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Focus: Law and religion in Africa: Comparative practices, experiences and prospects

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M Christian Green

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Please note that the editors will only consider submissions that have not already been submitted for publication or published elsewhere. Submissions should be no longer than 10 000 words (footnotes included).

For further information, see 'Guidelines for Contributors' after the last contribution in this *Journal*.

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Editorial

This issue of the *African Human Rights Law Journal* contains articles focusing on law and religion in Africa. These contributions were presented as papers at the first annual multi-national conference on law and religion in Africa, hosted by the Faculty of Law, University of Ghana, in 2013. The papers were subsequently converted into articles, and revised and reworked after undergoing peer review. This is the second time that the 'special focus' part of the *Journal* is devoted to the theme of law and religion (see (2008) 8 *AHRLJ* 337-595 for the previous focused edition), and marks the continued interest in and growing concern for issues pertaining to law, religion and human rights in Africa.

The thematic scope of the contributions is canvassed in a 'foreword', in which the articles are placed in context and summarised. As readers would notice, the majority of these contributions deal with the situation in Nigeria, a country in which ethnic and geographic fault lines largely coincide with differences in religion. This issue appears against the background of religious fundamentalism and abuse of religion for ideological posturing and violence, as perpetuated by Boko Haram in the northern parts of Nigeria. This harsh reality underscores the need for quiet and rational reflection on the relationship between the sacred and the secular, particularly in Africa.

Covering multiple viewpoints, departing from different premises and being grounded in a variety of disciplines, the contributions in the special focus section make a considerable contribution to scholarship on this important theme.

The guest editor for the special focus edition is Dr Christian Green, Senior Fellow at the Center for the Study of Law and Religion, Emory University in the United States. The editors of the *Journal* thank the guest editor for the easy professionalism which characterised our collaboration.

This issue of the *Journal* contains a limited number of other articles, covering a wide range of themes. In his article on gender-based violence among men in Malawi prisons, Kangaude addresses issues related to sexuality that are often silenced in Africa, such as conjugal visits, masturbation and consensual sexual intercourse between male prisoners. Novak traces changes in the legal regime permitting the imposition of capital punishment in Southern African states, and identifies an evolution towards the abolition of the doctrine of

extenuating circumstances, which placed an onus on the accused to show why he or she should not be executed. Thabane's contribution criticises the United Nations Protect, Respect and Remedy Framework and Guiding Principles for failing to adequately articulate the circumstances under which multi-national corporations can be held liable under the laws of their home states.

As has become customary, an overview is provided of human rights developments within the African Union. Covering the issues of major importance arising in 2013, Killander and Nkrumah express concern about the lack of engagement by AU political organs in human rights in Africa. This contribution also mentions the draft protocol aimed at bringing into being an African judicial authority competent to adjudicate international crimes. This edition of the *Journal* appears as the issue remains on the AU's agenda. Our view is that, whatever its merits or demerits, such a court should not erode the functioning and prospects of the fledgling African Court on Human and Peoples' Rights, and should not become a shield to deflect the imperative of accountability – especially of those in positions of political power on the continent.

The editors convey their thanks to the independent reviewers mentioned below, as well as the anonymous reviewers used for the special focus section, all of whom so generously assisted in ensuring the consistent quality of the *Journal*: Adem Abebe; Akinola Akintayo; Gina Bekker; Romi Brammer; Pierre Brouard; Helene Combrinck; John Dugard; Josua Loots; Bonita Meyersfeld; Bhekinkosi Moyo; Lukas Muntingh; Tarisai Mutangi; Charles Ngwena; and Emerson Sykes.

A sexual rights approach to addressing gender-based sexual violence among male prisoners in Malawi

Godfrey D Kangaude*

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Summary

Sexual violence and abuse in prison are largely ignored in Malawi. There has been some advocacy focusing on HIV and AIDS in prisons, and discussions about providing condoms to prisoners, but the issue of sexual violence has for the most part been ignored. However difficult or controversial the issue of sexuality in prison might be, the government has a duty to protect prisoners from sexual violence. It is illusory to think that sexual violence in prisons may be controlled merely by repressing sexual activity. This article suggests that the best way to respond to sexual violence in prison is to follow the expert counsel of the Technical Consultation on Sexual Health convened by the World Health Organisation and World Association of Sexology in 2002. The Consultation suggested that to achieve sexual health, sexuality and sexual relationships should be approached positively and respectfully. Further, the sexual rights of every person must be protected. Sexual rights are already recognised in national laws and policies, international human rights instruments and consensus documents. They include the right of persons to be free from coercion, discrimination and violence in their sexual relationships. Malawi has a panoply of laws and policies designed to advance sexual health and curb gender-based violence, including the Gender Equality Act, the National Policy on Sexual and Reproductive Health and Rights and sexual offences legislation. In order to end sexual

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violence and abuse in prisons, these laws and policies must be applied to and implemented in prison. Moreover, these laws and policies must reflect a positive and respectful approach to sexuality and sexual relationships, including those among prisoners.

1 Introduction

Reports on several studies and other sources reveal a significant level of sexual violence and abuse amongst male inmates in the prisons of Malawi.¹ Although several inquiries and studies have touched on prison sexual violence in Malawi, this subject has largely been ignored, not only in Malawi but in the rest of Africa. One reason for this is that sex is generally regarded a taboo topic. Talking about sex in prisons is a cause for anxiety among prison officials and governments, especially because it concerns sexual conduct between prisoners who usually are persons of the same sex.² For example, when a Zambian prison official was asked if condoms could be distributed in prisons, he was reported to have said that it was 'madness' and would portray a bad image about Zambia to other countries.³

Although the advent of HIV necessitated talking about sex in prison, sex and sexuality of prisoners are avoided or denied.⁴ One avoidance strategy has been to frame HIV/AIDS as a medical problem only and ignoring aspects of sexual activity. This over-medicalisation of the discourse diverts attention away from the fact of sexual violence

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- 1 D Jolofani & J DeGabriele 'HIV/AIDS in Malawi prisons' (1999) <http://www.penalreform.org/publications/hiv-aids-malawi-prisons-0> (accessed 9 December 2012); B Ligomeka 'Critics against massive rape and sexual abuse in Malawi prisons' *Afrol News* 9 January 2001 http://www.afrol.com/News2001/maw001_prison_rape.htm (accessed 8 December 2012); S Khan 'Still abuse of juveniles in Malawi prisons' *Afrol News* February 2001 http://www.afrol.com/News2001/maw006_prison_abuse.htm (accessed 1 December 2012); African Commission on Human and Peoples' Rights 'Prisons in Malawi, report on a visit 17 to 28 June 2001 by Dr Vera Mlangazuwa Chirwa, Special Rapporteur on Prisons and Conditions of Detention in Africa' http://www.achpr.org/files/sessions/30th/mission-reports/malawi/achpr30_misrep_specmec_priso_malawi_2001_eng.pdf (accessed 19 December 2012).
 - 2 G Kamlomo 'NGOs decry homophobia in Malawi' *The Daily Times* 21 May 2012 <http://www.bnlimes.com/index.php/daily-times/headlines/national/6542-ngos-decry-homophobia-in-malawi> (accessed 20 December 2012).
 - 3 'Zambia jail official rejects condoms, sex for prisoners' *Panapress* 9 April 2003 <http://www.panapress.com/Zambian-prison-official-rejects-condoms-sex-for-prisoners--13-476218-18-lang1-index.html> (accessed 13 February 2013).
 - 4 'To give or not to give Namibian prisoners condoms' *Africa Review* 11 May 2011 <http://www.africareview.com/Special-Reports/To-give-or-not-to-give-Namibian-prisoners-condoms/-/979182/1403754/-/kctbr1z/-/index.html> (accessed 13 February 2013).

and abuse.⁵ Consequently, proposed interventions have focused on the biological aspects of HIV and have failed to address the broader aspects of sexual health – including sexual violence. The various studies on HIV and AIDS in prisons have addressed sexual violence only tangentially.⁶

Inquiries on prison conditions have side-lined the topic. For instance, after recounting stories of rape and sexual abuse in a report on prison conditions in Malawi, the Special Rapporteur on Prisons and Conditions of Detention in Africa (Special Rapporteur on Prisons) does not address this at all in the concluding recommendations.⁷ Another example is the recent study on pre-trial detention in Malawi by Open Society Initiative for Southern Africa (OSISA) and others in collaboration with the government of Malawi.⁸ This was probably the most thorough study on prison conditions by the time the report was published in 2011. Amazingly, this study mentioned nothing about sexual violence or abuse despite that there had been evidence of this in previous studies and inquiries. It is almost as if the literature on sexual violence was deliberately ignored in this particular study.

The failure to address the problem of sexual violence in prisons also has to do with social and political attitudes about prison. Prisoners are regarded as persons deserving of bad living conditions. What Jones and Pratt say about American society might reflect the attitudes in Malawi and other African countries:⁹

American society may be guilty of accepting prison sexual assault as a part of prison life, largely because of the belief that inmates are undeserving of protection and that sexual victimisation in prison is a natural consequence of having violated society's norms and mores.

Prison conditions are generally poor in Malawi. There is overcrowding, poor sanitation and a lack of access to basic needs such as adequate food, bedding, clothing, security and health care. Advocacy for better

5 F Namangale 'HIV rate high in Malawi prisons' *Malawi Nation* 29 June 2012 <http://www.mwnation.com/national-news-the-nation/7378-hiv-rate-high-in-malawi-prisons> (accessed 20 November 2012). The comment by the Minister on HIV transmission was that homosexuality is not the only way this is transmitted. While that may be true, the Minister was avoiding talking about sex in prison.

6 R Zachariah *et al* 'Sexually-transmitted infections among prison inmates in a rural district of Malawi' (2002) 96 *Transactions of the Royal Society of Tropical Medicine and Hygiene* 617; OO Simooya *et al* 'Behind walls: A study of HIV risk behaviours and seroprevalence in prisons in Zambia' (2001) 15 *AIDS* 1741; CA Okochi *et al* 'Knowledge about AIDS and sexual behaviours of inmates of Agodi Prison in Ibadan, Nigeria' (2000) 19 *International Quarterly of Community Health Education* 353.

7 African Commission (n 1 above) 43.

8 Open Society Initiative of Southern Africa *Pre-trial detention in Malawi: Understanding caseload management and conditions of incarceration* (2011).

9 TR Jones & TC Pratt 'The prevalence of sexual violence in prison: The state of the knowledge base and implications for evidence-based correctional policy making' (2008) 52 *International Journal of Offender Therapy and Comparative Criminology* 292.

prison conditions in Malawi has focused on these but has ignored sexual health.

The aim of this article, therefore, is to start a discussion about sexuality and sexual violence in prisons. It will use the concepts of sexual health and rights to argue that prisons could shape sexual expression of prisoners away from sexual violence and toward sexual health. This requires a transformation of attitudes about prison sexuality and sexual relationships so that the prison system may be reformed towards protecting the sexual health of prisoners.

2 Sexuality, sexual health and rights of prisoners

In 2002, the World Health Organisation (WHO) and the World Association of Sexology (WAS) convened a technical consultation on sexual health in Geneva. This was a meeting of international and national experts on sexuality and sexual health-related issues, drawn from across all the regions of the world. The report of the technical consultation informs the discussion on sexuality, sexual health and the rights of prisoners.

2.1 Concepts

It is not disputed that sexuality is a central aspect of being human. Sexuality is experienced and expressed in diverse ways in relationships to the self or others, in solitude or in communion. Sexuality is therefore part and parcel of all cultures, including prison cultures. Various factors influence the expression of sexuality, including biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors. These interrelated factors also influence prison conditions, and how society treats prisoners. The experience and expression of sexuality in prison is inevitably shaped by prison conditions which are influenced by the above-mentioned factors.

Prisoners are human and sexual beings. They will therefore always express themselves sexually in one way or another, and this may include physical sexual activity. The prison system cannot control or repress the expression of sexuality, although it can play a role in shaping such expression. Indeed, Haney notes that prisons generally have a powerful influence on the expression of sexuality:¹⁰

[T]hese inverted sexual dynamics in which hypermasculinity is performed through forced homosexual behaviour are a testament to the power of prison to fundamentally change people, to distort and disturb their sexual identities as well as other core aspects of their pre-existing 'self'.

10 C Haney 'Perversions of prison: On the origins of hypermasculinity and sexual violence in confinement' (2011) 48 *American Criminal Law Review* 127.

In prison, men (and women) spend long periods of time together and in close proximity. This increases the likelihood of sexual activity amongst them. Persons who do not identify as homosexual may nevertheless be involved in sex with other men simply because there are no women in prison. Although prisons have the power to shape sexual expression, it would be illusory to suppose that prisons have control over the sexuality of prisoners. Prison systems can only shape the expression and experience of sexuality. This is crucial because prisons contribute towards the sexual health of prisoners, positively or negatively.

The technical consultation defined sexual health as follows:¹¹

Sexual health is a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence.

Sexual health in prisons is not merely the absence of disease or dysfunction. It is not merely the absence of HIV in prison. Indeed, neither is it the mere absence of sexual violence or abuse.

Sexual health involves the whole person; the physical, the emotional, the mental and social aspects of the person. Advancing sexual health in prisons means paying attention to all these aspects, and addressing the needs of the prisoner holistically rather than piecemeal. Sexual health is related to life's basic necessities, such as food, clothing, bedding, leisure activities, the personal security of the person, and adequate living space. General living conditions are not dissociated from sexual health. Separating these from sexuality and sexual health is perhaps another illusion of prison systems.

A crucial step to advancing sexual health in prison is to foster a positive and respectful approach to sexuality and sexual relationships. Prison systems must imagine the possibility for healthy sexual experiences among prisoners. This, however, is one of the greatest challenges and involves a shift of social attitudes about sexuality and gender relations. Social norms and laws about same-sex intimacy in Malawi reflect a negative view about same-sex sexuality; that it is shameful and immoral. This negativity is a hindrance because the very possibility of healthy sexual relationships among prisoners is denied. This repression contributes toward prison conditions that sustain unhealthy expressions of sexuality.

The technical consultation also stated that, in order to achieve sexual health, sexual rights must be respected, protected and fulfilled. Sexual rights were defined as follows:¹²

11 World Health Organisation (WHO) *Defining sexual health: Report of a Technical Consultation on Sexual Health 28-31 January 2002* (2006) 5.

12 As above.

Sexual rights embrace human rights that are already recognized in national laws, international human rights documents and other consensus documents. They include the right of all persons, free of coercion, discrimination and violence, to ... respect for bodily integrity ... consensual sexual relations ... pursue a satisfying, safe and pleasurable sexual life.

The concept of sexual rights is still a contested one and there is no consensus at the global level. However, the technical consultation appeals to the fact that sexual rights are not new rights but the very same human rights already recognised in national laws and international human rights documents. Freedom from violence, respect for bodily integrity, and the right to choose one's sexual partner and to pursue sexual intimacy that enriches one's life are founded upon the fundamental and basic rights already articulated in various human rights documents. Human rights are sexual rights when the basic fundamental rights are applied to sexuality and sexual relationships. Sexual rights are therefore a conceptual tool for advocating for sexual health, because without the realisation of these rights, sexual health cannot be attained.

2.2 Human rights and prison sexuality

The very first principle to guide prison systems toward addressing sexual violence in prisons is to treat prisoners as human beings entitled to certain rights that must be protected. Prisoners have the right to be treated in a humane manner and with respect for the inherent dignity of the human person.¹³ They have the right to physical and moral integrity, and not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹⁴ Prisoners also have the right to the highest attainable standard of physical and mental health, including sexual health.¹⁵

Lawful imprisonment does not strip prisoners of all human rights. This principle was first stated in 1912 by Innes J in *Whittaker & Morant v Roos & Bateman*, where he held that '[i]nmates were entitled to all the personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed'.¹⁶ In 1979, this *dictum* came to be known as the *residuum principle* when it was quoted by Corbett J in *Goldberg & Others v Minister of Prisons & Others*.¹⁷ In 2008, Plasket J held that the *residuum principle* enjoys even stronger protection in the era of

13 Principle 1 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment' A/RES/43/173 (1988) <http://www.un.org/documents/ga/res/43/a43r173.htm> (accessed 13 February 2013).

14 Art 5 Universal Declaration; art 7 ICCPR; Preamble & art 2 Convention against Torture.

15 Art 25 Universal Declaration; art 12 ICESCR.

16 1912 AD 122-123.

17 1979 (1) SA 14 (A) 39 C-E.

democratic constitutionalism as it is rooted in human rights principles which are the bedrock of democracy.¹⁸

Like many other democratic constitutions, the Constitution of Malawi extends the protection of rights to prisoners.¹⁹ In *Masangano v Attorney-General & Others* (*Masangano case*), prisoners from Chichiri Prison sought the protection of their rights under the Constitution.²⁰ The plaintiffs alleged that the prison conditions were such that their non-derogable right to freedom from torture and cruel, inhuman and degrading treatment or punishment was infringed.²¹ They raised the issue of a lack of basic necessities, such as blankets and food. Another issue was the lack of space in prison cells, leading to congestion. The court held that the overcrowding and other poor conditions were a violation of basic human dignity; that it amounted to inhuman and degrading treatment and was therefore unconstitutional. The court stated that '[p]risoners may have the right to liberty curtailed by reason of lawful incarceration; they, however, retain all their other human rights as guaranteed by the Constitution ...'²² The court therefore ordered, *inter alia*, that the prison authorities take steps to reduce congestion and improve conditions generally to meet minimum international standards.

Even if the plaintiffs in the *Masangano* case did not directly raise the issue of sexual violence or sexual health, the basic rights they claimed are not dissociated from sexuality and sexual expression in prison. Respect for the right to dignity of prisoners therefore entails deliberate efforts on the part of the penal system to take into account the power of the prison to shape expression of sexuality. It means engaging with the factors that create prison conditions that sustain sexual abuse and violence.

Prison systems foster unhealthy expressions of sexuality when they treat prisoners inhumanely, that is, when they fail to respect their human and sexual rights. Haney notes that 'many correctional institutions function as though the people that they house are not fully human – performing what some have characterised as "waste management functions."²³ Apart from denying prisoners the enjoyment of basic human rights, as revealed in the *Masangano* case, prison systems also tend to deny the sexuality of prisoners and to treat them as if they were non-sexual beings that should not engage in any sexual relationships. This repression of sexuality does not make sexual activity disappear. Rather, it contributes to the negative expression of sexuality, such as sexual violence. In order to promote sexual health

18 *Ehrlich v Minister of Correctional Services & Another* 2009 (2) SA 373 (E) para 7.

19 Art 164 Constitution of Malawi Act 20 of 1994.

20 *Gable Masangano v Attorney-General & Others* Constitutional Case 15 of 2007 (unreported), <http://www.malawilii.org/mw/judgment/high-court-general-division/2009/31> (accessed 11 November 2012).

21 Art 44 Constitution of Malawi.

22 *Masangano case* (n 20 above).

23 Haney (n 10 above) 126.

amongst prisoners, it must be accepted that sexual activity will take place. With this in mind, prison systems must adopt a respectful and positive approach to the sexuality of prisoners. This entails respecting the prisoner as a human being entitled to certain rights, including the right to be free from sexual violence. Ultimately, therefore, sexual health in prisons can only be advanced if sexual rights are respected, protected and fulfilled.

3 Gender-based sexual violence among men

Sexual violence among prisoners can be explained and understood through the concept of masculinity. Masculinity describes and explains the behaviour of men in relation to gender and sexual identities. It is the complex set of social regulations governing the conduct of 'real men'. It shapes attitudes and behaviours through socially-constructed expectations and meanings of what is the proper behaviour for a man as opposed to a 'non-man'.²⁴ These expectations shape behaviour by constructing the ideal (man) to which males strive to conform in order to be regarded as a real man. Therefore, males are always in a constant struggle to prove themselves. This is the 'hegemonic masculinity'.²⁵

Hegemonic masculinity shapes sexual behaviour among men by creating expectations of how a 'real man' should behave with regard to sex and sexual relationships. This links masculinity to heterosexuality, and specifically to heterosexism. Heterosexism is the cultural belief system that recognises heterosexuality as the only desired form of sexual expression to the exclusion of any other.²⁶ Heterosexual intimacy and sex is therefore the expected sexual expression of both the masculine and feminine genders. Patriarchal societies despise non-heterosexual intimacy because it is a subversion of the social order. Law argues that the legal and cultural contempt against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons is because their identity and life styles challenge the social meanings attached to gender.²⁷

[H]omosexuality is censured because it violates the prescriptions of gender role expectations. A panoply of legal rules and cultural institutions reinforce the assumption that heterosexual intimacy is the only natural and legitimate form of sexual expression.

24 R Robinson 'Masculinity as prison: Sexual identity, race, and incarceration' (2011) 99 *California Law Review* 1331.

25 DR Karp 'Unlocking men, unmasking masculinities: Doing men's work in prison' (2010) 18 *The Journal of Men's Studies* 65.

26 GM Herek 'Beyond "homophobia": Thinking about sexual prejudice and stigma in the twenty-first century' (2004) 1 *Sexuality Research and Social Policy* 14-15.

27 SA Law 'Homosexuality and the social meaning of gender' (1988) *Wisconsin Law Review* 196.

One of the defining characteristics of masculinity with regard to gendered sexual relations is the capacity to sexually penetrate a woman. By associating manhood with the capacity to engage in penile and penetrative sex with a woman, men internalise the belief that sexual penetration affirms masculinity. For instance, in several Malawian sub-cultures, rites of passage reinforce the idea that boys prove their manhood by having sex with girls.²⁸ The girl or woman may consent, but sometimes proving manhood may involve subduing the other. The pursuit of the masculine ideal to its logical end creates conditions for sexual violence by justifying the subjugation of women. Indeed, Kaufman notes that '[t]he various forms of men's violence against women are a dynamic affirmation of a masculinity that can only exist as contradistinguished from femininity'.²⁹ However, it is not only the woman who is subjected to this violence. The destructive force of masculinity casts an oppressive web across all who threaten the hegemonic masculinity ideal, including men and women.³⁰ As Harris puts it:³¹

[M]en achieve masculinity at the expense of women: at best by being 'not a woman', at worst by excluding, hurting, denigrating, exploiting, or otherwise abusing actual women. Even in male-male relations, the domination of men over women arguably continues to function: Men in all-male groups often prove their individual and collective manhood by symbolically reducing others in the group to women and abusing them accordingly.

