution of Ghana* (1992).

¹³¹ Article 15, *Constitution of Ghana* (1992).

¹³² Article 16, *Constitution of Ghana* (1992).

¹³³ Article 17, *Constitution of Ghana* (1992).

Section 314 (A)(1)(b) sets out that anyone who participates in any ritual or customary activity in respect of any person with the purpose of subjecting that person to any form of ritual or customary servitude or any form of forced labor related to a customary ritual commits an offense and shall be liable on conviction to imprisonment for a term not less than three years.¹³⁴ The perpetrators liable include the parents of the girl who authorized the giving away of the girl, the shrine priest, the people who made an arrangement with the gods and any spectator of the girl's initiation ritual.¹³⁵

c. Ghana's Children Act

The Children Act 1998 plays an important role in the protection of the rights and freedoms of these young girls who are victims of trokosi practice. The Act provides in Section 2 the 'welfare principle' which provides that the best interest of the child shall be paramount in any matter considering a child and where a matter is brought to court or before any institution, the best interest of the child shall be the primary consideration.¹³⁶ Section 5 of the Act provides the right of every child to live with their parents and family and grow up in an environment that is peaceful unless deemed by the court that living with one's parents is not in the best interest of the child or harmful to the child.¹³⁷ The Act also places a duty on parents to ensure the constant welfare of the child and it also protects the child's right to life dignity, respect, leisure, liberty, health, education and shelter from their parents.¹³⁸ Lastly, the Act provides that no one shall deprive a child of the right to access education required for the child's development.¹³⁹ The Act enshrines important commitments and rights of children protecting the young girls who are victims of trokosis.

d. Institutions

Two leading domestic institutions have been important in Ghana's commitment to eliminate Trokosi practice: the Ghana Reform Commission and the Ghana Commission for Human Rights and Administrative Justice.¹⁴⁰ The Ghana Law Reform Commission has played a fundamental role

¹³⁴ Section 314 (A), Criminal Code (Amendment) Act (No. 646 of 2003).

¹³⁵ Section 314 (A), Criminal Code (Amendment) Act (No. 646 of 2003).

¹³⁶ Section 2, *Children's Act* (Act No. 560 of 1998).

¹³⁷ Section 5, *Children's Act* (Act No. 560 of 1998).

¹³⁸ Section 6(2), *Children's Act* (Act No. 560 of 1998).

¹³⁹ Section 8(1), *Children's Act* (Act No. 560 of 1998).

¹⁴⁰ Kwame R, Fafa D and Araba N, 'Children Rights in Ghana: Reality or Rhetoric?' 21(4) *Journal of Community Practice*, 2013, 492.

in examining cases related to religious cultural practices. It has been crucial in highlighting the cultural contexts that allows for the continued existence of these practices and the challenges the judicial system has faced when addressing such practices.¹⁴¹

The Ghana Commission for Human Rights and Administrative Justice has also been integral in combatting trokosis and played an important role in the late 1990's in investigating the practice, deeming it as illegal and championing for its criminalization. The CHRAJ is an institution established by the constitution tasked with, among other things, the role of investigating human rights violations and complaints concerning practices that violate human rights. It is also mandated remedy the violations where possible through negotiation, initiating court proceedings and education of the public on human rights and human freedoms.¹⁵² Though we see no negotiations with the community facilitated by the CHARJ, which would have been an important mechanism to employ with respect to cultural violations, over the years, the CHARJ has promoted education as an alternative and even facilitated various trokosi seminars and workshops speaking on the need for education and prioritization of human rights.¹⁴²

4.5 CHALLENGES FACED IN IMPLEMENTATION

This segment looks at the challenges faced in the implementation of these legislative frameworks with an aim of looking at what still sustains trokosi practice 20 years down the line and despite the extensive frameworks put in place. Though the criminalization of trokosi practice is important in protecting and enshrining the rights and freedoms of these young girls and creating a legal avenue for a claim to be launched, research reflects how criminalization as a means of eliminating certain practices often ends up driving the practice underground and does not initiate any true social change.¹⁴³ This has been seen most, especially in the case of Female Genital Cutting and can be seen with trokosi practice as well.

¹⁴¹ Bilyeu A, 'Trokosi- The practice of sexual slavery in Ghana: religious and cultural freedom v human rights'9(2) *Indiana International and Comparative Law Review*, 1999, 498. ¹⁵² Article 216, *Constitution of Ghana* (1992).

¹⁴² Bilyeu A, 'Trokosi- The practice of sexual slavery in Ghana: religious and cultural freedom v human rights'9(2) *Indiana International and Comparative Law Review*, 1999, 499.

¹⁴³ Tubor M, 'A critical analysis of the trokosi practice in parts of West Africa as a harmful tradition against women and girls: states obligation under international human rights law' Published LLM thesis, Åbo Akademi University, Turku, 2019, 10.

Though trokosi practice was outlawed years ago and despite the legislative frameworks and institutions put in place, the mechanisms have hardly been engaged years down the line. Though the CHRAJ has been mandated with remedying violations by employing methods such as negotiation, which would be especially important when dealing with cultural violations, we see no case of negotiation between the shrine priest and community elders with the CHRAJ with an aim to realize the rights of these young girls.¹⁴⁴ We also see a lack of government enforcement as these legal provisions are recognized but seem to be ignored in practice.¹⁴⁵ Martha Shaffer advances important arguments on ‘the effectiveness concern’, stating that many times states simply pass legislation and this ends up being the only response from governments.¹⁴⁶ This gives governments an easy way out to claim that they have addressed the problem or at least portray an image that they have attempted to eradicate the practice meanwhile, the problem remains unresolved or only partially resolved and the rights of these young women continue to be infringed.¹⁴⁷

In addition to this, the deeply entrenched cultural and religious beliefs make it difficult for a legislative approach to eradicate the problem completely. As aforementioned, trokosi practice as social control mechanism has strong cultural and religious foundations that support its existence. A documentary launched by International Needs Ghana on the liberation of these girls highlight that one of the greatest challenges is that many of the girls, as a product of being in this community, are deeply influenced by their cultural and religious beliefs and fear to be liberated or to seek legislative avenues and even when emancipated, some still fear leaving the shrines.¹⁴⁸ Through doctrinal research I also found that many women's rights issues surrounding this practice are also not brought forward despite the legislative frameworks first because many of these women cannot

¹⁴⁴ Bilyeu A, ‘Trokosi- The practice of sexual slavery in Ghana: religious and cultural freedom v human rights’9(2) *Indiana International and Comparative Law Review*, 1999, 502.

¹⁴⁵ Tubor M, ‘A critical analysis of the trokosi practice in parts of West Africa as a harmful tradition against women and girls: states obligation under international human rights law’ Published LLM thesis, Åbo Akademi University, Turku, 2019, 50.

¹⁴⁶ Shaffer M, ‘Criminal responses yo hate-motivated violence: Is bill C-41 tough enough?’ 41 *McGill Law Journal*, 1995, 237.

¹⁴⁷ Shaffer M, ‘Criminal responses yo hate-motivated violence: Is bill C-41 tough enough?’ 41 *McGill Law Journal*, 1995, 238.

¹⁴⁸ Ameh R, ‘Child Bondage in Ghana: A contextual policy analysis of trokosi’ Published Thesis, Simon Fraser University, Ottawa, 146

afford the legal cost involved in litigation and the high illiteracy level among many of these girls and women, making them unaware of their rights and freedoms.¹⁴⁹

Similarly, as brought out Chapter 3 the lack of legitimacy of human rights in cultural traditions has posed one of the major difficulties in the practical implementation of the rights enshrined. For the human rights regime and frameworks to be more effective in a cultural context, the rights must be valid from their own cultural perspective. The rights must also be understood by the community and the language barrier can hinder this understanding.