A great deal of sexual violence in prisons is gender-based. Gender-based violence is manifested in the victimisation and the stigmatisation of female qualities in men, where perpetrators sexually abuse other men who are perceived to exhibit such female qualities.³² The perpetrator of gender-based sexual violence against another man does not perceive the act as a homosexual act, but rather imagines himself as engaging in a heterosexual act.³³ The victimised becomes symbolically his 'woman'. The heterosexual aggressor engages in a homosexual act but as an expression of despise of femininity and homosexuality. This is how sexual violence driven by hegemonic masculinities simultaneously entrenches misogyny and homophobia.

28 AC Munthali *et al* *Adolescent sexual and reproductive health in Malawi: A synthesis of research evidence* (2004) 13-14; EAT Pemba 'The changes in the conduct of Yao boys' initiation ceremonies: An empirical study of the impact of HIV and AIDS NGOs/projects interventions' unpublished Master's thesis, University of Nordland, 2012 15 http://brage.bibsys.no/hibo/retrieve/2370/Pemba_EAT.pdf (accessed 21 May 2013).

29 M Kaufman (ed) *Beyond patriarchy: Essays by men on pleasure, power, and change* (1987) 590.

30 L Segal *Slow motion: Changing masculinities, changing men* (1990) 16.

31 A Harris 'Gender violence, race, and criminal justice' (2000) 52 *Stanford Law Review* 785-786.

32 TA Kupers 'Role of misogyny and homophobia in prison sexual abuse' (2010) 18 *UCLA Women's Law Journal* 113.

33 As above.

Gender-based violence against women or any other person and in its many forms is therefore not a random occurrence of isolated events. Gender-based violence is a system of oppression within heteropatriarchy. This is the system which shapes the expression of hegemonic masculinities. Harris defines heteropatriarchy as 'a system of subordination that burdens not only women and sexual minorities but also the straight-identified men that it purports to privilege'.³⁴ Gender-based violence is therefore an interconnected web of intersecting forms of oppression stretching across civil society and the state.³⁵ State machinery, such as laws that criminalise sex between same-sex persons, forms part of this oppressive structure because of complicity with these masculinity ideals.³⁶ This, at least in part, explains the sexual victimisation amongst men in prison.

However, relationships amongst men are not governed by hegemonic masculinities alone. In their research on masculinity narratives amongst prisoners, Evans and Wallace described three groups.³⁷ The first group were gentler and softer men who had not internalised hegemonic masculinities. The second were those who lived by the hegemonic masculinity code and perceived themselves inadequate men who constantly had to prove their manhood through violence. The third initially internalised the hegemonic masculine codes, but had undergone certain transformative experiences that empowered them to re-evaluate their lives and adopt a more balanced view of their masculinities.

Sexual health and rights are about creating conditions for respectful gender and sexual relations which are the bases for persons to engage in sexual relationships and activity without coercion and discrimination, and based on mutuality and equality rather than power and subjugation. The concept of sexual rights is a useful tool to guide the transformation of hegemonic masculinities into positive and gender-equal relationships among men in prison.

34 A Harris 'Heteropatriarchy kills: Challenging gender violence in a prison nation' (2011) 7 *Washington University Journal of Law and Policy* 17.

35 As above.

36 DL Hutchinson 'Ignoring the sexualisation of race: Heteronormativity, critical race theory and anti-racist politics' (1999) 47 *Buffalo Law Review* 19-20; EM Schneider *Battered women and feminist law making* (2000) 499.

37 T Evans & P Wallace 'A prison within a prison? The masculinity narratives of male prisoners' (2008) 10 *Men and Masculinities* 498-499.

4 Sexual relationships among male prisoners in Malawi

4.1 Characteristics

4.1.1 Power and subjugation

The Special Rapporteur on Prisons described one incident of sexual violence characterised as rape.³⁸ In this instance, a newcomer to the prison was violently raped by fellow prisoners and had to be treated for trauma. Jolofani and DeGabriele also interviewed prisoners who admitted that 'homosexual rape' occurs in prison. Some prisoners said it was a common occurrence while others said it happened only occasionally, maybe once or twice a year.³⁹ The inquiry and study did not measure the prevalence or extent of sexual violence in Malawi's prisons.

Kainja, who was actually a prison official in Malawi when he conducted his study, designed his investigation specifically to determine the extent of sexual violence in prison, the common forms of sexual violence, and the prevalence and factors that shape sexual violence. According to the opinions of the prisoners he interviewed, 34 per cent of sexual violence in prison was coerced anal sex, 26 per cent was unwanted touching and 4 per cent was rape.⁴⁰ It is not clear how coerced anal sex was distinguished from rape because these two could easily be conflated. In any case, he also found that 21 per cent of the prisoners he interviewed had experienced some form of sexual violence.⁴¹

The most important characteristic of sexual relationships which are based on power and control is coercion. There are various levels of sexual coercion in prison. Some acts resemble rape, while others might appear consensual. In their report, Jolofani and DeGabriele observe that '[s]ome men have a "wife" with whom they have a constant relationship, while others have several long-term "wives"'.⁴² That some relationships are constant or long-term suggests that they may be or become consensual in nature. However, the fact that the prisoners described their sexual partners as 'wives' reflects the misogyny and homophobia associated with hegemonic masculinity ideals.

Sexual violence and abuse in Malawi's prisons should not be ignored. The finding that 21 per cent of the prisoners interviewed by

38 African Commission (n 1 above) 29.

39 Jolofani & DeGabriele (n 1 above) 9.

40 C Kainja 'Analysis of "inmate on inmate" sexual victimisation in prisons: A case study of a few selected prisons in Malawi' (2011) unpublished BA dissertation, Mzuzu University, 2011 18.

41 Kainja (n 40 above) 19.

42 Jolofani & DeGabriele (n 1 above) 9.

Kainja were sexually violated at one time indicates a prevalence of one in five prisoners, which is very high. The question is how prison systems can address sexual coercion, so that if there is sexual activity, at least then it is based on gender equality and positive attitudes towards sexuality.

4.1.2 Transactional

The boundaries between coercive and non-coercive sex in prison tend to be blurred, and sometimes the two may be conflated.⁴³ This is especially difficult where sex is used as a medium of exchange. Evidence suggests that the more prevalent sex in Malawi's prisons is between adults and juveniles, and is sometimes not necessarily accompanied by physical violence. This type of sex does not have the characteristics of forcible rape. The report of the Special Rapporteur on Prisons on Malawi recorded how adult prisoners propose sex to young prisoners in exchange for food.⁴⁴ Jolofani and DeGabriele capture a similar experience from a prisoner:⁴⁵

These juveniles agreed to have sex with these men because they had no clothes and no blanket, and they were hungry. One day these boys started to cry and refused to have sex. The men took away their blankets and after spending a night in the cold they agreed to allow the men to have sex with them again.

In this instance, the boys were not physically forced by the adult prisoners. Rather, the adult prisoners asked for sex and offered the boys food, clothing and blankets in exchange. By analogy with mainstream society, a person may choose to engage in sex in exchange for money or other commodities.

But perhaps the issue here is the underlying power relations which are influenced by a lack of basic needs. If one is forced into exchange because of destitution, this can be a very disempowering and humiliating experience. Therefore, even if it were debatable whether the boys had sex under coercion, it was certainly under conditions of destitution and disempowerment. So, while the question of whether this was consensual is problematic, the question of whether this was based on equality and mutual respect might be easier to answer, and it is in the negative.

Jolofani and DeGabriele also describe transaction sex where other prisoners are rented out for sex, especially boys.⁴⁶ This kind of arrangement points to the victimisation of these boys and is most likely based on their perceived or actual feminine qualities.

43 S Gear 'Behind the bars of masculinity: Male rape and homophobia in and about South African men's prisons' (2007) 10 *Sexualities* 214.

44 African Commission (n 1 above) 37.

45 Jolofani & DeGabriele (n 1 above) 10.

46 Jolofani & DeGabriele (n 1 above) 9.

Transactional sex in prison is perhaps the more problematic to address because it may not be possible to eliminate the place of sex as a highly-desirable commodity which can be used as exchange.⁴⁷ Even if all prisoners are given basic necessities, there will still be differences among prisoners, creating conditions for exchange. However, providing the basic necessities may at least avoid prisoners having to engage in sex out of destitution. As for exchange beyond the basic necessities, prison systems may just have to make sure that there is no coercion involved, and that the sexual activity is based on equality and mutuality.

4.1.3 Mutual and consensual

Sexual relationships in prison may be violent and abusive, but they may also be consensual. Jolofani and DeGabriele reported that juvenile prisoners in Malawi admitted to having consensual sexual relations amongst themselves.⁴⁸ However, the characteristics of such relationships were not elaborated upon. It can only be postulated that they are for mutual pleasuring and based on respect for the other rather than based on power, domination and control. This would also point to positive attitudes about men having sex with men.

While there has been a great deal of research on sexual violence in prisons, there has been comparatively little literature on consensual sex and love relationships. Anecdotal evidence, however, does suggest that some prisoners may engage in consensual sex with one another as an expression of love. Writing about his experience in a prison in the United States of America (USA), one prisoner said that some relationships in prison end up to be love affairs, even if out of necessity.⁴⁹ Another prisoner recounts his experience in prison with another inmate:⁵⁰

This man made love to me like no one else had ever has. It was wonderful each and every time. This was a man so straight that I was terrified to even kiss him the first time. This straight man completely, unreservedly, met every need that I had sexually.

There is a need for further research to find out what kind of mutual sexual relationships exist in Malawian prisons, and to what extent they are based on gender equality, and positive and respectful ideas about sexuality and sexual relationships among men. Perhaps one of the reasons this has not been investigated is because of the prejudice and bias of researchers in a homophobic environment, where the very

47 BV Smith 'Analysing prison sex: Reconciling self-expression with safety' (2006) 13 *Human Rights Brief* 18.

48 Jolofani & DeGabriele (n 1 above) 11.

49 J Urbaniak 'Lockdown: Prison love' *Qnotes* 29 November 2008 <http://go.qnotes.com/1150/lockdown-prison-love/> (accessed 13 December 2012).

50 CJ Richardson 'I am a gay man in prison: How some straight men find comfort in the arms of another man' *Yahoo Voices* 5 January 2011 <http://voices.yahoo.com/i-am-gay-man-prison-7510292.html?cat=43> (accessed 18 December 2012).

notion of positive and respectful sexual relationships among men is disregarded.

4.2 Factors influencing sexual expression

Kainja identifies several factors that in the opinion of the prisoners influence sexual relationships. Thirty-eight per cent of the prisoners thought the pressure for sex is the most important; another 38 per cent thought it was the length of sentence; and 6 per cent said it was boredom and congestion. Another study found that there was a greater tendency for sexual violence in maximum-security prisons than in other prisons. Interviewed prisoners thought that most perpetrators were among the prisoners with longer sentences rather than those serving shorter sentences.⁵¹ The respondents in Jolofani and DeGabriele's study also thought that overcrowding in cells contributes to an increased risk of sexual assault and violence.⁵²

These factors (that is, pressures of sex, the length of sentence, boredom and congestion) do not, however, by themselves explain why the sex should be abusive or violent. There is an interplay with other factors that create conditions for sexual violence, including the internalisation of hegemonic masculinities, and the emotional and psychological makeup of the individual. This is the reason behind the abuse of younger men and effeminate men by adult prisoners, where the adults idealise their victims as women or wives rather than as equal partners.⁵³

Systemic or structural factors, that is, the penal governance system, also play an important role. Jolofani and DeGabriele describe how adult prisoners in connivance with *nyapalas* (prison cell leaders) and warders smuggle juvenile prisoners into the adult section for sex.⁵⁴ Also, the *nyapalas* are supposed to report any acts of sexual violence and abuse, but they are bribed by other prisoners to keep quiet.⁵⁵ While the juveniles are encouraged to report such abuse to prison officials, they fear repercussions, which include being treated harshly by fellow prisoners or prison officials.

Another important structural factor is the socio-political and legal framework that perpetuates stigma against same-sex intimacy and the criminalisation of sex between persons of the same sex. This indiscriminately makes all physical sexual expression criminal, whether

51 V Mwapasa *et al* *Prevalence and risks factors for HIV, sexually-transmitted infections and tuberculosis in Malawian prisons* (2011). This is an unpublished report of a study that was commissioned by Malawi Prison Services and funded by the United Nations Office on Drugs and Crime (UNODC) in 2011 and presented to stakeholders in June 2012.

52 Jolofani & DeGabriele (n 1 above) 8.

53 African Commission (n 1 above) 29; Legal Assistance Center, AIDS Law Unit & University of Wyoming College of Law *Struggle to survive: A report on HIV/AIDS and prisoners' rights in Namibia* (2008) 30-31.

54 Jolofani & DeGabriele (n 1 above) 9.

55 As above.

there is consent or no consent, whether sex is a tool for gender-based violence or is a mutual, safe and pleasurable experience free of coercion or violence. However, since sexual expression may not be entirely repressed, prison officials have either remained passive and condoned sexual practices, or exploited the situation and facilitated the perpetration of sexual abuse and violence.⁵⁶ It is not surprising that prison authorities are anxious to acknowledge the existence of sexual activity in prison.⁵⁷ This invisibility hinders any efforts to address sexual violence in prison.

Another invisibility is the very victimisation of males in countries like Malawi where the legal definition of rape is not gender-neutral. This not only perpetuates the myth that males cannot be raped, but trivialises violent sex and relegates it to the category of sexual assault, which is a lesser offence. The denial that males cannot be sexually victimised creates an attitude that even if sexual violence is taking place in prison, it is not that bad. There is no outcry, nor a sense of urgency to address it.

Ultimately, the question is not whether there will be sexual activity in prison, but whether it is possible to create conditions for positive and respectful sexual relationships, where the sexual rights of prisoners will be respected and protected. Prisons should use their power to shape their sexual energies into positive sexual activity and away from gender-based sexual violence.

5 Toward transforming prison sexual health

5.1 Prison governance for sexual health

To transform the prison sexuality culture and address sexual violence requires transformation of the prison governance system. According to Tapscott:⁵⁸

[E]ffective governance of any correctional institution is a function not only of the state's administrative efficiency, but also of the extent to which society, at large, understands, and engages in, the challenges faced in combating crime and in incarcerating and rehabilitating offenders. These relate to issues of socio-economic development, to policing, judicial reform and, crucially, to the extent to which civil society is engaged in oversight of the prison system.

Prison governance therefore goes beyond the prison administration machinery created under chapter 17 of the Constitution of Malawi. Rather, it includes other government departments such as gender,

⁵⁶ Jolofani and DeGabriele (n 1 above) 10.

⁵⁷ African Commission (n 1 above). In response to the report of the Special Rapporteur on Prisons, the Chief Commissioner of Malawi prisons said: 'While it is an undeniable fact that homosexuality may exist in our prisons, it is very difficult to prove if it happens, as it is done in the absence of prison officers and behind curtains.'

⁵⁸ C Tapscott *A study of best practice in prison governance* (2005) 3.

finance, health and justice, the courts and legislature, but also civil society organisations and individuals, including the prisoners themselves. This is the governance system that should advocate for and promote sexual health in the prisons of Malawi.

Borrowing and adapting the term governance for health as defined in a study by WHO, good prison governance for health can be defined as the attempts of the government and various actors to steer society and the community to pursue sexual health as integral to the well-being of prisoners.⁵⁹ This requires an enabling legal and policy environment that empowers the prison administration to work in collaboration with all the stakeholders in order to advance the interests of society to incarcerate and manage offenders, but also taking into account the rights and interests of the prisoners. The legal and policy environment not only comprises of prison policies and laws, but includes other laws and policies relating to sexual health, such as (for Malawi) the Gender Equality Act, which prohibits sex and gender discrimination and harassment in institutions; sexual offences legislation; and the National Policy for Sexual and Reproductive Health and Rights, which is the government's plan to promote the sexual and reproductive health and rights of all Malawians. This legal and policy framework must also be implemented for the benefit of prisoners.

5.2 Zero tolerance of sexual violence

The prison governance system must protect prisoners from sexual harassment, abuse and violence. As a bare minimum, sexual violence should not be tolerated in prisons. Unabated sexual violence should certainly not be part of prison culture. The ever-present threat of sexual violence and actual violence in the prison environment can result in severe mental and physical pain and suffering. Since this takes place under the close control and monitoring of the state, the failure to prevent sexual violence is not only contrary to the right to health, but amounts to the infringement of the right against torture under international law.⁶⁰ In *Farmer v Brennan*, the Supreme Court of the USA said that prison officials had a duty to protect prisoners and therefore held that the indifference of prison officials to the risk of inmate-on-inmate rape amounted to cruel and unusual punishment.⁶¹

Addressing sexual violence in prisons is not a simple affair because of the interrelated factors that create, produce and sustain sexual violence in that environment. While there are laws on sexual offences, there may still be a need to tailor policies to the peculiarities of prison violence. In 2003, the USA enacted the Prison Rape Elimination Act (PREA) to protect individuals from sexual violence in prisons. The

⁵⁹ I Kickbusch & D Gleicher *Governance for health in the 21st century* (2012) 4.

⁶⁰ L Muntingh & Z Satardien 'Sexual violence in prisons Part 1: The duty to provide safe custody and the nature of prison sex' (2011) 24 *South African Journal of Criminal Justice* 7-12.

⁶¹ *Farmer v Brennan* 511 US 825 847 (1994).

significance of this law is first of all the acknowledgment that prison rape exists and that it is not to be tolerated.

Another function of the PREA is to define sexual violence in prisons. As discussed earlier, it might be difficult to distinguish between consensual and non-consensual sex and there is a need to define what is meant by sexual violence in prisons. The PREA includes the following terms in its definition section: carnal knowledge; rape; prison rape; sexual assault with an object; and sexual fondling. Defining what constitutes sexual abuse or violence is important for prison management and the prisoners themselves so that there is no confusion about what is allowed and what is not allowed.

This discussion is not meant to portray the PREA as a model law for Malawi, or any other country. However, it does show that it makes a great deal of sense to address sexual violence in prisons through adopting policies and laws that would guide prison officials and systems rather than expecting that the current sexual offences laws will deal with the problem.

5.3 Promoting healthy sexual relationships

The question of what expressions of sexuality should or could be allowed in prisons is much more challenging. There is a dearth of literature on what positive and healthy expressions of sexuality in prison are or could be. It is not enough for prison systems to prevent sexual violence, but they should also create conditions that support positive sexuality and sexual relationships.

The following anecdote from a prisoner writing about his experience appeals to common sense:⁶²

A man either turns homosexual ... entirely forgets about women out of religious or some other belief, abstains or becomes asexual, or manages to get hold of some good porn to masturbate to ...

Prisoners have to cope with sexual needs, and there are various ways of doing this, including engaging in sex and masturbation. Yet there are others who altogether abstain from the physical expression of sex. This is not unlike how persons cope with sexual needs in mainstream society. The difference, however, is that in mainstream society persons have the privacy and liberty that allow them to indulge in satisfying and pleasurable activities that are otherwise morally, culturally or socially stigmatised, such as masturbation. Masturbation has been shown to provide relief from sexual tension, and people do indulge in it to meet their sexual needs.⁶³ In prison, however, such sexual expression might be restricted by policy or circumstances, such as a lack of private space.

⁶² Urbaniak (n 49 above).

⁶³ E Coleman 'Masturbation as a means of achieving sexual health' (2003) 14 *Journal of Psychology and Human Sexuality* 7.

One way to approach sexuality positively is to promote constructive attitudes about masturbation and to support prisoners who want to engage in this practice to release sexual tension. The prison systems may need to ensure that prison conditions can as much as possible accommodate the needs of prisoners to masturbate and, indeed, to engage in any other sexual practices that are not harmful to themselves or others.

A more challenging question is what to do with prisoners who wish to or are actually having consensual sex. It is certainly a topic that generates controversy. In the light of HIV and AIDS, there has been advocacy about providing condoms to prisoners. This has been condemned by others as promoting immorality or criminalised sexual conduct.

Despite the topic being controversial, there is a need to engage in constructive dialogue about sex in prison and to generate ideas about how to curb sexual violence and promote sexual health. One solution could be to allow private visitation by sexual partners. A study documented by D'Alessio *et al* found that of the 50 states of the USA, those with prison conjugal visitation programmes had lower sexual violence in prisons than those which did not have.⁶⁴ In some jurisdictions, there are efforts to meet the sexual needs of prisoners through such programmes. Smith recounts a few examples: Brazil has communal visits, where relatives and friends can visit without restraint, and intimate partners can visit prisoners in their individual cells. Czech Republic and Spain have programmes for married prisoners to be visited by their spouses in privacy. Denmark has a prison 'leave' system where the inmate can spend a day or so at home and come back to prison.⁶⁵ The issue of prison visitations for sex has, however, provoked mixed reactions from African governments. When the issue was raised in Zimbabwe and Zambia, the government authorities cited economic constraints as prohibitive.⁶⁶ An online source reports that in Tanzania, the request was made by women to the Constitutional Review Commission. Tanzanian authorities seem to have responded favourably to these suggestions, at least in principle.⁶⁷

Apart from physical sex, sexuality concerns psychological and mental wellbeing. This relates to cognitive, affective and emotional needs such as sexual self-esteem. The quality of sexual wellbeing

64 SJ D'Alessio *et al* 'The effect of conjugal visitation on sexual violence in prison' (2013) 38 *American Journal of Criminal Justice* 22-23. However, they point to the need for more research.

65 Smith (n 47 above) 20.

66 'Health: Conjugal visits not the right answer for AIDS in prisons' *Inter Press Service* 21 July 1998 <http://www.ipsnews.net/1998/07/health-conjugal-visits-not-the-right-answer-for-aids-in-prisons/> (accessed 10 February 2013).