Last but not least, the locals and others who seek the practice, both uneducated and educated, continue to do so fundamentally because they lack confidence in the judicial system. Trokosi practice, despite how unjust the practice is, seems to fill a gap by creating an avenue for a customary remedy that is quick and inexpensive.¹⁵⁰ A report launched by the Ghana Law Reform Commission shows how many continue to seek redress to their disagreements and remedies from the shrine priests. This also due to an absence in the justice system of expeditious, cost-effective justice mechanisms.

¹⁴⁹ Final Report of the Country Working Group Ghana, *The African peer review mechanism (APRM) as a tool to improve governance*, April 2009, 94.

¹⁵⁰ Ameh R, 'Child Bondage in Ghana: A contextual policy analysis of trokosi' Published Thesis, Simon Fraser University, Ottawa, 165.

5 CHAPTER 5: A NEED TO DO MORE: RECOMMENDATIONS AND CONCLUSION

The approach taken by the state in its aim to eliminate trokosi practice has generally been legislative in nature, with the greater work laying in the hands of NGO's such as International Needs, who in this case have played the biggest role in engaging in negotiations with the shrine priest in an attempt to liberate the girls who fall victim to this practice. Still, International Needs Ghana reports that many young girls and women remain confined to the shrine in the name of culture.¹⁵¹ This paper acknowledges the relationship between the law and social change and recognizes the importance of the legislative frameworks put in place to reflect the ideal situation. It's a patent fact there exists a sociological function of the law and that laws can often be used as instruments to initiate social change.¹⁶³ However, enacting legislation without ensuring its implementation and realization is not enough if the rights of these girls are ever to be fully realized.

This paper argues that when engaging cultural violations, discourse centered on absolute elimination of the practice without any form of cultural sensitivity can lead to an unproductive outcome.¹⁵² As is seen with the Afrikania Mission,¹⁵³ such an approach can lead to even more resistance and such resistance is often simply a reflection of traditional resentments to Christianity and the imposition of values which they claim to be a form of cultural imperialism and not necessarily a resentment of the particular principles of human rights.¹⁵⁴ As is highlighted by Anoba, values and principles enshrined in the human rights regime are not that different from the values and principles appreciated and valued in cultural traditions creating an avenue for a middle ground to be reached.¹⁵⁵

¹⁵¹ -< <https://internationalneedsgh.org/gh/> > on 29 December 2020. ¹⁶³ Nagel S, 'Overview of law and social change' American Behavioral Scientist, 1969, 487.

¹⁵² Ameh R, 'Child Bondage in Ghana: A contextual policy analysis of trokosi' Published Thesis, Simon Fraser University, Ottawa, 297.

¹⁵³ Witte M, 'Spirit Media: Charismatics traditionalist and mediation practice in Ghana' Published PhD Thesis, Amsterdam Institute for Social Science Research, Amsterdam, 2008, 298.

¹⁵⁴ An-naim A, 'Universality of human rights: Mediating paradox to enhance practice' in Jovanovic A and Krstic I (eds), *Human Rights today -60 years of the Universal Declaration*, Eleven International Publishing, Netherlands, 2010, 29.

¹⁵⁵ Anoba I, 'The ambush of African philosophy: An exhumation of classical liberal principles in the evolution of Africa societies' 3(1) *Journal of Liberty and International Affairs*, 2017, 27.

It is well known that the community has a role in regulating the conduct of its members in accordance with the principles valued by that society.¹⁵⁶ Traditional cultural social control mechanisms are important to this extent, as they keep the society in check and also preserve cultural diversity but certainly there some harmful mechanism such as ‘honor killings’ and, in this case, trokosi practice which infringe on the rights and freedoms of the very members it ought to protect.¹⁵⁷ In such cases, there is an obligation to either eliminate those practices so as to protect human rights or realign those practices to take into account human rights concerns.