67 C Majaliwa 'Tanzania: Conjugal rights to be granted to prisoners' *Tanzania Daily News* 2 November 2012 <http://allafrica.com/stories/201211030279.html> (accessed 1 December 2012).

depends on various factors, such as socialisation, attitudes about sexuality, self-esteem, and the extent to which one is able to meet sexual needs. The failure to attain a certain threshold of social and emotional wellbeing may impact negatively on sexual behaviour, regardless of whether one wants to engage in a particular sexual activity or not. As Kainja found, there was a high prevalence of sexual abuse among juvenile prisoners. This could as well be due to the fact that their evolving sexuality and sexual wellbeing needs are frustrated under conditions of incarceration:⁶⁸

Despite the fact that many men are confined in jails and prison at an age when their sexual needs and wants (both physical and psychological) are at their peak, there are literally no officially sanctioned outlets through which they can express or satisfy them.

Young and juvenile prisoners, in particular, may require assistance in sexual development since their capacities are still evolving. They may need help with the adaption to conditions of incarceration where there is no opportunity to interact with a sexual partner according to their sexual orientation if they are heterosexual. It is important to mentor them to pursue positive and healthy sexual lifestyles, and to avoid or prevent sexual violence and HIV infection.

Sexuality education may be crucial in this regard so that young and even older prisoners understand about their sexuality, relationships and intimacy and the possibilities that are there in prison to pursue sexual health. Beyond this, some prisoners may need counsel that addresses gender norms and hegemonic masculinities. It is therefore necessary to talk about sex and sexuality with prisoners, rather than just imposing some piecemeal or quick-fix interventions like distributing condoms without tackling sexual violence.

In the light of the foregoing discussion, it is obvious that solutions to sexual violence in prison, or indeed to the problem of HIV infection, cannot be resolved effectively without taking into account gender and sexuality dynamics. Further, without understanding the interaction of sociocultural norms and sexuality, society may unwittingly impose hegemonic views about sexuality. For instance, distributing condoms without any accompanying discussion about sexuality may send the message that only penetrative sex is valued. It is also imperative that prisoners have positive attitudes about sexuality and sex in prison. If comprehensive sexual education could be part of the process, prisoners could be assisted to explore other possibilities of having intimate sexual relationships that do not necessarily involve penetration.

It is therefore proposed that, in order to generate creative solutions to sexual coercion and curb the unhealthy expression of sexuality; there is a need to talk about sex and sexuality more constructively.

68 Haney (n 10 above) 127.

The prisoner should be re-imagined as a human being with sexual needs, and a subject of sexual rights.

6 Some primary considerations

To begin to address the problem, its profile must be raised nationally and even regionally. There is still a great deal to be done to improve prison conditions in Malawi, as has been highlighted in the *Masangano* case and the other reports that have been referred to above. The challenge with advocacy for the protection of sexual rights is that it adds a dimension that is regarded as even more controversial. However difficult the issue of sexuality might be, Africa must not avoid the discourse. Sexuality and sexual health should be taken as integral to the wellbeing of prisoners and should be addressed together with all the other issues regarding prison conditions. The author agrees with Dolovich that⁶⁹

[p]risons ... and the problems they pose – including prison rape – admit no easy fix. Indeed, to wait for such a fix would be to consign some of the most vulnerable people behind bars to the worst forms of suffering and abuse.

Addressing sexual violence and promoting health sexuality in prisons should not wait until there is better food or clothing in prison, or until the controversy of sex between males in prison is sorted out. Every second of delay costs some prisoner his freedom from sexual violence.

6.1 Raising awareness

One of the important political bodies that has the potential to influence the agenda at the national and regional levels in Africa is the office of Special Rapporteur on Prisons. So far, the reports of the Rapporteur have failed to adequately address the issue of sexuality and sexual violence in prisons. In the report on Malawi, although the issue of rape was raised, it was not addressed in the concluding recommendations. Another example is the 2004 report on South African prison conditions. The Special Rapporteur on Prisons noted that⁷⁰

[t]he 28s are more interested in having forced sexual relationships with other prisoners which they refer to as 'wyfies' (meaning wives). They join by either being sodomised or like the 27s by stabbing.

Yet, in the recommendations of the report, there is no mention at all of sexual violence. The closest it comes to mentioning anything about gang-orchestrated rape is where it recommends that '[c]omplaints of

69 S Dolovich 'Strategic segregation in the modern prison' (2011) 48 *Criminal Law Review* 8.

70 African Commission on Human and Peoples' Rights *Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa's mission to the Republic of South Africa 14-30 June 2004* (2004) 49.

abuse should be investigated and dealt with expeditiously so as not to encourage impunity'.⁷¹

The 2012 draft activity report of the Special Rapporteur on Prisons addresses substantive issues on prison conditions in much more detail than previous reports. The report recounts the missions undertaken up to 2012, and the issues that had been raised at those and other meetings. On sexual violence, the report mentions that '[w]omen prisoners are particularly vulnerable to sexual abuse by prison guards'.⁷² Elsewhere, it notes that '[o]vercrowding compromises child prisoners' health and hygiene and exposes them to increased risk of sexual abuse'.⁷³ Unfortunately, this is pretty much all that the report says on the subject of violence in prisons.

The Special Rapporteur on Prisons needs to undertake and inspire a more robust analysis of prison conditions and the factors that perpetuate sexual violence. This should include discussions on how to transform hegemonic masculinities and to bring about better gender and sexual relations in prisons. The concepts of sexual health and sexual rights discussed at the technical consultation on sexual health should guide this analysis.

6.2 Developing and harmonising laws and policies on gender and sexuality

Socio-cultural norms about sexuality and gender relations are important factors in addressing sexual violence in prisons. The criminalisation of sexual intimacy between persons of the same sex forecloses the possibility of solutions that involve promoting healthy same-sex relationships. Indeed, as Ngwena succinctly states:⁷⁴

[T]he strong official political antipathy towards homosexuality that currently prevails in several African countries militates against liberal reforms to the detriment of creating synergy between human rights and public health.

Ngwena's conclusion applies to same-sex intimacy in prison. The failure to acknowledge the possibility of healthy sexual relationships between men in prison fails human rights, fails the sexual health of prisoners and ultimately fails public health. Rather, such antipathy fosters hegemonic masculinities and fuels the synergy between misogyny and homophobia. The consequences include unabated sexual violence in prisons and the physical and psychological *sequelae*, including HIV, and these are threats to public health in prison but also beyond the walls of prison.

⁷¹ African Commission (n 70 above) 66.

⁷² African Commission on Human and Peoples' Rights *Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa* (2012) 12.

⁷³ African Commission (n 72 above) 14.

⁷⁴ C Ngwena 'Sexual health and human rights in the African region' (2011) Working Paper commissioned by the World Health Organisation, Geneva.

The failure to recognise that men can be victims of rape condemns prisoners to pain, injury and suffering. Stemple has described how the international human rights regime and advocacy to eliminate gender-based violence have tended to perpetuate the gender-biased notion that only women can be raped.⁷⁵ This sustains myths and misconceptions about men which are linked to notions of masculinities. One is that men are aggressors and cannot themselves be raped unless they are not real men. A related misconception is that rape between men involves homosexuals. This conflates the sexual victimisation of males with 'homosexual rape' which, in turn, especially for countries such as Malawi which criminalise homosexuality, makes the subject of prison sex the more politically unpalatable for prison governance to address. This is why government and civil society advocates for the elimination of gender-based violence have given prison sexual violence a wide berth. These gender-biased notions about sexual victimisation and negative views about same-sex sexuality, coupled with the attitude that prisoners are transgressors of social norms and deserve prevailing prison conditions, condemn many boys and men to unjustifiable sexual violence and abuse without any recourse to justice.

Laws and policies on gender and sexuality play an important role in shaping attitudes and sexual behaviour. In order to reshape prison culture around sexuality, and to promote sexual health in prisons, laws and policies need to be harmonised with the concepts of sexual health and rights and to advance gender equality.

It would be problematic to address prison sexual violence without the concomitant positive acceptance of physical sexual intimacy among prisoners and the acknowledgment that this can be safe, pleasurable and free of violence and coercion. This necessitates the decriminalisation of same-sex intimacy, as well as recognising that men can be sexuality victimised. Therefore, there is a need to comprehensively reform sexual offences laws in Malawi so that they are gender neutral and reflect a positive and respectful perspective about same-sex sexuality. It would be difficult to realise sexual health and rights of prisoners without these intermediate interventions.

7 Conclusion

Prison conditions in Malawi are generally very poor, and this has prompted the Special Rapporteur on Prisons, the courts and civil society to call upon the government to improve prison conditions. It is important for prisons to have adequate food, clothing and good living space. However, despite evidence of significant levels of sexual violence and abuse in prison, none of these stakeholders have said

75 L Stemple 'Male rape and human rights' (2008) 60 *Hastings Law Journal* 618-625 627-637.

much about it, except that some have called for a better response to HIV and AIDS. There have not been adequate investigations of the phenomenon of gender-based sexual violence in prisons or how some prisoners are actually having positive mutual sexual relationships.

Sexuality in Malawian culture is a taboo topic and it is especially difficult to talk about men having sex with men because of homophobia supported by laws that criminalise homosexual sex. It has been easier for human rights advocates to talk about the lack of food, clothing and space in prison and to call on government to provide these, than to talk about sexuality and the sexual health needs of prisoners and to call on government to address sexual violence and promote sexual health.

It is not possible or even desirable to completely repress sexual activity among prisoners. Prisons, however, do shape sexuality and sexual relationships positively or negatively. The Malawian prison system has to date fostered unhealthy sexuality and sexual relationships. The reasons include socially and legally-sanctioned homophobia which forecloses the possibility of there being positive and respectful sexual relationships between and among men. Another reason is the gender-biased notion that men cannot be raped. This makes it difficult for prisons to address sexual violence justly.

Sexual health in prisons cannot be attained unless these misconceptions and misunderstandings about gender and sexuality based on hegemonic masculinities ideals are quashed. The challenge therefore is how Malawian society should genuinely transform gender and sexual relations, including in prisons, which is a microcosm of society. Such transformation requires that Malawi approach sexuality and sexual relationships positively, including same-sex sexualities and sexual relationships. It requires transforming laws and policies to accommodate sexual and gender diversity and to protect every person from sexual violence, and to allow every person the freedom to pursue sexual relationships safely and freely without discrimination, coercion and violence.

Perhaps the failure to address sexual violence by Malawian prison governance is related to the failure generally of the justice system to respond to sexual violence and discrimination against boys and men, but also women and LGBTI persons in Malawian society. The failure to address gender-based sexual violence in prisons says a great deal about how Malawi is faring in terms of moving the country towards greater gender equality. If Malawi is truly committed to advancing gender equality and the sexual health of all, then it must no longer neglect addressing gender-based and sexual violence in prisons.

Capital sentencing discretion in Southern Africa: A human rights perspective on the doctrine of extenuating circumstances in death penalty cases

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Summary

In 1935, South Africa reduced the harshness of the common law mandatory death penalty for murder with the passage of the doctrine of extenuating circumstances. A judge was permitted to substitute a lesser sentence if the accused proved the existence of a mitigating factor at the time of the offence. The doctrine, which operated as a rebuttable presumption in favour of death, passed to the criminal law of Botswana, Lesotho, Namibia, Swaziland, Zambia and Zimbabwe, as well as to the South Pacific nation of Papua New Guinea. The doctrine lacked the analytical rationality of an American or Indian-style discretionary death penalty, which required a judge to articulate an aggravating factor in order to sentence an accused to death, with the burden of proof on the prosecution. The doctrine has now been abolished in South Africa, Namibia, Papua New Guinea, Swaziland and Zimbabwe, and modified in Botswana and Lesotho. The decline of the doctrine of extenuating circumstances accords with the international consensus that the death penalty should be restricted only to the most serious crimes and only based on the circumstances of the individual offence and the characteristics of the individual offender.

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1 Introduction

The common law mandatory death penalty for murder, in which a death sentence is automatic upon conviction, is increasingly out of sync with prevailing human rights norms. By failing to consider individualised circumstances of an offence or an offender, the penalty overpunishes, encompassing mercy killing with sadistic killing and murders in cold blood with those in the heat of passion. Although most former British colonies inherited a process for executive mercy in which the governor-general and later an independent head of state could dispense clemency in troubling cases, the unreviewable power of the pardon does not remove all risk of arbitrariness or mistake. As a consequence, international tribunals such as the Inter-American Commission on Human Rights and the United Nations (UN) Human Rights Committee have determined that a mandatory sentence of death is a cruel and degrading form of punishment because it could be too harsh, and not limited to the 'most serious crimes' as required by international human rights instruments.¹

In the common law world, the harshness of an automatic sentence of death has gradually given way to judicial sentencing discretion in capital cases. In practice, judicial sentencing discretion has taken two forms. The first is to require a trial judge to articulate an aggravating factor that placed a crime into a special category of seriousness meriting the unusual penalty of death; the trial judge is able to review the evidence and pass a sentence specifically tailored to the criminal offence and offender. This was the regime that originated in the United States after the death penalty was reinstated in *Gregg v Georgia* in 1976, and in India after capital punishment was reserved for the 'worst of the worst' in *Bachan Singh v State of Punjab* in 1980.² The second option was the opposite: to require a judge to articulate a *mitigating* factor that removed the case from the sweeping scope of the death penalty, in essence a presumption in favour of death. This was the regime created by the Criminal Procedure and Evidence (Amendment) Act of 1935 in South Africa, which passed into the law of neighbouring Southern African countries in the following decades, where it was known as the 'doctrine of extenuating circumstances'.³ Over the past four decades, the first option, the American or Indian-style discretionary death penalty, has emerged as the consensus in the

1 See art 6(2) International Covenant on Civil and Political Rights UN Doc A/6316 (1966), 999 UNTS 171 (23 March 1976); art 4(2) American Convention on Human Rights; *Thompson v St Vincent* Comm 806/1998, UN Doc CCPR/C/70/D/806/1998 (2000) (UNHRC); *Edwards v Bahamas* Case 12.067, Report 48/01, OEA/SerL/V/II.111 Doc 20 (2000) (IAHRC).

2 *Gregg v Georgia* 428 US 153 (1976); *Bachan Singh v State of Punjab* 1980 (2) SCC 684 (India).

3 Sec 61 Criminal Procedure and Evidence (Amendment) Act 46 of 1935 (SA).

common law world, including in the Commonwealth Caribbean and common law East Africa.⁴

By contrast, the doctrine of extenuating circumstances, which requires a judge to find a mitigating factor in order to determine that a punishment does not merit the death sentence, conflicts with the overwhelming international trend to limit the death penalty only to the 'most serious crimes' by establishing a presumption *against* death.⁵ The doctrine lacks the analytical rationality of a pure discretionary death sentence as it places the burden on the accused person to prove beyond a fair preponderance of the evidence why he or she should *not* be executed, instead of requiring the prosecution to prove both guilt and sentence beyond a reasonable doubt. Unlike the mandatory death penalty, the doctrine of extenuating circumstances has not faced a direct challenge in an international human rights tribunal.

Apartheid South Africa had one of the most active death penalties in the Western world during the twentieth century, and an enormous body of intricate case law developed on the doctrine that was highly influential in the Southern African region. The white legislature of Rhodesia adopted the doctrine in 1949, as did the drafters of the revised penal codes of Botswana, Lesotho and Swaziland prior to independence; Zambia did so in a legislative reform in 1990.⁶ The doctrine of extenuating circumstances was replaced by a discretionary death penalty regime in South Africa in 1990 (prior to total abolition in 1995), in Swaziland in 2005, and in Zimbabwe in 2013. The doctrine was abolished with the death penalty in Namibia in 1989. In addition, both Botswana and Lesotho use a modified version of the original doctrine that removes the most objectionable aspects of the doctrine.⁷ Only Zambia retains the original doctrine, though the constitutional drafting process currently underway offers an opportunity to reform the capital sentencing process in a manner consistent with international human rights and due process norms.⁸ Where the doctrine survives, it is an anachronism, and its abolition contributes to the narrowing of the scope of the death penalty in the common law world.

4 See eg *Reyes v The Queen* [2002] 2 AC 259 (PC) (appeal taken from Belize); *The Queen v Hughes* [2002] 2 AC 259 (PC) (appeal taken from St. Lucia); *Fox v The Queen* [2002] AC 284 (PC) (appeal taken from St Kitts & Nevis); *Kafantayeni v Attorney-General* [2007] MWHC 1 (Malawi HC); *Attorney-General v Kigula* [2009] UGSC 6 (Uganda SC); *Mutiso v Republic* Crim App 17 of 2008 (30 July 2010) (Kenya CA).

5 See art 6(2) International Covenant on Civil and Political Rights.

6 A Novak 'Abuse of state power: The mandatory death penalty for political crimes in Southern Rhodesia, 1964-1970' (2013) 19 *Fundamina* 28.

7 See *Kelaletswe v S* [1995] BLR 100 (Botswana CA); *Letuka v Rex* 1997-1998 LLR-LB 346 (4 February 1998) 360 (Lesotho CA).

8 C Musonda & L Nyondo 'Constitution to stand test of time: Zambia still waits' *Zambia Daily Mail* 7 July 2013) <http://www.daily-mail.co.zm/features/14909> (accessed 31 January 2014).

2 International human rights and the doctrine of extenuating circumstances

The doctrine of extenuating circumstances is less compliant with prevailing human rights norms than a pure discretionary death penalty for three primary reasons. First, the doctrine requires two separate discretionary acts instead of one, which increases the potential for arbitrariness or error, by requiring a judge to consider all mitigating factors in determining whether extenuating circumstances exist, and then, separately, to weigh mitigating factors against aggravating factors to craft an appropriate sentence.⁹ The traditional doctrine shifts the burden to the accused to show why he or she should *not* be executed, accentuating the weakness of defence counsel and state-provided legal aid, and amplifying the risk of error in legal systems that are technical, foreign, and often bewildering.¹⁰

Second, the absurdity of the doctrine arises when a murder trial is bifurcated into two, in which a convicted accused who pleaded innocent must admit guilt and claim extenuating circumstances in order to avoid the noose.¹¹ Invariably, the prosecution claims that the accused had lied and therefore any testimony on extenuating circumstances is not credible, while an accused who maintained his or her innocence during the sentencing stage would fail to carry the onus of showing extenuating circumstances.¹²

Finally, the doctrine of extenuating circumstances fails to completely resolve the underlying tensions of a mandatory death sentence. The artificially narrow traditional definition of extenuating circumstances includes factors that existed at the time of the offence that reduced the moral blameworthiness of the offender. This could mean that an accused with powerful *ex post facto* grounds for mercy (illness, family considerations, religious conversion, remorse, testimony against accomplices) could still face a mandatory death sentence. In practice, the modern operation of the doctrine has expanded this definition in most jurisdictions, but this only exacerbates the failure of the doctrine to predictably guide judicial discretion. As the analysis below explains, the jurisdictions of Southern Africa vary widely as to the factors that are considered extenuating circumstances, and are often based on local policy considerations. In the event that a judge fails to find extenuating circumstances, he or she can disclaim responsibility for the resulting automatic death

9 DM Davis 'Extenuation: An unnecessary halfway house on the road to a rational sentencing policy' (1989) 2 *South African Journal of Criminal Justice* 211-212.

10 A Novak 'Guilty of murder with extenuating circumstances: Transparency and the mandatory death penalty in Botswana' (2009) 27 *Boston University International Law Journal* 194-197.

11 DS Koyana 'The demise of the doctrine of extenuating circumstances in the Republics of South Africa and Transkei' (1991) 4 *Consultus* 118.

12 D van Zyl Smit 'Judicial discretion and the sentence of death for murder' (1982) 99 *South African Law Journal* 86.

sentence, even though the judge possessed full discretion to find otherwise. Requiring a prosecutor to prove both a conviction and a capital aggravating factor beyond a reasonable doubt, as in a discretionary death penalty regime, requires a judge to articulate his or her reasoning for dispensing the ultimate punishment of death and accept personal responsibility for the verdict.

An international human rights consensus is emerging that the mandatory death penalty for murder is a cruel and degrading form of punishment. According to the UN Human Rights Committee, the mandatory death penalty violates the right to life since it is not individually tailored to fit the crime, finding that a death sentence could be disproportionately harsh.¹³ The Committee has even found that a mandatory death sentence for *aggravated* murder violated the International Covenant on Civil and Political Rights (ICCPR) because it did not permit judicial sentencing discretion.¹⁴ The Inter-American Commission on Human Rights has similarly found that a mandatory sentence of death violated the right to life, the right to humane treatment, and the right to a fair trial due to the absence of a sentencing hearing.¹⁵ In 2002, the Inter-American Court of Human Rights followed suit, indicating that, because the penalty could be imposed without regard to circumstances, it was not restricted to the 'most serious crimes' as required by regional human rights instruments.¹⁶ By contrast to the Inter-American system, the African regional human rights system has historically imposed few limitations on capital punishment. This is changing. In 1999, the African Commission on Human and Peoples' Rights (African Commission) passed a resolution advocating a moratorium on the death penalty, and in 2005 created a Working Group on the Death Penalty, which is mandated to develop a strategy for continent-wide abolition.¹⁷ The 1999 resolution, a non-binding document, called on states to limit the imposition of the death penalty only for the most serious crimes.¹⁸ Although the African Commission has never directly addressed the question whether the mandatory death penalty or a rebuttable presumption in favour of death violates the African Charter on Human and Peoples' Rights (African Charter), the Commission did find that Botswana's death penalty did not violate international law, in part due

13 *Thompson v St Vincent* Comm 806/1998, UN Doc CCPR/C/70/D/806/1998 (2000) (UNHRC).

14 *Carpo v Philippines* Comm 1077/2002, UN Doc CCPR/C/77/D/1077/2002 (2002) (UNHRC).

15 *Edwards v Bahamas* Case 12.067, Report 48/01, OEA/SerL/V/II.111 Doc 20 (2000) (IAHRC).

16 *Hilaire, Constantine & Benjamin v Trinidad & Tobago* ser C no 94 (21 June 2002) (IACtHR).