This chapter recommends; cultural reengineering as an alternative to elimination as a means to align cultural practices with human rights concerns, second, that human rights must facilitate cultural sensitive discourse, third, that there needs to be a vernacularization to bridge the understanding barrier, there need to be an increase in the roles of institutions such as the CHRAJ and Ghana Law Reform and NGOs working hand in hand with the internal actors who are contesting oppressive aspects of their own culture to facilitate reeducation and lastly, the promotion of alternative dispute resolution mechanism in local societies as a means to provide access to justice.

5.1 CULTURAL RE-ENGINEERING AS AN ALTERNATIVE

Cultural re-engineering is fundamentally based on the idea that culture is dynamic and is constantly evolving in response to both internal and external factors.¹⁵⁸ This means that culture is not static and can change, adapt and develop.¹⁵⁹ Cultural re-engineering as an alternative allows for a balance between human rights and cultural rights, where human rights concerns are accommodated in cultural expression. This allows the Ewe community to still express the acceptable elements of their cultural practice while stripping away the unacceptable parts.

¹⁵⁶ An-naim A, ‘Universality of human rights: Mediating paradox to enhance practice’ in Jovanovic A and Krstic I (eds), *Human Rights today -60 years of the Universal Declaration*, Eleven International Publishing, Netherlands, 2010, 47.

¹⁵⁷ Mojisola E and Udoh S, ‘Cultural re-engineering: the way out of human rights subversion in Sub-Saharan Africa, Nigeria as a case study’ 3(4) *Global Journal of Politics and Law Research*, 71.

¹⁵⁸ An-naim A, ‘Universality of human rights: Mediating paradox to enhance practice’ in Jovanovic A and Krstic I (eds), *Human Rights today -60 years of the Universal Declaration*, Eleven International Publishing, Netherlands, 2010, 30.

¹⁵⁹ Mojisola E and Udoh S, ‘Cultural re-engineering: the way out of human rights subversion in Sub-Saharan Africa, Nigeria as a case study’ 3(4) *Global Journal of Politics and Law Research*, 71.

As a case study for the cultural re-engineering approach, this paper looks at the ‘Alternative Rites approach’ spearheaded by the Catholic Church aimed at addressing Female Genital Mutilation in Kenya.¹⁶⁰ The concept of the alternative rite of passage approach was conceptualized by PATH and MYWO and was aimed at working with communities to abandon genital cutting and develop a rite of passage that replaces FGM but is still relevant to the communities’ cultural beliefs, practices and traditions.¹⁶¹ Alternative rites were implemented at a grass root level and began with community sensitization seminars on harmful traditional practices and the health effects of FGM.¹⁶²

The alternative rites program, with an aim to restructure FGM, incorporated and preserved the acceptable parts of the practice such as the seclusion period, which was a fundamental period for women who went through FGM and the public ceremony which was important for a rite of passage. However, instead of the girls undergoing circumcision, they were instead taught community values and customs by women of their community, trained on family life by peer trainers and educated on the importance of abstinence by peer educators.¹⁶³ The approach allows for the preservation of culture and cultural diversity while simultaneously ensuring human rights are respected. As a result, statistics show that after the alternative rites program was initiated in Meru the rate dropped from 93% who supported FGM to only 16% of the community member wanting the practice of FGM to continue.¹⁶⁴

Inspired by this approach, this paper recommends this as a more effective way of engaging cultural violations. In this case, acceptable elements such as consulting the shrine priest and atonement ceremonies can be sustained and protected. However, instead of the families giving young girls

¹⁶⁰ Heikki E, ‘Female genital mutilation in Kenya- A literature review’ Unpublished thesis, Turku University of Applied Sciences, Turku, 2011, 17.

¹⁶¹ Chege J, Askew I and Liku J, ‘An Assessment of the Alternative Rites Approach for Encouraging Abandonment of Female Genital Mutilation in Kenya’ *United States Agency for International Development*, 2001-<<https://knowledgecommons.popcouncil.org/>> on 28 December 2020.

¹⁶² Heikki E, ‘Female genital mutilation in Kenya- A literature review’ Unpublished thesis, Turku University of Applied Sciences, Turku, 2011, 18.

¹⁶³ Chege J, Askew I and Liku J, ‘An Assessment of the Alternative Rites Approach for Encouraging Abandonment of Female Genital Mutilation in Kenya’ *United States Agency for International Development*, 2001-<<https://knowledgecommons.popcouncil.org/>> on 28 December 2020.

¹⁶⁴ Chege J, Askew I and Liku J, ‘An Assessment of the Alternative Rites Approach for Encouraging Abandonment of Female Genital Mutilation in Kenya’ *United States Agency for International Development*, 2001-<<https://knowledgecommons.popcouncil.org/>> on 28 December 2020.

out as atonement for crimes committed, this can be replaced by giving away more acceptable elements that are valued in the community, such as livestock, pieces of land, the beer brewed or even money. This is feasible as during negotiations by International Needs, the NGO has often been required to pay for the release of the girls either through livestock, beer or money. Such reengineering would require;

a. Education programs facilitated at the grassroots level

This could be facilitated by government institutions already established by the constitution such as the CHRAJ and NGOs in partnership with internal actors who are contesting the oppressive aspects of their own culture. It must involve discourse with shrine priest, traditional leaders, young girls and other members of the community on human rights. The education programs should strive to patiently educate the actors in this traditional institution on the consequences of trokosism and it poses dangers to the rights and freedoms of these young girl, using values and principles that are already integral to the communities' way of life.¹⁶⁵ The discourse must be cultural sensitive appreciating those aspects of their cultural practices that promote unity and progress in the society.¹⁶⁶ It is also important to educate the young girls on their rights and freedoms and their right to liberty and freedom that should not be interfered with in the name of culture. This is because many of these young girls do not know what rights are provided for under the various Ghanaian frameworks causing the law not to be implemented.

b. Community negotiations

This will be geared toward re-engineering of this social control mechanism so as to accommodate the human rights concern. This will need negotiations with the shrine priest and community elders aimed at setting up alternatives for the giving up of young girls as atonement. The negotiations

¹⁶⁵ Mojisola E and Udoh S, 'Cultural re-engineering: the way out of human rights subversion in Sub-Saharan Africa, Nigeria as a case study' 3(4) *Global Journal of Politics and Law Research*, 79.

¹⁶⁶ Mojisola E and Udoh S, 'Cultural re-engineering: the way out of human rights subversion in Sub-Saharan Africa, Nigeria as a case study' 3(4) *Global Journal of Politics and Law Research*, 80.

must include trying to sustain the acceptable parts of the practice while stripping away the servitude element allowing the community to still set up their own social control mechanisms.¹⁶⁷

5.2 TRANSLATING OF HUMAN RIGHTS

As mentioned in the previous chapters, people only feel bound by norms they understand and accept. The need for cross-cultural legitimacy of human rights is imperative if cultural institutions are ever to accommodate human rights concerns. According to An-Na'im's cross-cultural approach, he proposes that human societies, despite their apparent diversity, share certain fundamental concerns, values and even interests.¹⁶⁸ This paper agrees with those views and argues that people are more likely to observe normative propositions that they believe are forbidden and sanctioned in their own traditions as well.

In so far as human rights continues to be articulated and implemented as an imposition no genuine change can take place. Merry brings this out when looking at the importance of transnational human rights translation, which can be effected in a manner that leads to positive reception from non-Western communities.¹⁶⁹ This paper agrees that indigenization would be an important step for human rights to gain cross-cultural legitimacy. This paper suggests however that human rights translation does not only mean translating human rights frameworks to local languages or the use of translators in any cross-cultural discourse. It also means showing the similarity between the principle valued in the human rights regime and the principles upheld and valued within cultural system.

5.3 ENHANCING ACCESS TO JUSTICE THROUGH ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

No matter how unjust trokosi practice is, we cannot ignore that one of the reasons people continue to seek it is due to a gap in Ghana's justice system in terms of providing fast, inexpensive justice

¹⁶⁷ Tihitina D, 'The role of the church in ending female genital mutilation/cutting in order to promote flourishing of women: A case study of Woloita Kale Heywet Church, Southern Ethiopia' Unpublished thesis, University of Stellenbosch, Stellenbosch, 2018, 29.