17 L Chenwi 'Taking the death penalty debate further: The African Commission on Human and Peoples' Rights' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 75 78-80.

18 Resolution Urging the State to Envisage a Moratorium on the Death Penalty, adopted in Kigali, Rwanda (15 November 1999) ACHPR Res 42 (XXVI) 99.

to the ability of judges to consider mitigating circumstances in sentencing.¹⁹

A death penalty that involves judicial sentencing discretion places principles of fairness and proportionality above certainty, and countries with discretionary death penalties have responded differently to the challenge of sentencing disparities in which different judges or sentencing authorities treat like cases differently. A legal regime that fails to provide adequate guidance to sentencers risks erratic and arbitrary sentences or, worse, discriminatory ones as plagued South African courts in the 1970s and 1980s. In some countries, such as the United States and Uganda, legislatures have enacted sentencing guidelines that provide judges with a baseline sentence, typically a term of imprisonment, and permit variations of that sentence within a specified range based on aggravating or mitigating circumstances.²⁰ Elsewhere, appellate courts have strictly monitored lower court decisions for consistency, ensuring that trial judges do not depart from usual parameters for length of an imprisonment sentence in the absence of weighty aggravating or mitigating circumstances.²¹ Finally, the judicious use of mandatory minimum sentences may succeed in preventing wide sentencing disparities without overly constraining a judge's discretion, if accompanied by review of prosecutorial discretion to ensure that prosecutors do not charge a crime too harshly.²² Because the doctrine of extenuating circumstances depends on a more complex judicial sentencing decision than in a pure discretionary regime, Southern African jurisdictions have struggled with balancing these competing tensions of proportionality and predictability.

3 South Africa

The doctrine of extenuating circumstances originated in South Africa, which 'inherited the wide definition of murder, the mandatory death sentence, and the secret process of mercy in death penalty cases' from Britain.²³ First codified in statute in 1917, the mandatory death regime was opaque and unaccountable, and the judicial practice of writing a confidential report to the Governor-General for assistance in clemency deliberations 'only contribute[d] very marginally to exclude

19 *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003). See also *Spilg (on behalf of Kobedi) v Botswana* Comm 277/2003 (10th session ACHPR 12-16 December 2011) http://www.achpr.org/files/sessions/10th-eo/communications/277_-_03/achpreos10_277_03_eng.pdf (accessed 2 April 2014).

20 E Ssekina & S Kakaire 'Order, certainty in new sentencing guide' *The Observer* (Kampala) 19 June 2013.

21 See eg *Tsela v Rex* [2011] SZSC 13 (13 May 2012).

22 S Terblanche & G Mackenzie 'Mandatory sentences in South Africa: Lessons for Australia?' (2008) 41 *Australia and New Zealand Journal of Criminology* 402.

23 R Turrell *White mercy: A study of the death penalty in South Africa* (2004) 4.

all risk of a judicial error'.²⁴ Between 1923 and 1934, no more than 24 per cent of capital sentences were actually carried out, with the remainder receiving clemency or reprieve.²⁵ The doctrine of extenuating circumstances arose as a political compromise in South Africa in 1935 as a result of this historically high rate of commutation by the Governor-General.²⁶ The law was widely accepted by judges, and murder convictions doubled over the next decade as jurors were less hesitant to convict of murder when lesser sentences were available.²⁷ Beginning in the 1930s, with the political consolidation of the white state, the death penalty was 'transformed from a form of class self-defence into a form of racial self-defence'.²⁸ As South Africa was the only country in the world with a rising murder rate between 1900 and 1950, the doctrine of extenuating circumstances provided a pressure valve for an increasingly harsh criminal justice regime.

From the creation of the Union of South Africa in 1910 until the moratorium on executions in 1990, about 4 200 people were hanged in South Africa. Originally applicable only to murder, rape and treason, after 1958 parliament expanded the list to include kidnapping, child stealing, robbery or attempted robbery, and aggravated housebreaking or attempt, as well as terrorism and related crimes, although 90 per cent of executions were for murder.²⁹ The first case to define the doctrine of extenuating circumstances was *R v Mfoni*³⁰ in 1935, which held that 'only such circumstances as are connected with or have a relation to the conduct of the accused in the commission of the crime should have any weight at all', which was to be an enduring feature of the doctrine. Three years later, in *R v Biyana*,³¹ extenuating circumstances were defined as any fact 'associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilt'. In 1947, the Appellate Division determined that the onus of showing extenuating circumstances beyond a preponderance of the evidence rested with the accused.³² In *R v Fundakubi*,³³ the

24 B van Niekerk 'Hanged by the neck until you are dead: Some thoughts on the application of the death penalty in South Africa' (1969) 86 *South African Law Journal* 461.

25 G Devenish 'The historical and jurisprudential evolution and background to the application of the death penalty in South Africa and its relationship with constitutional and political reform' (1992) 5 *South African Journal of Criminal Justice* 8.

26 E Kahn 'How did we get our lopsided law on the imposition of the death penalty for common-law crimes? And what should we do about it?' (1989) 2 *South African Journal of Criminal Justice* 146-150.

27 Turrell (n 23 above) 236.

28 Turrell (n 23 above) 21.

29 Symposium 'The relaunch of the Society for the Abolition of the Death Penalty in South Africa' (1989) 106 *South African Law Journal* 40.

30 1935 OPD 191.

31 1938 FDL 310 311.

32 *R v Lembete* 1947 (2) SA 603 (A).

33 1948 (3) SA 810 818 (AD)

Appellate Division provided the seminal definition of extenuating circumstances that endures in Southern African jurisprudence:

No factor not too remote or too faintly or indirectly related to the commission of the crime, which bears on the accused's moral blameworthiness in committing it, can be ruled out from consideration.

The procedure of weighing extenuating circumstances grew more complex over time, and large tracts of case law parsing the doctrine developed in South African courts. In *S v Letsolo*³⁴ in 1970, the Appellate Division framed the judicial responsibility as

a discretion, to be exercised judicially on a consideration of all relevant facts including the criminal record of the accused, to decide whether it would be appropriate to take the drastically extreme step of ordering him to forfeit his life

or whether another alternative, short of this 'incomparable extreme', would sufficiently satisfy the deterrent, punitive and rehabilitative goals of the sentence.

By the 1980s, South Africa's death penalty regime was in crisis. The Appellate Division vastly expanded the common purpose doctrine in political cases, and large numbers of accused were sentenced to death despite having only a trivial role in a crime.³⁵ Statistics on death sentences showed wildly sharp disparities among judges, including how frequently they imposed the punishment or granted leave to appeal.³⁶ In 1990, the African National Congress set a moratorium on executions as a precondition for negotiations with the South African government, which President FW de Klerk announced on 2 February 1990. The South African legislature abolished the doctrine of extenuating circumstances by the Criminal Procedure Amendment Act of 1990, which substituted a discretionary death sentence in all cases.³⁷ The legislation, applicable to all pending appeals, required that the death sentence be imposed only after full consideration of both mitigating and aggravating factors. It also provided review of cases in which the appeals were exhausted and the death sentences confirmed. In *S v Nkwanyana*,³⁸ the Appellate Division found that 'mitigating factors' included a broader range of factors than required by the doctrine of extenuating circumstances, and not just those connected to the commission of the crime. The Court also concluded that the prosecution had the burden of showing aggravating factors *and* the absence of mitigating factors beyond a reasonable doubt. Despite the institution of a discretionary death penalty regime in 1990, however, the gallows at Pretoria Central Prison never again

34 1970 (3) SA 476-477 (A).

35 Kahn (n 26 above) 162 n 99.

36 L Angus & E Grant 'Sentencing in capital cases in the Transvaal Provincial Division and Witwatersrand Local Division: 1987-1989' (1991) 7 *South African Journal on Human Rights* 69.

37 Criminal Procedure Amendment Act 107 of 1990.

38 1990 (4) SA 735 (AD).

hanged another prisoner. In 1995, the Constitutional Court of South Africa found the death penalty unconstitutional in *S v Makwanyane*,³⁹ holding that even in a discretionary system, '[a]t every stage of the process there is an element of chance'. *Makwanyane* has since gone global, cited by courts around the world for its treatment of human dignity in the criminal sentencing process.

4 Zimbabwe

At independence in 1980, Zimbabwe inherited a wide array of capital crimes from a period of white minority rule, including attempted murder, conspiracy, treason, rape and attempt, aggravated robbery and attempt, certain political offences under Rhodesian security legislation, and felony murder.⁴⁰ The death sentence was restricted to murder and treason in 1992.⁴¹ The doctrine of extenuating circumstances was first passed by the Southern Rhodesian Legislative Assembly in 1949, introducing some judicial discretion to capital sentencing.⁴² Then Minister of Justice, Thomas Beadle, told the legislature that 'only half the death sentences which are passed in this colony are ever carried out in fact'.⁴³ Another member noted that the mandatory regime created 'a tendency to strain the law against the finding of murder' and instead convict of manslaughter.⁴⁴ During the stresses of the Rhodesian War, however, the legislature passed mandatory death sentences without consideration of extenuating circumstances for certain political offences, including petrol bombing and possession of arms of war, which were upheld in a series of constitutional challenges.⁴⁵

At independence, the doctrine of extenuating circumstances passed to Zimbabwe wholly unreformed. Courts in Zimbabwe never developed a clear method of weighing aggravating and mitigating circumstances, adhering to the traditional rule placing the burden of proof on the accused. The Supreme Court permitted trial judges to either weigh all mitigating factors and aggravating factors together to determine whether extenuating circumstances existed, or to determine that extenuating circumstances existed before weighing them against aggravating factors.⁴⁶ The Court has upheld a death sentence where extenuating circumstances appeared to exist but were outweighed by aggravating factors, which is a corruption of the

39 1995 (3) SA 391 (CC).

40 G Feltoe *A guide to sentencing in Zimbabwe* (1990) 25-26.

41 Criminal Laws Amendment Act 2 of 1992 (Z).

42 Criminal Procedure and Evidence Amendment Act 52 of 1949 (SR).

43 *Debates of the Legislative Assembly of Southern Rhodesia* (18 October 1949) 2643.

44 *Debates* (n 43 above) 2651.

45 Law and Order (Maintenance) Amendment Act 12 of 1963 (SR); *R v Runyowa* 1966 RLR 42 (PC).

46 G Feltoe 'Extenuating circumstances: A life and death issue' (1986) 4 *Zimbabwe Law Review* 66-78.

doctrine.⁴⁷ Also troubling was the Supreme Court's willingness to confirm death sentences for felony murder and accomplice liability in which the accused did not have the actual intent to kill, although it did recognise as an extenuating circumstance a homicide in which the possibility of death was relatively remote.⁴⁸

One unique aspect of Zimbabwe's doctrine of extenuating circumstances was the degree of deference that the Zimbabwe Supreme Court gave to decisions of the trial courts, rendering it effectively powerless to change a sentence in the absence of misdirection or irregularity, even if it would have imposed a lesser sentence.⁴⁹ In one recent case upholding a death sentence, the Supreme Court noted that 'the trial court exercises what is essentially a moral judgment' that extenuating circumstances exist, and the Court on appeal 'cannot substitute its own view'.⁵⁰ The Court may only interfere⁵¹

if persuaded that the conclusion of the trial court could not reasonably have been reached; or where the court had regard to the wrong factors; or had mistakenly excluded factors proper to be taken into account, or had, in some other way, erred in principle.

This level of deference contrasts markedly with the efforts of other appellate courts in Southern Africa to seek uniformity in sentencing, and conflicts with the global trend toward more robust review in capital cases. In refusing to reduce a sentence for murder with extenuating circumstances from 25 years to 20 years, the justices wrote that it was 'not for this Court to interfere with a sentence passed by a court of first instance merely because it might have imposed a different sentence'.⁵² This level of deference places great weight on the decision of an individual trial judge, increasing the risk of error.

In March 2013, Zimbabwean voters ratified a new Constitution which prohibits the mandatory death sentence.⁵³ The new provision in article 48(2) only authorised the death penalty for murder committed in 'aggravating circumstances', indicating that 'the law must permit the court a discretion whether or not to impose the death penalty', which abolishes the doctrine and grants a judge discretion to impose a lesser sentence even in the absence of

47 *Kanhumwa v S* Crim App 189/2002 (29 November 2004).

48 *Murijo v S* [2005] ZWSC 139 (22 September 2005); *Mugwanda v S* Crim App 215/2001 (6 June 2002); *Siluli v S* [2005] ZWSC 135 (6 September 2005).

49 J Hatchard 'Capital punishment in Southern Africa: Some recent developments' (1994) 43 *International and Comparative Law Quarterly* 925.

50 *S v Woods* 1993 (2) ZLR 284.

51 As above.

52 *Mamvura v S* Crim App 127/2003 (20 June 2005).

53 Art 48(2) Zimbabwe Constitution; 'Zimbabwe approves new constitution' *BBC News* 19 March 2013 <http://www.bbc.co.uk/news/world-africa-21845444> (accessed 31 January 2014).

extenuating circumstances.⁵⁴ The effective abolition of the doctrine of extenuating circumstances in Zimbabwe accords with a global trend toward discretionary death penalty regimes.

5 Botswana

Botswana's Penal Code authorises the death sentence for murder, treason and piracy with intent to murder, although no convictions have occurred under the latter two crimes.⁵⁵ According to the Penal Code, '[w]here a court in convicting a person of murder is of the opinion that there are extenuating circumstances, the court may impose any sentence other than death'.⁵⁶ As in Zimbabwe, South African jurisprudence is an important source of law in capital sentencing. Decisions of South African courts are of 'strong persuasive force' because 'the concept of "extenuating circumstances" in sentences for murder as introduced into the Penal Code was plainly derived ... from and based on legislation in South Africa'.⁵⁷ A court must consider the accused's social background according to standards of behaviour of an ordinary person in the accused's community and judge the accused's behaviour according to his or her own weaknesses, foibles, defects and beliefs.⁵⁸ The Botswana Court of Appeal has generously interpreted extenuating circumstances to include a wide range of factors. Provocation or absence of premeditation alone may be an extenuating circumstance, unlike in Zimbabwe, where a defence of provocation that failed at trial is likely to be rejected by a judge as an extenuating circumstance since the judge already rejected the accused's version of events.⁵⁹

The Botswana Court of Appeal has removed the evidentiary burden on the accused to show extenuating circumstances, removing the most objectionable aspect of the doctrine of extenuating circumstances. In *Kelaletswe v State*,⁶⁰ the Court first determined that the burden of showing extenuating circumstances no longer rested with the accused. A judge and counsel themselves had the responsibility to inquire as to the existence of extenuating circumstances, and the benefit of the doubt belonged to the accused.⁶¹ The Court of Appeal confirmed that a trial judge engages in a single step, weighing aggravating and extenuating circumstances together to determine whether extenuating circumstances exist, obscuring the sentencing analysis. This lack of analytical clarity persists

54 Art 48(2) Zimbabwe Constitution.

55 DDN Nsereko 'Extenuating circumstances in capital offences in Botswana' (1991) 2 *Criminal Law Forum* 267.

56 Sec 203(2) Penal Code.

57 *Gofhamodino v S* Crim App 4/1984 (June 1984) (B).

58 Nsereko (n 55 above) 262-263.

59 *Masono v S* [2000] 1 BLR 46 (CA); *Ndhlovu v S* Crim App 15/1995 (11 July 1995). Compare *Jongwe v State* [2002] ZWSC 62 (8 August 2002).

60 [1995] BLR 100 (CA).

61 As above.

in Botswana's case law, although decisions show more consistency than in Zimbabwe.⁶²

In 2003, in *Kobedi v State*,⁶³ the Court of Appeal addressed a fair trial challenge to Botswana's *pro Deo* system of legal representation in which junior lawyers are paid a flat fee to represent indigent accused. The Court dismissed this ineffective assistance of counsel challenge, finding that most indigent capital accused receive adequate counsel. However, one observer has noted that '[t]he quality of such representation mostly leaves a lot to be desired', and the average amount received for a *pro Deo* case is one-tenth of that made by an attorney in private practice for a single court appearance.⁶⁴ As two human rights organisations have noted:⁶⁵

Most *pro Deo* cases are handled by inexperienced lawyers who lack the skills, resources and commitment to handle such serious matters [affecting] ... the rights of the accused.

Kobedi also raised a challenge to the definition of extenuating circumstances as unconstitutionally narrow because it prevented courts from considering mitigating factors that were unrelated to the offence itself, including a lack of prior convictions, good behaviour, religious conversion, medical needs, familial obligations, or remorse after the fact. The Court dodged the argument, writing that nothing stopped the accused from proffering such arguments.⁶⁶ Botswana continues to use a narrow definition of extenuating circumstances even though it no longer adheres to the burden-shifting aspect of the original doctrine.

6 Swaziland

The doctrine of extenuating circumstances passed into Swazi criminal law via the Criminal Law and Procedure (Amendment) Act of 1959, modelled on the South African provision.⁶⁷ Ratified in 2005, section 15(2) of the Constitution of Swaziland prohibits the mandatory death penalty, the only constitution in Africa to do so until Zimbabwe's in 2013.⁶⁸ In practice, however, the doctrine of extenuating circumstances fell into disuse starting in 1998 after a series of decisions in which the Court of Appeal (renamed the Supreme Court under the new Constitution) determined that the burden did not shift to the accused to show extenuating circumstances; instead, the

62 *Ntesang v S* [1995] BLR 151 (CA).

63 [2003] BWCA 22 (19 March 2003).

64 DG Boko 'Fair trial and the customary courts in Botswana: Questions on legal representation' (2000) 11 *Criminal Law Forum* 454.

65 FIDH & Ditshwanelo *The death penalty in Botswana: Hasty and secretive hangings* (2007) 21.

66 *Kobedi* (n 63 above).

67 Criminal Law and Procedure (Amendment) Act 47 of 1959 (S).

68 Art 15(2) Constitution of Swaziland.

prosecution maintained the burden of showing that there were none, a more progressive interpretation than in Botswana. The most recent case law requires judges to weigh aggravating and mitigating factors even where no extenuating circumstances are found, which provides a path forward for other retentionist countries in Southern Africa.

In an unreported judgment in *Daniel Dlamini v Rex*⁶⁹ in 1998, the Swaziland Court of Appeal wrote: 'We find ourselves in respectful agreement with the conclusion of the Botswana Court of Appeal that no onus rests on the accused person', for which it cited *Kelaletswe*. The Court noted that the trial judge had the duty to consider all of the testimony and weigh all aggravating and mitigating factors in order to determine whether extenuating circumstances existed. In a subsequent case in August 1998, the Court of Appeal reversed a death sentence where a doctor's statement as to the accused's mental state was not contradicted on the record.⁷⁰ Unlike courts in Zimbabwe or Botswana, the determination of whether extenuating circumstances existed was a separate inquiry from the weighing of all aggravating and mitigating factors to determine the appropriate inquiry. Trial judges were directed to consider the nature and circumstances of the offence; the characteristics of the offender, with a 'perceptive understanding of the accused's human frailties'; and the impact of the crime on the community in order to determine an appropriate sentence.⁷¹

In 2009 the High Court ruled that the constitutional prohibition on the mandatory death penalty rendered the extenuating circumstances analysis obsolete since a court *always* had discretion to substitute a lesser sentence, regardless of whether extenuating circumstances existed.⁷² Consequently, the penal code provision authorising extenuating circumstances was unconstitutional to the extent that it required a mandatory death sentence. In a separate case, the Supreme Court of Swaziland confirmed that courts had a discretion to substitute a lesser sentence regardless of whether extenuating circumstances existed, but determined that the doctrine could still be relevant as it could 'fortify a decision to impose' the death penalty.⁷³ Since the establishment of a purely discretionary death penalty in Swaziland, judges have been reluctant to dispose a death sentence even when it was in their discretion to do so. In one High Court decision, the trial judge found that the accused was guilty of murder with no extenuating circumstances and found that the aggravating factors 'far outweigh[ed]' the mitigating factors, but nonetheless opted for a sentence of imprisonment on account of the accused's

69 Crim App 11/1998, cited in *Rex v Blignaut* [2002] SZHC 10 (29 April 2002).

70 *Rex v Motsa* [1998] SZHC 31 (8 October 1998).

71 *Motsa* (n 70 above), citing *S v Zinn* 1969 (2) SA 537; *S v Scheepers* 1977 (2) SA 154.

72 *Rex v Musa Kotso Samuel Dlamini* [2009] SZHC 151 (29 May 2009).

73 *Rex v Ntokozo Adams* [2010] SZSC 10 (30 November 2010).

lack of a prior criminal history.⁷⁴ In the sensationalised case of serial killer David Simelane, convicted of 28 murders of women and girls over a two-year period, the Supreme Court had no such hesitation, upholding the death penalty as the accused 'sunk to the very depths of depraved and evil conduct'.⁷⁵ The two cases together suggest that the death penalty in Swaziland is truly reserved for the rarest of the rare cases, in closer conformity to international human rights standards.

With the rise of a discretionary death penalty, the Supreme Court monitors sentences of imprisonment from the High Court for consistency, creating a kind of judicial common law of sentencing in lieu of legislative sentencing guidelines. The Court has done this in three ways. First, the Court has cited to courts in Botswana, Lesotho and elsewhere to determine the appropriate length of sentence for a given crime.⁷⁶ Second, the Supreme Court has compared recent domestic cases to discern an acceptable range for an offence. In *Tsela v Rex*,⁷⁷ the Court listed the sentences of every murder case in the prior ten years, determining that all sentences fell between five and 25 years, with 15 as the mean, suggesting that lower courts should not depart from this range without good reason. Third, the Court has reasoned by analogy to earlier cases. In *Tfwala v Rex*,⁷⁸ the Court upheld a sentence of 15 years for murder, citing several cases in which the accused acted without provocation but otherwise had no prior convictions and was young at the time of the offence. According to the Court, '[t]hese cases serve to show in rough and general terms the judicial trend in sentencing for murder'. The Swazi Supreme Court's diligence in monitoring consistency is unique in the region and provides a promising counterexample to the Supreme Court of Zimbabwe's troubling deference.