¹⁶⁸ An-naim A, 'Universality of human rights: Mediating paradox to enhance practice' in Jovanovic A and Krstic I (eds), *Human Rights today -60 years of the Universal Declaration*, Eleven International Publishing, Netherlands, 2010.

¹⁶⁹ Merry S, 'Transnational Human Rights and local activism: Mapping the middle' 108(1) *American Anthropologist*, 2006, 22.

mechanisms.¹⁷⁰ The right to access is now a basic and inviolable right provided in international frameworks as well as in Ghana's law.¹⁷¹ However, the truth is despite the importance of the right to access justice, there still exists several impediments to justice such as language barrier, weak economic position and high court fees, and last but not least, the long and cumbersome process of litigation.¹⁷²

Access to justice simply means that where people are seeking to find effective solutions to disputes, they should be able to find effective solutions from justice systems that are not only accessible, but affordable, understandable and expeditious.¹⁷³ With this in mind, apart from reengineering harmful traditional social control mechanisms, this paper recommends enhancing access to justice through alternative dispute resolution mechanisms specifically negotiation and mediation both of which are mechanism already accepted by the community. This paper suggests that creating credible enforcement mechanisms can expand the opportunities for the affected women to seek recourse.

5.4 CONCLUSION

*'Truly great cultural and religious beliefs are based on ethical tenets such as the duty to widen the bounds of good-neighborliness and the obligation to meet human needs in the broadest sense'*¹⁷⁴

- *Krishnaswami*

The trokosi social control system when viewed from a historical lens was just aiming to achieve that which all great culture and religions aspire to do. It is a practice that had cultural and religious foundations but is now outdated with the times. The aim of this paper was to evaluate what systems and institutions continue to sustain such well-meaning but harmful cultural systems today. Within

¹⁷⁰ Ameh R, 'Child Bondage in Ghana: A contextual policy analysis of trokosi' Published Thesis, Simon Fraser University, Ottawa, 249.

¹⁷¹ Davis W and Turku H, 'Access to justice and alternative dispute resolution' 2011(1) *Journal of Dispute Resolution*, 201, 48.

¹⁷² Muigai K and Kariuki F, 'Alternative dispute resolution, access to justice and development in Kenya' 1(1) *Strathmore Law Journal*, 2015, 4.

¹⁷³ Muigai K and Kariuki F, 'Alternative dispute resolution, access to justice and development in Kenya' 1(1) *Strathmore Law Journal*, 2015, 5.

¹⁷⁴ Quashigah K, 'Religious freedom and vestal virgins: the trokosi practice in Ghana' 10(2) *African Journal of International and Comparative Law*, 1998, 215.

the research, this article looks at where the human rights discourse has fallen short when engaging cultural violation. In conclusion, this article suggests that if any true social change is ever to take place, if the rights of the girls who fall victims to this practice are ever to be realized then their must a process of unlearning and relearning. Education and an approach geared at cultural reengineering must work hand in hand with the legislative approach so as to ensure that which is reflect in law is accomplished in reality.

BIBLIOGRAPHY

Abdullahi A, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, University of Pennsylvania Press, Philadelphia, 1992.

Abotchie C, *Social control in traditional Southern Eweland of Ghana: Relevance for modern crime prevention*, Ghana University Press, Accra, 65.

African Charter of Human and Peoples Rights.

Ahmed D and Bulmer E, *Limitation Clauses*, 2nd ed, International Institute for Democracy and Electoral Assistance, Stockholm, 2017.

Ameh R, 'Child Bondage in Ghana: A contextual policy analysis of trokosi' Published Thesis, Simon Fraser University, Ottawa.

An-naim A, 'Universality of human rights: Mediating paradox to enhance practice' in Jovanovic A and Krstic I (eds), *Human Rights today -60 years of the Universal Declaration*, Eleven International Publishing, Netherlands, 2010.