7 Lesotho

The doctrine of extenuating circumstances in Lesotho has evolved in more progressive ways than in Zambia or Zimbabwe prior to abolition, although Lesotho still places the onus on the accused to show extenuating circumstances in order to avoid a sentence of death. The Constitution of Lesotho contains a death penalty savings clause in article 5, and the Penal Code permits the death penalty for murder, treason and rape where a rapist knows or has reasonable suspicion to believe that he or she is infected with the Human Immunodeficiency Virus (HIV), though no person has been sentenced

74 *Rex v Nhlanhla Lucky Dlodlu* [2012] SZHC 236 (28 September 2012).

75 *Simelane v Rex* [2011] SZSC 54 (30 November 2012).

76 See eg *Rex v Mtsethwa* [2010] SZHC 145 (16 September 2010); *Nyandzeni v Rex* [2012] SZSC 3 (31 May 2012).

77 [2012] SZSC 13 (31 May 2012).

78 [2012] SZSC 15 (31 May 2012).

to death for either treason or rape.⁷⁹ Judges in Lesotho 'show a distinct reluctance to impose the death penalty', and have a tendency to 'find extenuating circumstances where their existence is sometimes slender'.⁸⁰ Owori puts the current state of the doctrine in even more stark terms:⁸¹

Of the 915 murder charges brought before the courts in the last five years, there is at the moment not a single convict on death row, partly due to the courts always looking for and *finding* extenuating circumstances.

In recent years, the Court of Appeal has always reversed a death sentence imposed by the High Court by using a broader definition of 'extenuating circumstances' than in neighbouring countries.

In 1998, the Court of Appeal issued a seminal case on the doctrine of extenuating circumstances in *Letuka v Rex*,⁸² developing a clear process for weighing aggravating and mitigating circumstances. After conviction, the accused person has an opportunity to give evidence to rebut the view that the offence fell into the category of heinous crimes deserving of death, and the trial judge must conduct the extenuating circumstances inquiry 'with diligence and with an anxiously enquiring mind'. However, the Court 'caution[ed] against the use of the *onus* as the determining cause for holding that no extenuating circumstances exist', as this bore 'the hallmark of ready recourse to a legal make-weight and can be employed to justify an overly retributive response to serious crime'.⁸³ The Court distinguished the Botswana case *Kelaletswe*, noting that the law of Lesotho required the *onus* to remain on the accused, but warned that the ready invocation of the *onus* as a determining factor was 'a course to be avoided' because it constrained a judge's inquiring mind into the totality of the circumstances. The Court continues to hedge on the question of the *onus*. In reversing a death sentence in 2011, the Court noted that '[e]ven if there was an *onus* on the appellant, what he said about the bad relationship between him and the deceased was not challenged'.⁸⁴ This jurisprudence suggests that Lesotho is moving toward the position of Botswana in removing the burden of proof from the accused to show extenuating circumstances.

Lesotho courts are also notable for the broad range of extenuating circumstances that they consider at the sentencing stage, including youth, intoxication, emotional conflict, motive, provocation, general background, impulsiveness, minor role, absence of actual intent to kill, witchcraft, absence of premeditation, 'heavy confrontation', and rage

79 Art 5 Lesotho Constitution; sec 297 Criminal Procedure and Evidence Act 9 of 1981; sec 32(a)(vii) Sexual Offences Act 3 of 2003.

80 WCM Maqutu *Contemporary constitutional history of Lesotho* (1990) 55.

81 M Owori 'The death penalty in Lesotho: The law and practice' British Institute of International and Comparative Law (2004) http://www.biiicl.org/files/2298_country_report_lesotho_owori.pdf (accessed 31 January 2014).

82 1997-1998 LLR-LB 346 (4 February 1998) 360.

83 *Letuka* (n 82 above) 364.

84 *Kopano v Rex* [2011] LSCA 19 (20 April 2011).

of an accused.⁸⁵ In one case, the High Court found a confession and co-operation with investigators to be extenuating, which is broader than the original doctrine, although another case rejected the accused's health problems and an offer to pay compensation to the victim's family as extenuating.⁸⁶ Lesotho courts treat youth as an extenuating factor even in the absence of other factors, a broader application than that used in Zambia or Zimbabwe.⁸⁷ Once the Court of Appeal found extenuating circumstances even in the case of a murder for hire, the High Court became more liberal in the extenuating circumstances analysis.⁸⁸ In one case, the trial judge noted that the Court 'moved the goal posts a little' and 'extenuating circumstances are now found in cases where in the past they would not have been'.⁸⁹ Lesotho's liberal application of the doctrine has removed its most objectionable features and is closer to conformity to the limitation on the death penalty in international law to only the most serious crimes. Only total abolition, however, can remove all risk of arbitrariness or error.

8 Zambia

Under the Penal Code Amendment Act of 1990, the death penalty in Zambia was no longer mandatory upon a finding of extenuating circumstances, defined in the statute as any facts 'associated with the offence which would diminish morally the degree of the convicted person's guilt', following the traditionally narrow definition.⁹⁰ The provision sharply narrowed the scope of the death penalty for murder, although it did not allow appellate courts to exercise independent review of whether extenuating circumstances existed, and it placed the onus on the accused.⁹¹ The Zambian Supreme Court refused to find the doctrine retroactive to crimes committed before the statute's passage.⁹² In addition, the Court failed to extend the doctrine to armed robbery, a crime that also triggers a mandatory death penalty, at odds with the growing international consensus that the death penalty should be restricted only to crimes that result in death.⁹³

In general, the doctrine operates in similar fashion as elsewhere. The Supreme Court reversed a death sentence in a witchcraft murder

85 *Letuka* (n 82 above) 363.

86 *Rex v Maphobole* [1981] LSHC 2 (29 January 1981); *Rex v Mbobo* [2012] LSHC 78 (8 May 2012).

87 *Rex v Raseotsana* [1995] LSHC 122 (30 October 1995); *Rex v Mokalanyane* [2001] LSHC 44 (15 May 2001).

88 *Rex v Ramaema* [2003] LSHC 83 (6 August 2003).

89 *Rex v Mosili* [2001] LSHC 87 (23 August 2001).

90 Penal Code Amendment Act 3 of 1990 (Zambia).

91 J Hatchard 'Developing the criminal law in Zambia: The Penal Code (Amendment) Act, 1990' (1992) 36 *Journal of African Law* 103-104.

92 *Mvula v People* [1991] ZMSC 19 (1 August 1991).

93 *Chongo v People* [1999] ZMSC 16 (20 April 1999).

case and in a case with evidence of provocation, but refused to find that the age of an accused or the acquittal of an accomplice to be extenuating circumstances.⁹⁴ Zambia's variant of the doctrine does not include the progressive innovations used by the judiciary of Botswana and Lesotho; the country is the last to adhere to the original version. Voters are expected to vote on a long-postponed constitutional draft some time in 2014, which includes a right to life provision in article 28 that prohibits the death penalty where extenuating circumstances are found relating to the commission of the crime.⁹⁵ This will have the effect of constitutionalising the doctrine in perpetuity, including the shifting of the burden to the accused to rebut a presumption in favour of death. While the death penalty retains popular support, Zambia is considered *de facto* abolitionist and had three presidents in succession who have preserved moratoria on executions.⁹⁶ Nonetheless, by continuing to adhere to a narrow definition of extenuating circumstances and requiring the accused to show why he or she should not be executed (not to mention the death penalty for armed robbery), the scope of the death penalty in Zambia is broader than in its southern neighbours.

9 Namibia

Prior to independence, courts in Namibia (then South-West Africa) appealed to the Appellate Division of South Africa.⁹⁷ As a consequence, the doctrine of extenuating circumstances operated indistinguishably from South Africa. At independence, the death penalty was abolished in Namibia. According to the independence Constitution:⁹⁸

No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.

The Supreme Court finally put the doctrine of extenuating circumstances to rest in 2003 in *State v Alexander*,⁹⁹ reversing a

94 *Moola v People* [2000] ZMSC 47 (17 October 2000); *People v Kashwenka* [2007] ZMSC 5 (6 February 2007).

95 Technical Committee on Drafting the Zambian Constitution *First Draft Constitution* (30 April 2012) <http://zambianconstitution.org/downloads/First%20Draft%20Constitution.pdf> (accessed 31 January 2014).

96 A Novak 'The death penalty and the right to life in the draft Constitutions of Zambia and Zimbabwe' *AfricLaw.org* 18 April 2013 <http://africlaw.com/2013/04/18/the-death-penalty-and-the-right-to-life-in-the-draft-constitutions-of-zambia-and-zimbabwe> (accessed 31 January 2014).

97 D Dyzenhaus *Hard cases in wicked legal systems* (2010) xxii; SK Amoo 'The structure of the Namibian judicial system and its relevance for an independent judiciary' in N Horn & A Bosl (eds) *The independence of the judiciary in Namibia* (2008) 69.

98 Art 6 Constitution of Namibia.

99 [2003] NASC 5 (13 February 2003).

sentence of life imprisonment where a lower court relied on South African death penalty jurisprudence in determining the appropriate sentence. According to the Court, it was

fundamentally wrong to import and apply pre-independence norms for the imposition of the death penalty to the current sentencing criteria for the imposition of life imprisonment in appropriate instances.

With the constitutional abolition of the death penalty, a judge's discretion was 'no longer tied up in the procedural straightjacket' of determining whether circumstances existed at the time of the offence that reduced an accused person's moral blameworthiness. Judges were to consider the broader 'mitigating factors' rather than 'extenuating circumstances' in determining whether a sentence was appropriate, the Court ruled. The rejection of the extenuating circumstances analysis in non-death penalty cases in Namibia represents a clean break with pre-independence precedent.

10 Conclusion

The doctrine of extenuating circumstances successfully reduced the harshness of the mandatory death penalty by turning the sentence into a rebuttable presumption of death, requiring a judge to articulate a mitigating factor that allowed substitution of a lesser sentence. The doctrine placed an overwhelming emphasis on the most important of mitigating factors, namely, those that existed at the time the offence was committed, but it was not the only – and certainly not the most transparent – means of doing this.¹⁰⁰ In South Africa, the doctrine failed to adequately guide judicial discretion, placed great stress on the defence counsel and legal aid regimes, and led to gross disparities in sentencing by the time of its abolition in 1990. The most objectionable aspect of the doctrine was that it placed the burden on the accused to show why he or she should not be executed, which conflicted with the essential thrust of the presumption of innocence and forced a person convicted of murder into the awkward position of changing his or her story to avoid the death sentence or maintaining innocence at his or her peril.

Increasingly, the doctrine of extenuating circumstances is out of sync with human rights norms in capital cases because it fails to guide judicial discretion in a predictable and rational way. After abolition of the death penalty in South Africa and Namibia, the doctrine of extenuating circumstances continued to survive in Botswana, Lesotho, Swaziland, Zambia and Zimbabwe, although it produced similar tensions in each case. While Botswana and Swaziland eventually discarded the requirement that the accused bears the burden of showing extenuating circumstances, and Lesotho is likely to follow, Zambia and Zimbabwe adhered to the traditional doctrine. The

¹⁰⁰ Koyana (n 11 above) 118.

doctrine is now abolished in Swaziland and Zimbabwe, which fits with the emerging Commonwealth consensus that a trial judge should weigh aggravating and mitigating circumstances and require that the death penalty be reserved only for the most heinous crimes. The doctrine's decline across the region brings capital sentencing closer to conformity with international due process norms, limiting the death penalty to the 'worst of the worst'. Although a rebuttable presumption in favour of death reduces the harshness of a mandatory death penalty regime by importing some discretion to substitute a lesser sentence, international human rights law increasingly demands a presumption *against* death, even if extenuating circumstances are often found. Adopting a discretionary death penalty would narrow the class of persons who could be subject to death, moving closer to the goal of total abolition of capital punishment.

Weak extraterritorial remedies: The Achilles heel of Ruggie's 'Protect, Respect and Remedy' Framework and Guiding Principles

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Summary

The United Nations Protect, Respect and Remedy Framework and its Guiding Principles were adopted at the back of a long history of failed UN attempts to deal with corporate-related human rights abuses and ineffective corporate initiated voluntary measures. The need for the Framework and Guiding Principles was heightened by the current climate of neo-liberal globalisation which allows powerful multinational corporations to operate in countries that are sometimes unable to rein them in due to various factors, including sheer corruption; the need to attract and retain foreign direct investment; and archaic legal systems that are unable to deal with intricate corporate structures. This article critically examines the availability of remedies for victims of corporate-related abuses who, for one or more of the above reasons, are unable to access justice in the host state and look towards the home state for a remedy. It argues that by failing to address hurdles to accessing home state remedies, such as the principle of forum non conveniens, state sovereignty, separate legal personality and limited liability, the Framework and Guiding Principles have failed to clearly define circumstances under which, and means by which, multinational corporations will be held liable under the laws of their home states for human rights violations committed beyond their home borders – by their subsidiaries or so-called 'foreign hands'. Consequently, victims are likely to be without remedies which are unavailable in the host state. Thus, for victims of corporate-related abuses, the more things change, the more they stay the same.

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1 Background: Globalisation and corporate-related abuses

The end of the Cold War and advances made in technology saw a surge in globalisation.¹ The contemporary world is characterised by this phenomenon. Although a contested concept, globalisation is about the destruction of territorial boundaries in the name of free trade and the easy movement of finance, labour and increased production.² Other than the economy (profits) and technology, it is also driven by forces of religion and empire.³ These forces all work in concert to transform the world into a global village. They constrict distance and increase mobility, while at the same time homogenising cultures and rendering territorial borders irrelevant. Thus, the world is in a constant state of villigisation.⁴ The pursuit of advantage, or profit, is ultimately at the heart of globalisation. Globalisation has negative and positive effects on society and life.⁵ It is for this reason that some have described it as 'a multi-levelled phenomenon, currently underpinned by the ideology of neoliberalism'.⁶ O'Connell⁷ calls it neo-liberal globalisation, and argues that it is irreconcilable with human rights protection, both in theory and practice. He agrees with Tabb⁸ that this is because this form of globalisation is based on the neoliberal agenda which, amongst other things, calls for deregulation and openness to foreign direct investment and small government, which in the end only benefit powerful countries and their corporations.⁹ This, it is argued, leads corporations to have an insatiable appetite for risk and profit that in the end characterise this neoliberal globalisation model. Major multinational corporations (MNCs) opt to operate where they can reap maximum profits. They operate in virgin markets, resource or commodity-rich countries,

1 A Mazrui *Pan-Africanism and the origins of globalisation* (2001) http://igcs.binghamton.edu/igcs_site/dirton12.htm (accessed 4 November 2011). Mazrui makes the point that the word 'globalisation' might be new, but 'global interdependence' is a centuries-old phenomenon.

2 See K de Feyter *Human rights: Social justice in the age of the market* (2005). See also U Baxi *The future of human rights* (2002) 139, who conceives globalisation in terms of the three D's, representing deregulation, denationalisation and disinvestment.

3 Mazrui (n 1 above).

4 See M McLuhan & BR Powers *The global village: Transformations in world life and media in the 21st century* (1989).

5 For a critique of the negative impact of globalisation, particularly in the Third World, see A Anghie 'Time present and time past: Globalisation, international financial institutions, and the Third World' (2000) 32 *New York University Journal of International Law and Politics* 243.

6 A Pollis 'Human rights and globalisation' (2004) 3 *Journal of Human Rights* 343.

7 P O'Connell 'On reconciling irreconcilables: Neo-liberal globalisation and human rights' (2007) 7 *Human Rights Law Review* 483 489.

8 W Tabb *Economic governance in the age of globalisation* (2005) 3, cited in O'Connell (n 7 above).

9 See O'Connell (n 7 above) 490, citing A Saad-Filho & Dohnston 'Introduction' in A Saad-Filho & D Johnston (eds) *Neoliberalism: A critical reader* (2005) 1.

countries with archaic legal systems often unable to deal with intricate legal entities, and those besieged by corruption and political instability.¹⁰ Unfortunately, some of these countries are also ostensibly fertile ground for corporate-related human rights abuses and are mainly found in the developing world.

Aware of this reality, in 2003 the United Nations (UN), through the erstwhile Human Rights Commission, commissioned Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, with the aim of, *inter alia*, pronouncing on the human rights obligations of business.¹¹ It was clear at the time that corporations had metamorphosed into intricate 'ogre' entities, with considerable financial and political power, and could not therefore be left unregulated and unaccountable. The power of corporations in modern society is substantial. By way of illustration, Standard and Poor, a single MNC, has the power to determine countries' credit ratings, thus affecting each country's ability to borrow money and take care of its citizenry.¹² To further illustrate this power of MNCs, the world economy was recently brought to its knees by the collapse of Wall Street, which resulted in serious aftershocks in countries across the world – leading to people losing their homes and not being able to feed their families and educate their children.¹³ It is a truism that some modern MNCs wield more power than entire countries. Of the world's 100 biggest economies, 40 are corporations, and 60 are states.¹⁴ In 2012, the revenues of Royal Dutch Shell exceeded the gross domestic product

10 See International Commission of Jurists Report *Corporate complicity and legal accountability: Facing the facts and charting a legal path* (2008) 1-2.

11 See UN Economic and Social Council (ECOSOC) Sub-Commission on Promotion and Protection of Human Rights *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* UN Doc E/CN.4/Sub.2/2003/12/Rev.2. See also ECOSOC Sub-Commission on the Promotion and Protection of Human Rights *Commentary on the norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, UN Doc E/CN.4/Sub.2/2003/38/Rev.2; L Backer 'Multinational corporations, transnational law: The United Nations Norms on Responsibilities of Transnational Corporations as a harbinger of corporate social responsibility in international law' 2005 *Columbia Human Rights Review* 101-192. The author saw these norms being able to reduce the ability of states to resist emerging international law norms. See also T Sorell 'The UN norms' in J Dine & A Fagan (eds) *Human rights and capitalism: A multidisciplinary perspective on globalisation* (2006) 284-299.

12 Standard and Poor is a MNC with a presence in 23 countries. It is a market intelligence organisation that offers investors information on other corporations and countries' credit ratings and indices. It also offers investment research and risk evaluations and solutions; <http://www.standardandpoors.com/about-sp/main/en/us> (accessed 6 January 2012).

13 For an inside story of the collapse of one of the major players on Wall Street, Lehman Brothers, see L McDonald & P Robinson *A colossal failure of common sense: The inside story of the collapse of Lehman Brothers* (2009).

14 See Corporate Cloud 2013: Time for responsible capitalism, <http://www.globaltrends.com/knowledge-center/features/shapers-and-influencers/190-corporate-cloud-2013-time-for-responsible-capitalism> (accessed 29 September 2013).

(GDP) of 171 countries.¹⁵ Commenting on the power of the modern MNC, Grossman and Bradlow tersely observed that:¹⁶

[G]rowth in corporate power raises a significant problem for traditional international law. First, it means that whatever the international legal status of states may be, the sovereign has less power, measured in terms of control over human, natural, financial and other resources, than those corporations that it is supposedly regulating. This suggests that in fact the sovereign is no longer 'master of its own territory'.

It is this colossal power and the ever-growing corporate-related human rights violations that warrant far-reaching control and remedies, wherever possible.¹⁷ In the main, given that business and capital-exporting countries were vehemently opposed to the 2003 UN draft norms, while non-governmental organisations (NGOs), some countries, and indeed some elements of business were supportive, the Special Representative of the UN Secretary-General for Business and Human Rights (SRSG), John Ruggie, was appointed to find common ground between stakeholders.¹⁸ He was tasked largely with identifying and clarifying standards of corporate responsibility and accountability regarding human rights; elaborating on states' roles in regulating and adjudicating corporate activities; clarifying concepts such as 'complicity' and 'sphere of influence'; developing methodologies for human rights impact assessments; and considering state and corporate best practices.¹⁹ After much consultation, the SRSG produced the Protect, Respect and Remedy Framework which was adopted by the UN (Ruggie's Framework).²⁰ He was then asked to provide guidance on the implementation of the framework, which he did by developing the Guiding Principles on Business and Human

¹⁵ As above.

¹⁶ C Grossman & D Bradlow 'Are we being propelled towards a people-centred transnational legal order?' (1993) 9 *American University Journal of International Law and Policy* 8-9.

¹⁷ Justice Louis Brandeis described corporations, as far back as 1933, as 'Frankenstein monsters', given that they were capable of doing a lot of harm to ordinary citizens. See *Louis K Liggett Co & Others v Lee, Comptroller & Others* 288 US 517 (1933) 567, cited in J Bakan *The corporation: The pathological pursuit of profit and power* (2004) 19.

¹⁸ See OHCHR Report 2005 E/CN.4/2005/91, para 19.

¹⁹ UN Human Rights Commission Resolution 2005/69 ap.ohchr.org/documents/E/.../resolutions/E-CN_4-RES-2005-69.doc (accessed 5 October 2011).

²⁰ The journey is chronicled in the following SRSG's reports: *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc E/CN.4/2006/97 (2006) <http://www1.umn.edu/humanrts/business/RuggieReport2006.html>; *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts* A/HRC/4/035 <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb2007.pdf>; *Protect, Respect and Remedy: A framework for business and human rights* UN Doc A/HRC/8/5 (2008) <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>; *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* UN Doc A/HRC/17/31 <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> (accessed 25 April 2011).

Rights: Implementing the United Nations Protect, Respect, and Remedy Framework (GPs).²¹

As previously observed, globalisation thrives where there is little or no regulation. Corporations' insatiable need to maximise profits leads them to avoid accountability, as they may go to the extreme measures to realise this goal.²² Its prime environment is fertile ground for what may be termed globalised corporate-related human rights violations. The GPs correctly acknowledge that it is unrealistic to expect that MNCs will always be held accountable in the host state.²³ This is because host states are at times unwilling and/or unable to hold these MNCs to account because of corruption, lack of legal capacity or political instability. When this happens, the home state becomes relevant.