An-naim A, 'Universality of human rights: Mediating paradox to enhance practice' in Jovanovic A and Krstic I (eds), *Human Rights today -60 years of the Universal Declaration*, Eleven International Publishing, Netherlands, 2010.

Anoba I, 'The ambush of African philosophy: An exhumation of classical liberal principles in the evolution of Africa societies' 3(1) *Journal of Liberty and International Affairs*, 2017.

Bilyeu A, 'Trokosi- The practice of sexual slavery in Ghana: religious and cultural freedom v human rights'9(2) *Indiana International and Comparative Law Review*, 1999.

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, ACmHPR Comm. 276/2003.

Chege J, Askew I and Liku J, 'An Assessment of the Alternative Rites Approach for Encouraging Abandonment of Female Genital Mutilation in Kenya' *United States Agency for International Development*, 2001-< <https://knowledgecommons.popcouncil.org/> >.

Children's Act (Act No. 560 of 1998).

Chimni B, 'Customary International Law: A Third World Perspective' 112(1) *American Journal of International Law*, 2018.

Constitution of Ghana (1992).

Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 38/180.

Convention on the Rights of the Child, 20 November 1989, UNTS 157.
Criminal Code (Amendment) Act (No. 646 of 2003).

Davis W and Turku H, 'Access to justice and alternative dispute resolution' 2011(1) *Journal of Dispute Resolution*, 2011.

Donder Y, 'Do cultural diversity and human rights make a good match?' 61(199) *International Social Science Journal*, 2010.

Dzansi Y and Biga P, 'Trokosi- slave of a fetish: An Empirical Study' 12(1) *Central University of Technology Journal*, 2014.

E Dovlo and K Adzoyi, *Report on Trokosi Institution: Commissioned by International Needs for Department for Studies of Religions*, University of Ghana Press, Ghana, 1995.

Erturk Y, 'Culture versus Rights Dualism: A myth or reality?' 55(3) *Palgrave Macmillan Society for International Development*, 2012.

Fagan A, 'Cultural harm and engaging the limits of a right to cultural identity' 39(1) *Human Rights Quarterly*, 2017.

Final Report of the Country Working Group Ghana, *The African peer review mechanism (APRM) as a tool to improve governance*, April 2009.

Finnis J, *Natural law and Natural Rights*, 2nd ed, Oxford University Press, Oxford, 2011.

Franck T, 'Are Human Rights Universal?' 80(1) *Foreign Affairs*, 2001.

Gedzi V, 'Field of power: A religio-cultural analysis of trokosi in Ghana' 1(1) *Political Science Journal*, 2016.

Greene S, 'Family concerns: Gender and ethnicity in pre-colonial West Africa' 44(7) *International Review of Social History*, 1999.

Halbertal M and Margalit A, 'Liberalism and the Right to Culture' 61(3) *Social Research*, 1994.

Heikki E, 'Female genital mutilation in Kenya- A literature review' unpublished thesis, Turku University of Applied Sciences, Turku, 2011.

Hey H, 'Universal human rights and cultural diversity' 1(2) *Human Rights and Human Welfare*, 2001.

Howard R, 'Human rights and the cultural wars: Globalization and the universality of human rights' 53(1) *International Journal*, 1998.

Human Rights Council, Report of the Special Rapporteur on violence against women, Mission to Ghana Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural, including the rights to Development, its causes and consequences A/HRC/7/6/Add.3, 21 February 2008.

Indigenous and Tribal Peoples Convention, 27 June 1989, C169.

International Covenant on Civil and Political Rights, 16 December 1966, UNTS 993.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS 993.

Kühn B, 'Universal Human Rights vs Traditional Rights' *Human Rights in Sub-Saharan Africa*, 2009, 59 -< <https://www.du.edu/korbel/hrhw/researchdigest/africa/UniversalHumanRights.pdf> >

Kwame R, Fafa D and Araba N, 'Children Rights in Ghana: Reality or Rhetoric?' 21(4) *Journal of Community Practice*, 2013.