The fundamental question, however, is whether the GPs clearly define circumstances under which, and by means of which, MNCs may be held liable under the laws of their home states for human rights violations committed beyond their home borders – by their subsidiaries or so-called 'foreign hands'.²⁴ The Framework and GPs are here critically assessed with a view to answering this fundamental question. I argue that the Framework and GPs have not placed enough emphasis on host state remedies, thus worsening the plight of those who are unable to access remedies in the host state. In the home state, the parent company has enough resources to make good the wrongs of its subsidiaries committed in the host state. I also argue that by not guiding victims that cannot access the host state, the GPs are perpetuating the *status quo* of corporate impunity. Finally, I speculate about the reasons for the lack of guidance on how to access home state remedies given these well-known hurdles.

21 Annexed to the SRSG final report to the Human Rights Council (A/HRC/17/31) and adopted by the Council through Resolution 17/4 of 16 June 2011. Special Representative of the Secretary-General, Protect, Respect and Remedy: A framework for business and human rights, UN Doc A/HRC/8/5, 9 (2008) (2008 Framework Report); Special Representative of the Secretary-General, Guiding principles on business and human rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc A/HRC/17/31 (2011) (GPs).

22 This view, however, is refuted by the International Chamber of Commerce (ICC), which claims that MNCs 'are not necessarily attracted to countries with low wages and weak environment protection', or to countries with 'the lowest tax levels'. On the contrary, so the argument continues, evidence shows that the majority of US-based MNCs direct their foreign investment to other developed countries. However, as Deva rightly observes, the ICC argument fails to grasp the 'race to the bottom hypothesis', which is essentially that developing countries contest with each other with the hope of attracting FDI and that there is little race to be talked of where the contest is not between countries with similar levels of development. See S Deva 'Human rights realisation in the era of globalisation: The Indian experience' (2006) 12 *Buffalo Human Rights Law Review* 96.

23 See commentary to GP 2.

24 According to Deva, corporate hands include subsidiaries, affiliate sister concerns, contractors, joint ventures, and other business partners of similar identity. See S Deva 'Acting extraterritorially to tame multinational corporations for human rights violations: Who should bell the cat?' (2004) 5 *Melbourne Journal of International Law* 47.

2 Long haul towards the Framework and Guiding Principles: Home state remedies in perspective

The journey towards the elaboration of the Framework and the subsequent adoption of the GPs is well documented.²⁵ The SRSG undertook this journey diligently and successfully conducted extensive stakeholder consultations.²⁶ Of particular importance, for our purposes, is the 14 September 2010 expert meeting that the SRSG convened at the Harvard Kennedy School in the United States of America. This was to explore the role and limits of extraterritoriality in the business and human rights domain – especially in relation to countries in which MNCs are domiciled.²⁷ Leading experts on the subject advised the SRSG on how to navigate the extraterritorial jurisdictional jungle. They observed that corporations preferred to be held liable in the host state rather than in the home state and that, should they be held liable in the latter, they would most likely prefer criminal or administrative regimes as opposed to exposure to private civil suits. One of the obvious reasons for this preference is the far-reaching nature of civil suits.²⁸ However, experts warned that victims have a clear interest in obtaining remedies, and that this has to be paramount. In fact it is argued that this should be the fundamental concern, because the SRSG's mandate was about the protection of human rights from violation by MNCs, and instituting mechanisms to remedy such violations.

The experts also addressed the issue of liability of corporate groups, noting that the issues of separate legal personality and courts' reluctance to pierce the corporate veil are still challenges to holding corporations liable for their subsidiaries' wrongdoings committed

25 See n 20 above. See D Bilchitz 'The Ruggie framework: An adequate rubric for corporate human rights obligations' (2010) 7 *International Journal of Human Rights* 199-229; RJ Anderson 'Reimagining human rights law: Toward global regulation of transnational corporations' (2010) 88 *Denver University Law Review* 183-236. For a discussion of both the 2008 Framework Report and the Guiding Principles, see JH Know *The Ruggie rules: Applying human rights law to corporations* (2011) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916664 (accessed 20 November 2012); SA Aaronson & I Higham "'Re-righting business': John Ruggie and the struggle to develop international human rights standards for transnational firms' (2011) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1922224 (accessed 20 November 2012).

26 Ruggie's consultations raised and canvassed a plethora of issues around business human rights obligations. He convened numerous consultative meetings in many countries, and also received and reviewed written submissions from various stakeholders across the globe. Most of the reports and submissions are available at <http://www.business-humanrights.org/SpecialRepPortal/Home> (accessed 10 January 2012).

27 'Exploring extraterritoriality in business and human rights: Summary note of expert meeting' 14 September 2010, the Mossavar-Rahmani Centre for Business and Government, Harvard Kennedy School, Cambridge MA, USA <http://www.business-humanrights.org/media/documents/ruggie-extraterritoriality-14-sep-2010.pdf> (accessed 13 October 2011).

28 As above.

abroad. They suggested that this challenge may be overcome by exposing the 'singleness' of the corporation, by pointing to its own initiated, centralised and uniform reporting across the group – as evidence of a single 'enterprise'. They also raised the problem of political sensitivities between the home and host state, when the former attempts to exercise jurisdiction. Although difficult to agree on, they suggested that reasonableness factors may be developed to guide the home state in avoiding actual or perceived interference.²⁹ Disappointingly, GP 2 merely requires states to make their expectations clear that business enterprises domiciled in their territory or jurisdiction respect human rights in all their operations, but does not provide guidance and depth on what states must do. GP 2 mentions only one reasonableness factor in passing, and does not offer any depth and clarity on other factors proposed by the experts. It should be borne in mind that one of the aspects of the mandate was to 'identify and clarify' standards and practices. Borrowing from the field of anti-corruption measures, the experts suggested that the home state should prevent and redress violations contributed to or perpetrated by corporations in their territory and/or under their jurisdiction.³⁰ This suggestion is also not embraced by the GPs.

With the experts' advice in mind, the question then is: To what extent does the final product produced by the SRSG bear witness of this advice? It will be argued later that the GPs are inadequate on home state remedies because of the apparent challenges of sovereignty and the strong opposition by corporations, and possibly the SRSG's avoidance of controversy for the sake of 'consensus'. Indeed, from early on, the SRSG questioned the very existence and efficacy of a remedy against corporations.³¹ This stance later changed, but it was rather curious given that, if there was no right to remedy for victims the state would not be expected to protect it, nor would the corporations be required to respect it under the Framework. Foundational principle 25 and GP 26 and 27 eventually provide for state-based remedies, but it is argued that the SRSG's initial views on remedies explain the somewhat superficial attention given to remedies in general, and extraterritorial remedies in particular. Before being given the mandate, the SRSG once rightly observed that '[b]usiness typically dislikes binding regulations until it sees their

29 These factors include an assessment of whether there are multilateral or unilateral measures, as the former are more acceptable, and whether there is international consensus on the wrongfulness of the activity. See also Summary note of expert meeting (n 27 above).

30 They envisioned this in the event of the adoption of a binding instrument. However, some advised that binding instruments are difficult to attain, and advised that this would be a progressive step, and therefore there was nothing stopping the SRSG from incorporating it in the Framework and GPs (n 27 above).

31 At para 88 of A/HRC/8/5 of 7 April 2008, the report states that '[j]udicial mechanisms are often under-equipped to provide effective remedies for victims of corporate abuse'. It suggests further that victims may lack a basis in domestic law on which to found a claim for compensation.

necessity or inevitability. Governments often support the preferences of corporations domiciled in their countries and/or compete for foreign investment.³² One would, therefore, have expected that he would remedy this in the Framework and GPs but, alas, they seem to reinforce those views. One is tempted to conclude that this was done for the sake of consensus.

3 Inaccessibility of home state remedies under the Guiding Principles

The availability of host state judicial remedies to victims of corporate-related human rights abuses is mostly uncontested. This is because of the almost sacrosanct principle of territoriality on which this is premised. This principle essentially gives the host state authority to prescribe rules governing persons (natural and juristic), as well as to regulate events occurring in its territory. It also gives the host state authority to avail its judicial remedies, in the event of a contravention.³³ Although these host state remedies theoretically are available to victims, in practice sometimes they are unavailable due to the host state's unwillingness to act against corporations, driven by its desire to protect foreign direct investment (FDI). States are under the constant threat that MNCs will pack up and go, because globalisation and the mobility of capital make it easy for them to switch countries.³⁴ It is because of this reality that host states sometimes turn a blind eye to corporate violations.³⁵ This phenomenon has been described as a 'race to the bottom', where states vigorously compete to attract and retain FDI.³⁶ It is also viewed as a form of 'dependency',

32 J Ruggie 'Business and human rights: The evolving international agenda' (2007) 4 *The American Journal of International Law* 822.

33 SL Seck 'Exploding the myths: Why home states are reluctant to regulate', keynote address for Mining Watch Canada Conference: Regulating Canadian Mining Companies Operating Internationally (20 October 2005) 6.

34 As one business leader remarked, corporations owe no allegiance to countries in which they were born. Such countries, the argument goes, need to remain attractive to the company in order for it not to relocate to other countries. See Bakan (n 17 above) 22.

35 D Chirwa 'Towards binding economic, social and cultural rights obligations of non-state actors in international and domestic law: A critical survey of emerging norms' unpublished PhD thesis, University of the Western Cape, 2005 212.

36 See EM Macek 'Scratching the corporate back: Why corporations have no incentive to define human rights' (2002) 11 *Minnesota Journal of Global Trade* 101 104; S Ratner 'Corporations and human rights: A theory of legal responsibility' (2001) 111 *Yale Law Journal* 460. The 'race to the bottom' happens where a host state relaxes its standards in order to attract investment. See also P Muchlinski *Multinational enterprises and the law* (2006) 105. See also Deva (n 22 above).

because MNCs exploit weaker host states with no remedial action.³⁷ Host states sometimes are unwilling to avail judicial remedies to victims because of sheer corruption.³⁸ Some have even gone to the extent of enacting legislation to make it an offence for their own nationals to pursue an MNC in its home state.³⁹ There are, however, genuine instances where the host state is unable to provide judicial remedies, because it is plagued by armed conflict and therefore incapable of controlling its territory effectively. It may also be due to a lack of the necessary human and financial resources, or simply the required expertise to fight a subsidiary of a powerful MNC. MNCs are often structured in such a way that they maximise profits while minimising their risk to liability. One way of achieving this is by operating very lean structures in the host state, and with no significant assets there. This may therefore render the host state unattractive for victims, particularly where there are serious violations that warrant substantial compensation.

It is under these circumstances of unwillingness, incapacity or plain unattractiveness of the host state that victims look to the home state for remedies. Cases that arose in Nigeria, India, South Africa and, recently, Bangladesh, illustrate this point. In *Kiobel v Royal Dutch Petroleum Company*, Dr Barinem Kiobel and others from Ogoniland lodged a class action against Royal Dutch and its subsidiary, Shell Petroleum Nigeria, in the United States (US), citing corruption in the host state's judiciary.⁴⁰ The plaintiffs sought damages for torture and extrajudicial executions. The issue before the US Supreme Court was '[w]hether and under what circumstances the Alien Tort Statute ... allows courts to recognise a cause of action for violations of the law of

37 See E Benvenisti 'Exit and voice in the age of globalisation' (1999) 98 *Michigan Law Review* 167. From Benvenisti's perspective, national courts and legislatures in the home state are also aware that if they impose strict regulatory rules on MNCs operating abroad, the MNCs may leave the country and set up where their competitors are based; thus, these institutions are also caught in what he calls the 'prisoner's dilemma' of protecting domestic interests. See also M Monshipouri *et al* 'Multinational corporations and the ethics of global responsibility: Problems and possibilities' (2003) 25 *Human Rights Quarterly* 973. See also Deva (n 22 above). See, lastly, JL Dunoff & JP Trachtman 'Economic analysis of international law' (1999) 24 *Yale Journal of International Law* 1 54- 55.

38 J Ruggie 'Business and human rights: The evolving agenda' (2007) 101 *American Journal of International Law* 819.

39 Papua New Guinea enacted the Compensation (Prohibition of Foreign Legal Proceedings) Act 1995, designed to protect BHP from potential liability for environmental damage accessioned at the Tedi River Basin. Legislation cited in S Joseph *Corporations and transnational human rights litigation* (2004) 5.

40 The Alien Tort Claims Act was passed by the United States Congress in 1789. It provides district courts with original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. It has increasingly been used by victims of corporate abuses to launch civil suits in the US for human rights violations committed outside the US. See J Jarvis 'A new paradigm for the Alien Tort Statute under extraterritoriality and the universality principle' (2003) 30 *Pepperdine Law Review* 671. See also *Kiobel v Royal Dutch Petroleum Co*, *Wiwa v Royal Dutch Petroleum*, *Wiwa v Anderson*, and *Wiwa v Shell Petroleum Development Company*, full court documents available at <http://ccrjustice.org/> (accessed 10 January 2014).

nations occurring within the territory of a sovereign other than the United States'.⁴¹ Unfortunately, the Supreme Court held that there was a presumption against extraterritoriality and therefore the ATS could only apply extraterritorially when the case 'touches and concerns' the US with 'sufficient force'.⁴² In dismissing the claims as not actionable in the US, the Supreme Court held that the US would be a 'uniquely hospitable forum for the enforcement of international norms' because the action was brought by foreigners against a foreign company for violations that happened outside the US.⁴³

In the case of the Indian Bhopal disaster, the victims sought remedies in the US citing, among others, inadequate assets to meet their claim in India, and the unsophisticated nature of the legal system there to dispose of a case of that magnitude.⁴⁴

In South Africa, after initiating a case in 2004 and taking several years to move it through the court system, gold miners who had contracted silicosis and tuberculosis in South African gold mines approached a United Kingdom high court for remedies largely because of this delay.⁴⁵ The case was dismissed in 2013 due to a lack of jurisdiction but is currently being appealed before the UK Court of Appeal.⁴⁶ The case instituted in South Africa was settled in 2013.⁴⁷ In similar instances, victims of corporate abuses during the apartheid era sued corporations that aided and abetted the apartheid system in the US courts, because of the unavailability and/or unattractiveness of

41 See *Hempe & Others v AASA Co* 132 S Ct 1738, 1738 (2012) (order directing re-argument), <http://www.supremecourt.gov/orders/courtorders/030512zr.pdf> (accessed 14 November 2013).

42 See *Kiobel* (n 41 above) 1669.

43 See *Kiobel* (n 41 above) 1659 1669. See also a critique of the *Kiobel* decision in A Colangelo 'The Alien Statute and the Law of Nations in *Kiobel* and Beyond' (2013) 44 *Georgetown Journal of International Law* 1329.

44 The government of India passed a law that allowed it to represent victims before the US courts, mainly because it was aware that the assets of Union Carbide in India could not meet the amount of \$3,1 billion it had claimed. The case was initiated in the US but later referred back to India, where it was settled. Some 'activist petitioners', however, lament the settlement and argue that victims could have recovered substantially more damages had the case been fully pursued in the US system. See M Galanter 'Bhopal's past and present: The changing legal response to mass disaster' (1990) 10 *Windsor Yearbook of Access to Justice* 151 153-155.

45 *Hempe & Others v AASA* South Gauteng High Court, Johannesburg, Case 18273/04 and *Vava & Others v Anglo American South Africa Ltd* Claim HQ11X03245 (UK). See also R Meeran 'Tort litigation against multinational corporations for violation of human rights: An overview of the position outside the United States' (2011) 3 *City University of Hong Kong Law Review* 38.

46 See <http://www.leighday.co.uk/News/2013/July-2013/UK-Court-decision-in-gold-miner%E2%80%99s-silicosis-cases> (accessed 11 February 2014).

47 The parties reached a confidential settlement in September 2013, that is, after nine years of litigation and delays. See <http://www.lrc.org.za/lrc-in-the-news/2916-2013-09-25-anglo-american-settles-silicosis-suit> (accessed 5 February 2014).

remedies in the host state.⁴⁸ The cases are currently before the US District Court and parties have been given an opportunity to file supporting papers on corporate liability under the ATS in light of the recent Supreme Court decision in *Kiobel*.⁴⁹

These cases represent classic examples of the unavailability of remedies in the host state, due to corruption, inadequate assets, and the sheer unattractiveness of the legal system to dispose of the case concerned.

The important question at this juncture is whether the Guiding Principles have provided guidance to victims such as those in the cases cited above on how to access the home state. Before delving into this question, it is important to acknowledge that, unlike the host state, the home state's accessibility is also not uncontested – it faces some conceptual challenges. The first is that home state remedies infringe on the host state's sovereignty. Secondly, in almost all cases where MNCs are charged with human rights violations in the courts of the home state, MNCs rely on the doctrine of *forum non conveniens* to 'defeat-delay-frustrate' actions initiated by victims of their violations committed in the host state.⁵⁰ Thirdly, they rely on the twin principles of separate legal personality and limited liability. Finally, they rely – albeit to a limited extent – on the principle of international comity. A few misconceptions surrounding these impediments are discussed in turn below.

States are sovereign, equal entities in the eyes of international law. They have the right to decide on their individual political, social and economic paths, without any interference from other states. It may be argued, however, that the *Lotus* case in the Permanent Court of International Justice shows that home states are not necessarily precluded from entertaining violations that occur within the territories of host states – by either applying their law or availing their courts – as

48 Major corporates like Daimler, Ford, General Motors and IBM have been sued before the US courts under the ATS, for the support and assistance they provided to the South African apartheid government in committing human rights violations. The basis for the cases is that these corporations aided and abetted the apartheid government in extrajudicial killing, torture, cruel, inhuman or degrading treatment, and denationalisation. See *In Re South African Apartheid Litigation*, 02-MDL-1499, US District Court, Southern District of New York (Manhattan), 8 April 8 2009. For a discussion of the litigation, see M Saage-Maaß & W Golombek 'Transnationality in court: *In Re South African Apartheid Litigation* 02-MDL-1499, US District Court, Southern District of New York (Manhattan), April 8, 2009' (2010) 2 *European Journal of Transnational Studies* 5.

49 See *In Re South African Apartheid Litigation* Order 02 MDL 1499 (SAS) <http://www.lawfareblog.com/wp-content/uploads/2013/12/Judge-Scheindlin-Order.pdf> (accessed 12 February 2014).

50 S Deva 'Corporate Code of Conduct Bill 2000: Overcoming hurdles in enforcing human rights obligations against overseas corporate hands of local corporations' (2004-2005) 8 *Newcastle Law Review* 92.

corporations always argue.⁵¹ It is clear that a reliance on territoriality is also problematic, as globalisation has eroded the nation state and its boundaries although host states still jealously protect it, while corporations religiously defend it.⁵² Indeed, the goal posts are constantly shifted when victims seek justice – all in the name of state sovereignty. Baxi passionately asks:⁵³

[F]or *whom*, and *when* the 'nation-state' has 'ended' ... [t]he so-called borderless world remains cruelly *re*-bordered for the violated victims ... Myanmar is thus borderless for Unocal, though not for Aung San Su Kyi and the thousands of Burmese people she symbolizes. India is borderless for Union Carbide and Monsanto but not for the mass disaster-violated Indian humanity. Ogoniland is borderless for Shell but becomes the graveyard of human rights and justice for a Ken Saro Wiwa, and the people's movement martyred alongside him.

A closer look at how MNCs function reveals that they often have centralised reporting, and that their headquarters – situated in the home state – usually provide an overall strategic vision for the entire enterprise. Seck argues that this vision-setting process should be seen as 'territorially-based' in the home state.⁵⁴ The centralised reporting on the other hand exposes the single 'enterprise' nature of the MNC.⁵⁵ This would then mean that by availing its judicial remedies, the home state would actually be responding to events taking place within its territory, albeit partly so. The availing of home state remedies should not be interpreted as an encroachment on the host state's sovereignty, but rather as 'the home state acting more responsibly within an interconnected international system'.⁵⁶

The doctrine of *forum non conveniens* has proved to be a near insurmountable impediment for victims of corporate-related human

51 It was decided in *SS 'Lotus' (France v Turkey)* 1927 PCIJ (ser A) No 10 18-19 that '[f]ar from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it [principle of territoriality] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules'.

52 The government of South Africa opposed apartheid litigation in the US because it had competence to deal with its own issues of reconciliation, reparation and transformation, without outside interference, instigation or instruction. In his declaration, the then Minister of Justice stated that '[i]t is the government's submission that as these proceedings interfere with a sovereign's efforts to address matters in which it has the predominant interest, such proceedings should be dismissed'. Minister Maduna's declaration is available at <http://www.info.gov.za/view/DownloadFileAction?id=70180> (accessed 11 November 2013).

53 U Baxi *The future of human rights* (2002) 136-137.

54 SL Seck 'Exploding the myths: Why home states are reluctant to regulate' keynote address for MiningWatch Canada Conference: Regulating Canadian Mining Companies Operating Internationally (20 October 2005) 6.

55 On the 'enterprise theory', see the seminal work by PI Blumberg *The multinational challenge to corporation law: The search for a new corporate personality* (1993).

56 Expert Report (n 27 above).

rights abuses seeking access to the home state's courts.⁵⁷ Cassels has noted that this 'doctrine shields multinationals from liability for injuries abroad'.⁵⁸ In fact, MNCs use it as their very 'first line of defence'.⁵⁹ In terms of this doctrine, a court in the home state will decline jurisdiction if it is proved that a court in the host state is the more appropriate forum, as was the case in *Bhopal*.⁶⁰ Different factors are taken into consideration in order to determine the appropriateness of the forum. However, the overarching consideration is which – between the host and the home state – has the 'most real and substantial connection' with the corporation.⁶¹ Aware of the misuse by MNCs, courts have now warned that this doctrine is 'an exceptional tool to be employed sparingly'.⁶²

In the event that victims overcome the *forum non conveniens* hurdle, they further face the challenge of separate personality and limited liability. It is a basic tenet of corporate law that shareholders are separate from the corporation and, by extension, the parent corporation is separate from its subsidiary.⁶³ Corporations have a tendency to insulate themselves from liability by allocating the risky aspects of the business to foreign subsidiaries which hold only

57 See P Prince 'Bhopal, Bougainville and OK Tedi: Why Australia's *forum non conveniens* approach is better' (1998) 47 *International and Comparative Law Quarterly* 573; KL Boyd 'The inconvenience of victims: Abolishing *forum non conveniens* in US human rights litigation' (1998) 39 *Virginia Journal of International Law* 41; MJ Rogge 'Towards transnational corporate accountability in the global economy: Challenging the doctrine of *forum non conveniens* in *Re: Union Carbide, Alfaro, Sequihua and Aguinda* (2001) 36 *Texas International Law Journal* 299.

58 J Cassels *The uncertain promise of law: Lessons from Bhopal* (1993) 273, cited in Deva (n 22 above). See also KL Boyd 'The inconvenience of victims: Abolishing *forum non conveniens* in US human rights litigation' (1998) 39 *Virginia Journal of International Law* 41.

59 See Rogge (n 57 above).

60 The Indian victims of the gas leak at Union Carbide Corporation's pesticides plant in Bhopal were denied access to the US courts on the basis that the Indian courts were better placed to deal with the matter. For a critique of the application of this doctrine to the facts of the case, see U Baxi (ed) *Inconvenient forum and convenient catastrophe: The Bhopal case* (1986) 1-30; U Baxi 'Mass torts, multinational enterprise liability and private international law' (1999) 276 *Hague Receuil* 301.

61 Seck (n 54 above) 13.

62 See *Mujica v Occidental* 381 F Supp 1134 (CD Cal 2005). See also the dismissal of the doctrine in the case of *Wiwa v Royal Dutch Petroleum*, 226 F 3d 88, 92 (2nd Cir 2000), cited in J Davis *Justice across borders: The struggle for human rights in the US courts* (2008) 177-178.

63 This rule was developed in *Salomon v Salomon & Co* [1897] AC 22 51, where Lord MacNaughten held: 'The company is at law a different person altogether from the subscribers to the memorandum and, although it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or the trustee for them. Nor are subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.'

minimal assets.⁶⁴ Courts have, however, come up with tools designed to curb the negative effects of the twin principles of separate personality and limited liability.⁶⁵ They depart from these principles if they are used as a mere façade aimed at perpetrating fraud or other illegality. Thus, they pierce the corporate veil to impute liability on the real perpetrators. In practice, these tools are not very helpful to victims of corporate abuses because of the inconsistent manner in which they are applied. Deva has compellingly suggested that⁶⁶

[t]he principles of separate personality and limited liability were evolved to serve certain public purposes, including the promotion of entrepreneurship so as to contribute to individual/societal development. But at the same time they should not be used to defeat another equally important social objective, ie the promotion of human rights. It is important, therefore, to balance the business concerns of corporations represented by these two principles with the concerns of human rights activists. Such a balancing will not [only] allow corporations to play a key role in the development of society but will also ensure that these principles do not become corporate tools for systematic avoidance/evasion of legal responsibility for human rights violations by exploiting a series of legal fictions.

In almost all the cases lodged before the home state, the twin 'vintage' principles of separate personality and limited liability are invoked by corporations to avoid liability.⁶⁷ It is therefore fair to ask whether the GPs have given clarity on how the balance suggested by Deva can be achieved, in the interest of promoting entrepreneurship and curbing corporate impunity. GP 26 rightly provides that '[s]tates should take appropriate steps ... to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy'. However, the GP does not go further to elaborate on how these legal and practical barriers, such as separate personality and limited liability, can be reduced.

As far as the principle of international comity is concerned, home state courts decline to exercise jurisdiction on events that occurred in the host state out of respect for the latter's laws, policies, traditions and aspirations.⁶⁸ This principle is based on the sovereign equality of states, and is meant to ensure order and fairness among states. It has

64 According to H Hansmann & R Kraakman 'Toward unlimited shareholder liability for corporate torts' (1991) 100 *Yale Law Journal* 1879 1891, there is 'strong empirical evidence [that] indicates that increasing exposure to tort liability has led to the widespread reorganisation of business firms to exploit limited liability to evade damage claims'.

65 These include the piecing of the corporate veil, principles of agency and *alter ego*. See Deva (n 22 above) 101.

66 Deva (n 24 above) 104-105.

67 Deva (n 24 above) 96. See also the cases of *Hempe & Others v AASA* and *Kiobel v Royal Dutch Petroleum Co*, *Wiwa v Royal Dutch Petroleum*, *Wiwa v Anderson*, and *Wiwa v Shell Petroleum Development Company* and *Bhopal* where the defendant companies invoked these principles.

68 ZA Jennifer 'Extraterritorial jurisdiction: Lessons for the business and human rights sphere from six regulatory areas' (2010) Corporate Social Responsibility Initiative Working Paper 59 160.

been observed that the principle of international comity is rather vague, and difficult to define in precise terms.⁶⁹

Turning to the question of home state remedies in the GPs, it has to be noted that commentary on GP 2 provides, in part, that home states *are not prohibited from or are permitted to* take measures to ensure access to remedies.⁷⁰ This language has been criticised for being ‘timid and unambitious in a context where victims of abuse by multinational corporations routinely face insurmountable obstacles to remedy in their own countries and have no other place to turn for help’.⁷¹ The GPs ought to have specifically provided clear guidance on how to navigate each of the procedural and substantive impediments to home state remedies they so ably identified. They also ought to have elaborated on the ‘governance gaps’ to assist home states to implement governance mechanisms to ensure that their corporations do not violate human rights abroad.⁷²

The other obvious weakness of the GPs is an over-emphasis on non-judicial mechanisms as well as voluntary mechanisms, which do not always afford victims adequate protection against corporate-related human rights abuses, as opposed to an emphasis on legally-binding remedies. The GPs ought to have provided comprehensive remedies that are effective and legally binding and consistent with human rights obligations of states and corporations both in the host state and home state. They have further failed to take into account the power imbalances in terms of resources and information between victims of corporate abuses and MNCs.⁷³ All these omissions represent a serious failure to ensure access to justice for victims of corporate abuses, particularly those in host states.

4 Who benefits from the Framework and Guiding Principles paradigm?

At the risk of asking the obvious, the question is whether the Framework and GPs are too corporate-friendly to the disadvantage of victims. Before attempting to answer this, it is useful to catalogue corporate responses to various attempts made to regulate them throughout history. The first attempt to regulate corporations can be traced back to the late 1600s in England, after the collapse of many

69 As above.

70 My emphasis.

71 G Quijano ‘Is the right to remedy under international law sufficiently protected in the 2011 UN Guiding Principles on Business and Human Rights?’ paper presented at International Conference on the ‘Protect, Respect and Remedy’ Framework: Charting a future or taking the wrong turn for business and human rights? 23-24 January 2012, Constitution Hill, Johannesburg, South Africa (on file).

72 As above.

73 RC Blitt ‘Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an embrative approach to corporate human rights compliance’ (2012) 48 *Texas International Law Journal* 52.

'perverted' corporations that sold valueless stock to ignorant buyers.⁷⁴ The English Parliament, in 1720, in response outlawed the corporation due to the constant failures of many to return 'fabulous profits' to their naïve investors who had been wooed to buy stock in bogus companies which would flourish for a while due to speculation of good returns before going under.⁷⁵ However, it was not long before they were allowed to operate again.⁷⁶ In the US, President Roosevelt introduced regulatory reforms in 1934 to curb the greed and mismanagement of corporations believed to have caused the Great Depression. However, this was unacceptable to corporations and they actually plotted a *coup* to overthrow his administration.⁷⁷ It would seem, from their inception, corporations have always been inimical to regulation.

As well, corporations such as the British East India Company, the Dutch East India Company and the Hudson's Bay Company exploited the southern hemisphere's natural resources, using child labour and forced prison labour, particularly during the colonial period.⁷⁸ Mafeje once asked:⁷⁹

[T]here is a continued plunder of resources by the developed countries well beyond their borders and yet they reserve the right to shut out the victims of their centuries-old exploitation of overseas territories. Could there be a worse form of global injustice?

By failing to clearly articulate how home state remedies may be accessed, the Framework and GPs fail to answer the age-old question posed by Mafeje. Turning to efforts to regulate MNCs in modern times, during the decolonisation period the colonised states tried to reverse the exploitation through various measures such as nationalisation, but these were vehemently opposed by corporations. Ratner provides a useful account of how the host states attempted to regulate MNCs during the decolonisation period. He observes that⁸⁰

[h]ost states sought to rein in the power of TNEs by drafting a multinational code of conduct for transnational corporations ... In 1974, the United Nations established a Centre for Transnational Corporations to prepare the Code; it completed a draft in 1983 and another in 1990. While recognizing some rights for investors, these Codes emphasized the need for foreign investors to obey host country law, follow host country

74 Bakan (n 17 above) 6.

75 Bakan (n 17 above) 7.

76 Bakan (n 17 above) 8.

77 Bakan (n 17 above) 20.

78 See, eg, W Rodney *How Europe underdeveloped Africa* (1982); M Meredith *The state of Africa: A history of fifty years of independence* (2006); DC Dowling 'The multinational's manifesto on sweatshops, trade/labour linkage, and codes of conduct' (2000-2001) 8 *Tulsa Journal of Comparative and International Law* 52.

79 A Mafeje 'Democracy, governance and new democracy in Africa: Agenda for the future', paper presented at African Forum for Envisioning Africa, Nairobi, Kenya, 26-29 April 2002, <http://www.worldsummit2002.org/texts/ArchieMafeje2.pdf> (accessed 10 July 2012).

80 Ratner (n 36 above) 467 (footnotes omitted).

economic policies, and avoid interference in the host country's domestic political affairs. In a response to this development, the Organization for Economic Cooperation and Development (OECD), the principal international institution composed of wealthy states, drafted its own set of guidelines for multinational enterprises. These contained far fewer and weaker obligations on TNEs and were not intended to be binding.

Thus, MNCs got away with it again during the decolonisation period. The accelerated globalisation and consequent globalised corporate abuses of the 1990s subsequently saw the UN take a stand and commission the drafting of the 2003 UN Draft Norms. As already stated, these Draft Norms sought to move beyond voluntarism, and progressively articulated binding obligations for corporations.⁸¹ They were, however, vehemently rejected by major corporations and the SRSG.⁸² The trend here is that, on the one hand, major corporations and capital-exporting countries totally reject strong measures (the 1983 and 1990 codes and the 2003 Draft Norms) while, on the other, they accept and embrace seemingly weaker ones (OECD guidelines and the SRSG's Framework and Guidelines). Being mainly exposed to the host state is a great victory for MNCs, given that they usually operate lean structures in the host state, with minimal assets.⁸³ According to the Framework, a company's failure to meet its social responsibilities can subject it to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and occasionally to charges in actual courts.⁸⁴ This is, however, wholly inadequate from the perspective of a victim of host state corporate abuses, who wants actual remedies in the home state but has no guidance from the GPs on how to actuate those remedies. It is, therefore, tempting to conclude that on the issue of access to a remedy, MNCs are winners and victims are losers, in the bigger scheme of things.

81 On the failure and/or inadequacy of voluntarism, see International Council on Human Rights Policy *Beyond voluntarism: Human rights and the developing international legal obligations* (2002). See also S Deva 'The UN global compact for responsible corporate citizenship: Is it still too compact to be global?' (2006) 146 *Corporate Governance Law Review* 151, where the author, *inter alia*, laments the 'directional uncertainty, lack of enforcement and independent monitoring, misuse as a marketing tool, and amorphous role of states' as far as the UN Global Compact is concerned.

82 See Sorell (n 11 above) 284; and Ruggie (n 21 above).

83 In the *Bhopal* case (n 44 above), the court ended up settling only \$470 million in India, compared to the initial amount of \$3.1 billion that was claimed before the US courts.

84 See Report of the Special Representative of the Secretary-General (John Ruggie) on the issue of human rights and transnational corporations and other business enterprises, titled 'Protect, Respect and Remedy: A framework for business and human rights' A/HRC/8/5 7 April 2008 54.

5 Concluding remarks

The mandate of the SRSG was, in essence, to rein in the modern MNC in this age of neoliberal globalisation and robust capitalism. Whether the Framework and GPs achieved this is debateable. Some have described them as 'minimalist', while others have argued that they represent the status quo where companies are encouraged, but not obliged, to respect human rights.⁸⁵ On his part, the SRSG saw the whole process as underpinned by 'principled pragmatism'.⁸⁶ I investigated a specific question: whether the GPs offer any guidance to victims of corporate-related abuses who fail to obtain justice in the host state, and look to the home state for redress. It goes without saying that the home state is not easily accessible, due to the known hurdles presented by age-old legal concepts misused by corporations in order to avoid liability. As already argued some of these challenges are overemphasised. The home state is seen mostly as possessing the greatest potential for victims of corporate abuses, because the MNC is headquartered there, with substantial assets to make good its wrongdoings.⁸⁷

The Framework and GPs have failed to clearly articulate the accessibility of home state remedies. Rather, they have provided a somewhat unbalanced emphasis on host state judicial remedies and non-judicial mechanisms, which are sometimes clearly unavailable or unattractive to victims of corporate abuses. Consequently, as critical as it may sound, there is a perpetuation of corporate impunity, particularly in the developing world where most multinationals are attracted to virgin markets, natural resources, commodities and favourable tax systems.

85 U.N. Human Rights Council: Weak Stance on Business Standards, Human Rights Watch (16 June 2011) <http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards> (accessed 7 April 2014).

86 See Bilchitz (n 25 above) and SRSG (2006) Interim Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc E/CN.4/2006/97 (22 February 2006) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement> (accessed 12 November 2011).

87 S Joseph 'Taming the Leviathans: Multinational enterprises and human rights' (1999) 46 *Netherlands International Law Review* 176-178.

Foreword: Law and religion in Africa - Comparative practices, experiences and prospects

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Africa presents a world of contrasts. All too representative is the following, culled from a recent Associated Press (AP) report:¹

The latest attack by suspected Islamic extremists in Nigeria's northeast has left 115 people dead, more than 1 500 buildings razed and some 400 vehicles destroyed ... Sitting among the smoking ruins of his palace, the *shehu*, or king, of Bama ... charged that the government 'is not serious about halting the Islamic uprising ...'

In a video message from one of the uprising's leaders, the chief assailant declares: 'The reason I will kill you is that you are infidels, you follow democracy.' The report goes on to note, however, that²

many more Muslims than Christians have been among the thousands killed in the four-year-old rebellion by ... Boko Haram – the nickname means 'Western education is forbidden' – which aims to transform Nigeria into an Islamic state.

In quiet contrast, a case study published in August 2013 by Georgetown University's Berkley Center for Religion, Peace and World

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1 H Umar '115 killed, 1 500 buildings razed in Nigerian town' *Associated Press* 20 February 2014, <http://bigstory.ap.org/article/islamic-extremist-leader-threatens-nigerian-oil> (accessed 21 March 2014).

2 As above.

Affairs concludes the following with regard to South Africa's post-apartheid Truth and Reconciliation Commission:³

[O]ne cannot wholly grasp the features of this painful yet peaceful transition without understanding the prevalence of Christian beliefs among the majority of the populace, the highly respected role of clerics in the society, the joint application of Christian and traditional African principles of restorative justice, forgiveness and reconciliation, and the role of religious symbols and rituals like prayer in the TRC process. South Africa's TRC and the personnel associated with it have become world figures through their efforts to resolve intractable conflict.

Thus, religion continues to play an ambivalent role on the world stage – and not less in Africa. One need not look far for examples of Muslims, Jews, Hindus, Buddhists, Christians and others making extraordinary sacrifices for the good of humanity. But, unfortunately, neither must one look far for large-scale abuses committed in the name of religion. If secularisation theories of the nineteenth and twentieth centuries are not dead, surely they are moribund. Predictions, whether by Marx or Morgenthau, that modern economies, communications and technology, and a new age of ratiocination would place religion in the backseat (and eventually out the door) have proven themselves invalid. The death that was supposed to befall religion has felled secularisation theories instead.

The resurgence – or perhaps the rediscovery – of religion in recent decades has caused policy makers worldwide to re-evaluate the relationships of conscience and religious belief with law, politics, international relations, education and with most other social institutions. Those relationships have proven complicated, with religion sometimes walking the high road in the company of institutions that foster the expansion of social goods and amenities, and sometimes taking the lower path of violence and regression. Regardless, the appearance today of religion on the agenda of virtually all governments – at both global and local levels – demonstrates that the interaction of law and religion cannot be ignored. It is this recognition that has given the discipline of law and religion new salience. This issue of the *African Human Rights Law Journal* makes important contributions to this burgeoning field.

In one sense, the interaction of law and religion has posed challenging issues as long as law and religion have existed. In some of its earliest forms in many African societies, law was difficult to distinguish from religion – the two were intertwined often to the point of being identical. Modernity has brought a sharper sense of the hazards of such fusion, and the need to make room for diverse beliefs. Although the unity of religion and government in some cases has fostered virtue in political leaders and the citizenry, all too often it has

3 Berkley Center *South Africa: The religious foundations of the Truth and Reconciliation Commission Religion and Conflict Case Study Series*, August 2013, <http://repository.berkeleycenter.georgetown.edu/130801BCSouthAfricaReligiousFoundationsTruthReconciliationCommission.pdf> (accessed 21 March 2014).

led to hypocrisy at the top and oppression of conscience the rest of the way down. The result has been the emergence of a range of configurations of law and religion that implement, with varying degrees of effectiveness, the widely-accepted norms of freedom of religion or belief embodied in international human rights documents and in constitutions worldwide.

Law and religion began to emerge as an identifiable field of study about 40 years ago. One of its earliest manifestations was in the formation of the Law and Religion Section of the American Association of Law Schools which was founded at that time. It was a small section which was, in some ways, very quiet, not drawing much attention to itself. The section saw some growth during the 1980s, but things did not really begin to change until the collapse of communism, which triggered a transformation of legal systems from Central Europe to Eastern Siberia, and produced consequences throughout much of the rest of the world, including the collapse of apartheid in South Africa.

With the end of East-West political polarisation came transformations in the way people thought about law and religion. The euphoria that came with the 1990s, however, gradually gave way to retrenchment and greater restrictions on religious freedom. Part of this is the result of a variety of concerns with religious extremism and security concerns after the terrorist attacks of 11 September 2001. Whether as a result of these events or due to other ironies of history, the global resurgence of religion has sometimes brought setbacks for religious freedom, not so much as a result of direct attacks on the idea of religious freedom, but through a steady process of erosion by exception. The notion that ordinary laws can override religious freedom claims has expanded. Courts seem increasingly inclined to allow other state interests to outweigh religious freedom claims. The range of competing rights is constantly expanding. The result is that commitment to the ideal of religious freedom remains strong, but its practical strength is suffering constant attrition.

Whether as a result of such attrition, or because of longstanding failures to live up to religious freedom commitments, the latest research shows that a remarkable percentage of the world's inhabitants live in countries with high or very high restrictions on religious freedom. Path-breaking research published by the Pew Forum for Religion and Public Life in 2009 showed that 32 per cent of the countries in the world today had high or very high restrictions on religious freedom, including some of the largest countries and encompassing 70 per cent of the global population.⁴ Follow-up studies in successive years show that the situation is getting worse. Now, 76 per cent of the world's population suffers high or very high

4 Pew Forum on Religion and Public Life *Global restrictions on religion*, <http://www.pewforum.org/files/2009/12/restrictions-fullreport.pdf> (2009) 1 (accessed 21 March 2014).

restrictions.⁵ Ironically, these increasing restrictions are occurring at precisely the time that new research demonstrates that religious freedom correlates and appears to be linked to the generation of countless other social goods,⁶ while increasing restrictions on religion are as likely to be a cause as an effect of religious violence.⁷

Now, of course, some of the constraints on freedom of religion are justified. Thoughtful observers should acknowledge what Scott Appleby has called the 'ambivalence of the sacred'.⁸ Religion has done bad things, but it has also made good and ennobling contributions to society. It appears that we live in an age in which we are beginning to forget the latter: the values that have made our age possible, including much of what is best about our age – values, even political values, which more often than not find their origins in religion.

1 Law and religion in Africa

This issue of the *African Human Rights Law Journal* brings the discussion of law and religion on the African continent together in unprecedented ways. In January 2013, Dean Kofi Quashigah of the University of Ghana and a handful of other leaders in the field of law and religion welcomed more than 40 scholars to Legon, Ghana, for the first annual multi-national conference on law and religion in Africa. Participants came together for two days of frank yet respectful discussions on the relationships between religion, conscience, belief, law, politics and government in sub-Saharan Africa.⁹ Contributors to this issue of the *African Human Rights Law Journal* explore a range of issues in law and religion, including some that Africans share more widely with others and some that are unique to Africa.

Bishop Musonda Trevor Selwyn Mwamba inaugurates the present volume with the suggestion that, as law and religion are both ultimately concerned with justice, law should allow itself to be nurtured by spiritual and moral values. The meaning with which religion infuses life can fuel the duties and respect for human rights demanded by law. Mwamba's perspective clearly suggests why, as the world wrestles with questions of church, mosque, synagogue and state, it is more natural that outsiders might look to Africa for insights, successes and cautionary concerns regarding religion's role in society.

5 Pew Research Center *Religious hostilities reach six-year high*, <http://www.pewforum.org/files/2014/01/RestrictionsV-full-report.pdf>7 (accessed 21 March 2014).

6 BJ Grim & R Finke *The price of freedom denied: Religious persecution and conflict in the twenty-first century* (2011) 206.

7 Grim & Finke (n 6 above) 215-222.

8 R Scott Appleby *The ambivalence of the sacred* (2000).

9 For a more complete report on the conference, see D Kirkham 'Law and religion in Africa: Comparative practices, experiences and prospects' (2013) 15 *Ecclesiastical Law Journal* 219-222.

An observation of Christian-Muslim feuds in Nigeria or the infusion of clearly religiously-rooted spiritual values into governmental institutions, such as South Africa's Truth and Reconciliation Commission, to good effect, may leave non-Africans either impressed or nonplussed. Nevertheless, it should not leave anyone unclear that Africa is rich terrain for the exploration of new ways for understanding legal and religious relationships, both traditional and modern. Significantly, this volume consists of contributions from various corners of Africa, placing local concerns in shared and universal perspective. Bishop Mwamba and Dean Quashigah set the stage, raising somewhat conflicting perspectives, with the Bishop, as noted, seeking more accommodation of law and religion, whereas the Dean promotes a more strict separation of religion and state.