Letsas G, 'Two concepts of margin of appreciation' 26(4) *Oxford Journal of Legal Studies*, 2006.

Mackie G and LeJeune J, 'Social dynamics of abandonment of harmful practices: A new look at the theory' Innocenti Working Paper Number 6, 2009, 1 -< https://www.unicef.org/publications/pdf/iwp_2009_06.pdf >.

Madigan J, 'Being Human, being good: The source and submit of universal human rights' Unpublished Doctorate of Philosophy Thesis, University of Maryland, College Park, 2004.

Malacci O, 'Conflicting Discourses on the Trokosi Practice in Ghana: Exploring tensions in the Global and Local Human Rights Translations' Unpublished Development Studies Thesis, International Institute of Social Studies, Ghana, 2011.

Merry S, 'Transnational Human Rights and local activism: Mapping the middle' 108(1) *American Anthropologist*, 2006.

Mojisola E and Udoh S, 'Cultural re-engineering: the way out of human rights subversion in Sub-Saharan Africa, Nigeria as a case study' 3(4) *Global Journal of Politics and Law Research*, 2015.

Mountis B and Elene G 'Cultural Relativity and Universalism: Reevaluating Gender Rights in a Multicultural Context' 15(1) *Penn State International Law Review*, 1996.

Muigai K and Kariuki F, 'Alternative dispute resolution, access to justice and development in Kenya' 1(1) *Strathmore Law Journal*, 2015.

Mutua M, 'Human Rights in Africa: The limited promise of liberalism' 51(1) *African Studies Review*, 2008.

Mutua M, 'Savages, Victims and Saviors: The metaphor of Human Rights' 42(1) *Harvard International Law Journal*, 2001.

Nagel S, 'Overview of law and social change' *American Behavioral Scientist*, 1969.

Nukunya G, *Tradition and change in Ghana: An introduction to sociology*, 2nd ed, Ghana University Press, Accra, 2003.

Parras F, 'Democracy, diversity and the margin of appreciation: A theoretical analysis from the international and constitutional function of the European Court of Human Rights' 29(1) *Revista Electronica de Estudio Internacionales*, 2016.

Santos B, 'Human Rights: a fragile hegemony' in Crepeau F and Sheppard C (eds) *Human Rights and Diverse Societies: Challenges and Possibilities*, Cambridge Scholars Publishing, 2013.

Shaffer M, 'Criminal responses to hate-motivated violence: Is bill C-41 tough enough?' 41 *McGill Law Journal*, 1995.

Tharoor S, 'Are Human Rights Universal?' 16(4) *World Policy Journal*, 2000.

Tihitina D, 'The role of the church in ending female genital mutilation/cutting in order to promote flourishing of women: A case study of Woloita Kale Heywet Church, Southern Ethiopia' Unpublished thesis, University of Stellenbosch, Stellenbosch, 2018.

Tubor M, 'A critical analysis of the trokosi practice in parts of West Africa as a harmful tradition against women and girls: states obligation under international human rights law' Published LLM thesis, Åbo Akademi University, Turku, 2019.

UNGA, *Universality, cultural diversity and cultural rights*, UN A/73/227 (25 July 2018).
Universal Declaration of Human Rights.

Witte M, 'Afrikania's dilemma: Reframing African authenticity in the public sphere' 17(2) *University of Amsterdam*.

Witte M, 'Spirit Media: Charismatics traditionalist and mediation practice in Ghana' Published PhD Thesis, Amsterdam Institute for Social Science Research, Amsterdam, 2008.

Xanthaki A, 'Cultural rights and their implications for minorities and indigenous communities' Minority Rights Group International, 2016.

Y Asomah 'Cultural rights versus human rights: A critical analysis of the Trokosi practice in Ghana and the role of civil society' 15(1) *African Human Rights Law Journal*, 2015.

Zechenter E, 'In the name of culture: Cultural relativism and the abuse of the individual' 53(3) *Journal of Anthropological Research*, 1997.