Other contributors emphasise African historical forces as they have played out over time and geographical space. Jean-Baptiste Sourou examines, for example, the relationships between the Roman Catholic Church and traditional African religions. Sylvia Tamale offers a provocative assessment of how outside religions and cultural forces have affected traditional African law and religion to the point of altering the sexuality of African peoples with potentially serious consequences. Christian Green pays particular attention to social hostilities towards religious minorities, an aspect of the complex relationship of religion, state and society warranting particularly careful attention. According to Green, although religious persecution has been aggravated in a number of African countries as a result of social hostilities, developing social media outlets and technology are providing the means by which such hostilities can be addressed and perhaps curtailed at the popular level.

Regional offerings in this volume include Daniel Mekonnen's analysis of the persecution of minorities in Eritrea who do not belong to the four officially-recognised religions: Sunni Islam; the Eritrean Orthodox Tewahdo Church; the Eritrean Catholic Church; or the Eritrean Evangelical Church. He offers a human rights challenge to the religion-state *status quo* in that country. A trio of Nigerian contributions include Is-haq Olanrewaju Oloyede's assessment of the historical evolution toward a present-day Nigeria 'with politics defined along religious lines and religion itself highly politicised'. The result is a Muslim-Christian division and a nation where personal insecurity is a constant in many regions. One possible contributing factor to Nigeria's religious complexity emerges from Enyinna Nwauche's discussion of the Nigerian police force's constitutional obligation to enforce Islamic penal codes in 12 Northern Nigerian states. Another Nigerian perspective, provided by Allswell Osini Muzan, sees the threat of a failed Nigerian state as potentially emanating from the religiously and ideologically fueled insurgencies of Northern Nigeria.

From another corner of the continent, Pieter Coertzen provides a constitutional assessment of religion and the state in his analysis of the South African Constitution's religious freedom protections and those

guaranteed by the proposed South African Charter of Religious Rights and Freedoms. Coertzen makes special note of the variety of intellectual and legal sources of modern South African protections of conscience, stemming from African traditional law and religion as well as Roman-Dutch law. Mark Hill concludes the symposium with a European perspective, 'examining various ways of defining dominant and minority religions and various paradigms of church-state relations', and drawing comparatively on English religious establishment models for their possible relevance to African conditions.

Taken together, the articles here combine to suggest that, in many countries, people have lived so long with the benefits of religion and religious freedom that they forget the importance of these values when other problems arise. The research represented in this issue of the *African Human Rights Law Journal* buttresses work elsewhere, demonstrating that excessive government intervention and restriction regarding religion, far from being a method of stabilising societies, is often counterproductive. The basic insights go back to John Locke and other early liberal thinkers, but these articles provide cumulative evidence drawn from the best of current social science, and should have profound policy implications.

2 Conclusion: Secularism, secularity and religious freedom

Recent comparative work has emphasised the contrast between two approaches to religion in modern secular states.¹⁰ One approach pursues secularism as an end in itself, with an ideological fervour akin to that sometimes found in religion. The other approach has been called 'secularity', even a 'healthy secularity'. Where the secular becomes an end in itself, religion is excluded or confined in the private sphere alone; whereas secularity provides a more flexible framework capable of accommodating the rich differences of religious diversity. The differences between these approaches are often merely matters of degree. They have their roots in differing social, political and colonial histories. French-style *laïcité* tends to be more inclined toward secularism as an end in itself. The secular regimes that we see in many parts of the former British Commonwealth in the common law world are often more accommodating. One of the challenges, as we move into the twenty-first century, is to determine which model will prevail in different systems, and in how much detail those systems

10 J Martínez-Torrón & WC Durham Jr 'Religion and the secular state/*La religion et l'Etat laïque*' in *La religion et l'Etat laïque/Religion and the secular state: Interim reports prepared for the XVIIIth International Congress of Comparative Law* (2010), <http://www.iclrs.org/content/blurb/files/General%20Report.pdf> (accessed 31 March 2014) (analysing national reports from 46 countries).

will be structured. What is the place of religion in general and specific religions, in particular in African societies?

Part of the reason why religious freedom is good for societies is that it helps to unlock the social capital associated with religion itself, which is why many people care about the relationship of law and religion. This relationship is also changing the way people think of social, political and economic development. It used to be that people thought of development primarily as a secular enterprise, but development without taking into account the spiritual dimension of human beings cannot really be optimal. All of these considerations have had a profound significance for the field of law and religion, and one of the results is that that which was a quiet backwater in academia in the 1970s, has moved to the forefront in many disciplines. Law and religion stand at the crossroads between law, political science, theology, sociology, and a wide array of other disciplines that are now being energised and that are feeling the dynamism of this discipline. This volume reveals that dynamism as it is becoming readily apparent across the African continent.

Although some of the concerns expressed in this issue rise from a view of a particular religion being dominant in, and therefore posing a risk to, this or that society, the reality is that, in the current world, no society lives in religious or ideological isolation. There are obviously prevailing or majority religions in many countries, but no country is totally homogeneous. The world we live in is highly pluralistic. Indeed, if one looks beyond national boundaries, there is no religion on earth that constitutes more than a third of the world's population. We are all minorities. With that in mind, it is vital for all of us to find ways to work and live together in peace. It is hoped that this issue of the *African Human Rights Law Journal* will be a useful stimulus for ongoing and productive thought about these questions.

3 Acknowledgments

This volume of the *African Human Rights Law Journal*, and the conference in Ghana that inspired it, will help inaugurate the 'African Consortium on Law and Religion Studies', and enable it to take its place on the international stage in 2014 with counterpart consortia in Latin America, Europe and other world regions. The Ghanaian conference in 2013 concluded with a commitment to move toward the official organisation of the African Consortium at its second convocation in May 2014 at the University of Stellenbosch, South Africa. In addition to the contributors to this symposium issue, many other persons and institutions deserve recognition for the production of this volume and for seeing the dream of the African Consortium come to fruition. These include the steering committee of the 2013 conference, Dean Kofi Quashigah and Professors Rosalind Hackett, Johan van der Vyver, Pieter Coertzen, Cole Durham and Magnus Killander.

Other participants who raised the stature and impact of the original conference include Samuel Kofi Date-bah, Justice of the Supreme Courts of The Gambia and Ghana; Naa John S Nabila, Professor and President of the Ghanaian National House of Chiefs; Ernest Aryeetey, Vice-Chancellor and Professor at the University of Ghana; and James R Rasband, Dean and Professor at the J Reuben Clark Law School of Brigham Young University in the United States. Others who assisted with the organisation of the 2013 conference included Peter Atupare, Lecturer in Law at the University of Ghana; Professor Briged Sakey of the Centre for Social Policy Studies at the University of Ghana; Professors Robert Smith and David Kirkham of the Brigham Young University Law School; and the husband and wife lawyer team, Mark and Barbara Taylor.

In addition to the University of Ghana's Faculty of Law, sponsors of the Consortium and the conference included the Unit for the Study of Law and Religion, Faculty of Theology, University of Stellenbosch, South Africa; the Centre for Human Rights, University of Pretoria, South Africa; and from the United States, the Center for the Study of Law and Religion at Emory University, United States, and the International Center for Law and Religion Studies at Brigham Young University's J Reuben Clark Law School.

In the final assessment of this current volume, particular recognition goes to its guest editor, Christian Green, Senior Fellow at the Center for the Study of Law and Religion and an editor at the *Journal of Law and Religion*. Professor Green worked tirelessly, prompting and prodding contributors to provide materials in a timely manner and then working and reworking each piece, with the assistance of Isabeau de Meyer of the Centre for Human Rights at the University of Pretoria, to bring it into compliance with the *African Human Rights Law Journal's* editorial requirements. She brought more to this work, however, than an eye for the craft of good writing. An expert on law and religion in her own right, Professor Green understands the complexities of the subject as only one wholly immersed in the field can. Much credit for what is good and right about these articles can be credited to her excellent work.

Law and religion in Africa: Living expressions and channels of co-operation

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Summary

Drawing on Anglo-American legal and literary classics and the contemporary situation of Africa, this article discusses the unity of law and religion, the demand for justice, the importance of context, the power of law and religion as living expressions of a people's humanity, and the centrality of the moral agent. It concludes with observations about the need to nurture spirituality and morality in Africa in order to strengthen both legal and religious norms.

1 Introduction: The tools of the trade

The theme of this conference, 'Law and religion in Africa: Comparative practices, experiences and prospects', is very apt at this stage of Africa's development. The theme is profound and multifaceted as the papers which will be presented reflect.

I am sure we shall not be groping in the dark as in this parable set in an African forest:

A blind rabbit and blind snake met. And since they could not make out who the other was, they decided to feel each other and say who they were. So the snake went first and begun to touch the rabbit and said, 'You are furry. You have long ears. You have a short stumpy tail. Ah! You are a rabbit.' The rabbit shouted enthusiastically jumping up and down, 'Yes! Yes! Yes!'

Then the rabbit proceeded to touch the snake and said, 'You are rather long and cold blooded. You have beady eyes. You have a forked tongue. You are slithery and have no means of self-locomotion. You must be, you must be a lawyer!'

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The renowned British jurist, Lord Alfred Denning, once advised lawyers to read works of history and literature. He specifically cited Sir Walter Scott's novel *Guy mannering*.¹ The client, Colonel Mannerling, goes to the lawyer. He finds the rooms of the lawyer lined, not with law books, but with books of history and literature, the great authors, the classics, and a painting by FE Jamieson, the Scottish Van Dyke. The lawyer points to the books of history and literature and says: 'These are my tools of trade.'² A lawyer without history or literature is a mere mechanic, a mere working mason. If he has some knowledge of these, he may venture to call himself an architect.

It is to these 'tools of trade', the great authors, the classics, the arts, music, culture, politics, stories of great men and women, life happening all around us, that I turn for inspiration to address the theme of law and religion in Africa. Let me start with a book by Peck entitled *Gifts for the journey*.³ He was once at a dinner talking to a clever lawyer about it before it was published. The lawyer wanted to know what the book was about. Peck explained that it was a mix of psychology and religion. The lawyer understood that, but wanted to know the message of the book. Peck said it was rather complicated as the book said a lot of things. The lawyer persisted. All he wanted was a few sentences getting to the heart of the matter and telling what the book was about. Peck said he could not do that in a few sentences, that was the reason he had written the book.

The lawyer thought it was all nonsense and he explained to Peck that in the legal profession, there was a wise saying that anything worth saying can be said in two sentences or less – and if it cannot be, then it is not worth listening to. I should hastily say that this does not apply to any of us here.

Peck could not give the lawyer the two sentences he required. But thinking about it later, he remembered that Jesus had a similar experience in Jerusalem and he handled it brilliantly. You remember a lawyer came to Jesus and said in effect:

Professor Jesus, all these parables are very nice. But what is it that you are really trying to say? What is your message? I don't want a whole Sermon on the Mount. I just want a few concise sentences, straight and simple. What is it you are telling us we ought to learn and do?

Jesus responded and it was really no more than a single sentence. 'Love the Lord, your God, with all your heart and mind and soul, and your neighbour as yourself.' That is all He said.

Suffice to say, I too was grappling with how to locate the heart of this conference given its profundity. I have settled on the following thoughts to focus on: (1) the unity of law and religion; (2) the demand for justice; (3) the crucible of context; (4) the power of law

1 W Scott *Guy mannering* [1845] (2003).

2 AT Denning *The family story* (1981).

3 MS Peck *Gifts for the journey Treasures of Christian life* (1999).

and religion as living expressions; and (5) the centrality of individuals as moral agents.

2 Unity of law and religion

On the unity of law and religion, I should state that I speak from a Christian perspective. But the principles are applicable to other faiths such as Judaism, Islam, Buddhism and Hinduism. People often think in compartments and imagine that law and religion, or politics and religion, are separate from each other. The reality is that everything in life is interconnected. Stollman illustrates this in his enchanting book *The illuminated soul*,⁴ when he writes about the 'net of reality'. This net of reality weaves seemingly disparate things together and makes of them whole cloth. On its own, our world seems a chaos of unrelated events to the human mind, but in fact this is not the case. This perception is only due to our limitations of observation and reason.

Law and religion are two sides of social relations and human nature. As Berman wisely stated:⁵

Law is not only a body of rules; it is people legislating, adjudicating, administering, negotiating – it is a living process of allocating rights and duties and thereby resolving conflicts and creating *channels of co-operation*. Religion is not only a set of doctrines and exercises; it is people manifesting a collective concern for the ultimate meaning and purpose of life – it is a shared intuition of commitment to transcendent values.

Law ensures that a society maintains cohesion and peace and hence prevents chaos, whilst religion gives society faith to pursue transcendent values that promote the goodness in people and a community and hence seeks to prevent corruption.

The unity between law and religion is also evident in Islam and Judaism, which have sophisticated systems of law found in their sacred writings. Some say the observance of law is itself a religious act. For example, in ancient Israel, the law, the Torah, is the religion.

3 Demand for justice

The second thought, I suggest, which streams through the conference theme and will tacitly flow in the papers to be presented, is *justice*. Both law and religion are concerned with justice. The issue of social justice dominates the Old Testament. For example, the prophet Amos is emphatic on the demands of God for His nation Israel in the call to

⁴ AL Stollman *The illuminated soul* (2002) 196.

⁵ HJ Berman *The interaction of law and religion* (1974) 24.

'[l]et justice roll down like waters, and righteousness like an ever-flowing stream'.⁶ Lord Harries, former Bishop of Oxford, recently gave an address at the Justice Service, at Chelmsford Cathedral in England, in which he said that if we had to choose one word to sum up the message of the Hebrew Scriptures (the Christian Old Testament), that word would be justice. The core theme is also summed up by the prophet Micah in the admonition 'He has told you, oh mortal, what is good, and what does the Lord require of you but to do justice, and to love kindness and to walk humbly with your God.'⁷

This is the most fundamental insight the Jewish people have given to the world, not only in Judaism itself, but in its abiding legacy in Christianity and Islam.⁸ God is inseparable from justice; because *justice is the expression of love seeking to do the right thing or what is right in any given situation*. So where justice is, there is God.

Justice is required in all aspects of life: in our personal lives, in our family life, in our politics, in the life of the nation, in the judicial system, in the world's economic order.

Justice in the treatment of the citizen by the state, of the litigant by the judge, of customary law by statutory law, of the consumer by the supplier, of the customer by the bank, of religion by the state, of the minority by the majority, of women by culture, of gays by straights, of religious intolerance by fundamentalist, of religious pluralism by constitutions.

Law and religion in concord have a vital role to play in Africa faced with challenges of injustices, prejudices and corruption, as both are focused on *justice as the expression of love seeking to do the right thing or what is right in any given situation*; as both can interact in robust laws conceived in moral values rooted in religious foundations that reverence all peoples made in the image of God. I believe this conference will have much to offer in this regard.

4 Crucible of context

The third way in which law and religion interact relates to the importance of *context*. Law and religion do not exist in a vacuum - they absorb their environment, including political, social, cultural, economic, time and historic context. The great jurist Oliver Wendell Holmes said of law:⁹

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories ... even the prejudices which judges share with their fellowmen ... The law embodies the story of a nation's development through many centuries, and

6 Amos 5: 24.

7 Micah 6:8.

8 Richard Lord Harries, Chelmsford Cathedral Justice Service, 14 October 2012.

9 OW Holmes *The common law* (2009) 2-3.

it cannot be dealt with as if it contained only axioms and corollaries of a book of mathematics.

The life of the law reflects human life which we can imagine evolving to the rhyme of the captivating phrases of Charles Dickens's book, *A tale of two cities*:¹⁰

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of light, it was the season of darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way ...

So law absorbs at different times, the best, the worst, wisdom, foolishness, belief, incredulity, light, darkness, hope, despair, everything, nothing, heaven and hell. It is human life in its historic development, its ups and downs. In light of this insight, legal positivism is inadequate as a philosophical position to understand the life of law. Legal positivism would argue that all you can see is all there is, and that to make judgments of value, to seek meanings or causes, to seek good and bad in political and policy questions are unscientific and run the old risk of superstition and obscurantism. When the law sees itself in this way, that all there is are the rules mechanically applied without taking into consideration the dynamic contexts which give it life, then the label 'the law is an ass' becomes apt.

Let me give you the context in which the label arises from Dickens's *Oliver Twist*.¹¹

'That is no excuse', replied Mr Brownlow. 'You were present on the occasion of the destruction of these trinkets, and indeed are the more guilty of the two, in the eye of the law; for the law supposes that your wife acts under your direction.' Then Mr Bumble said, 'If the law supposes that, the law is a ass – a idiot. If that's the eye of the law, the law is a bachelor, and the worst I wish the law is, that his eye may be opened by experience – by experience ...' The experience law needs is not so much a married life! But rather a constant flow of moral values to bring forth justice.

5 Power of law and religion as living expressions

I think it is clear that law is not principally a code of rules or legal opinions, but rather a *living expression* of¹²

a collection of human stories, each with a moral; not as a fetter, but as a source of freedom; not as an unwelcome but inescapable response to the ills of society, but as a means of providing that justice upon which good government and social harmony fundamentally depend.

10 C Dickens *A tale of two cities* (2003) ch 1 1.

11 C Dickens *Oliver Twist* (2003) ch 51 489.

12 TH Bingham *The business of judging: Selected essays and speeches* (2000) 412.

The law, ideally, is a reservoir of justice to remedy the ills of human injustices. The reservoir of justice we speak of has to be replenished by streams of moral values that flow from religion providing a constant cleansing and healing flow for people and society.

Now, just as the life of the law has not been logic but experience, more so religion is not about logic but mystery and inspiration, wrapped in God. Albert Einstein once said:¹³

Every one of us appears here on earth involuntarily and uninvited for a short stay, without knowing the whys and wherefores ... The most beautiful and deepest experience a [person] man can have is the sense of the *mysterious*. It is the underlying principle of religion as well as all serious endeavours in art and science. He who has never had this experience seems to me, if not dead at least blind. To *sense that behind anything* that can be experienced there is something that our mind cannot grasp and whose beauty and sublimity reaches us only indirectly and as a feeble reflection, that is religiousness.

Not from logic but 'the sense of the mysterious' flow the transcendent values into life ennobling us if we are sensitive to them. So morality is not temporal but eternal. The spirit in people responds to the good in them. It is the good and potential good in people that is the focus of religion. It is the good in people which intuitively recognises what is justice, and law becomes the application, however imperfectly, of justice, of that good, in our everyday affairs. Religion conveys to us the importance of *moral purpose* and *spiritual sense*. Religion conveys above all the *reality* and importance of a *power* that transcends our lives and world; *a power beyond ourselves*; *a power that loves us*; *a power* that seeks to act through us to do justice in every situation.

6 Centrality of the moral agent

A final place where law and religion intersect is in their common insistence on the importance of individuals as moral agents in striving for justice in our world. Let me illustrate this in the life of Lord Denning, who embodied the meeting of law and religion.

In his book *Decision making in the White House*, Sorensen concludes:¹⁴

I can only offer a conclusion which all of us already know: that the only way to assure good presidential decisions is to elect and support good presidents. For in mixing all these ingredients (the challenges and forces that presidents have to deal with), his style and standard, his values and vitality, his insights and outlook will make the crucial difference. A great presidential decision defies the laws of mathematics and exceeds the sum of all its parts. A great president is not the product of his staff but the master of his house.

¹³ D Brian *The unexpected Einstein: The real man behind the icon* (2005) 182-183.

¹⁴ TC Sorensen *Decision making in the White House: The olive branch or the arrows* (2005) 87.

This observation is applicable to decision makers in every profession. Good decisions, good leadership, do not arrive from a vacuum; it is a manifestation of *wisdom*. Wisdom is not something we can download from the internet or buy in a shop or earn. It is a gift from God. Remember Solomon's prayer for wisdom before he took up his leadership role:¹⁵

Give your servant *therefore* an understanding mind to govern your people, and able to discern between good and evil; for who can govern this your great people?

This is the secret of great leadership in any field. This is what made Lord Denning a great judge and a legend in his time.

Lord Devlin once remarked that the secret of Lord Denning's appeal to both the legal profession and the general public was the belief that he opened the door to the law above the law.¹⁶ That 'law above the law' is the wisdom of God of which Lord Denning was so aware. Lord Thomas Bingham said that Lord Denning had this uncanny insight into the thoughts and values of the ordinary person. We are talking here of 'the sense of the mysterious'. I recall 30 years ago, as a theological student at Oxford, having an inspiring conversation with Lord Denning in his office in London. He talked in depth about his faith, how '[i]n coming upon legal obstacles, it is not enough to keep your law books dry. It is as well to have a Bible ready to hand too.' He said the Bible was the most tattered book in his library. He believed that '[w]ithout religion there can be no morality, and without morality there can be no law',¹⁷ and that '[i]f religion perished in the land, truth and justice would also'. He believed modern society had strayed too far from the faith of our fathers, and urged a return to it, for it was the only thing that could save us.¹⁸

In his book *The closing chapter*, Lord Denning spoke candidly about his faith and its impact on his life at a Legal Service at the Cathedral at Norwich. This is what he said:¹⁹

I would not be here unless I believed in God. My belief in God is in part due to my upbringing – to what I have been taught – and in part to what I have found out in going through life. That is the case with all knowledge. No man knows anything except what he has been taught and what he has found out for himself.

The fundamental point in my experience is that there is a spirit in man – quite separate from his body and from his intellect – which, when it reaches its highest and best, is but the reflection of the spirit of God. Now I know nothing of theology. Nor can I say that I have seen the sudden light of conversion as some have, but I do know that in the great experiences of life – and in the small ones too – such strength as I have is of God, and the weakness is mine.

15 1 Kings 3:9.

16 JL Jowell & JPWB McAuslan *Lord Denning: The judge and the law* (1984) vii.

17 Denning (n 2 above) 182.

18 Denning (n 2 above) 183.

19 AT Denning *The closing chapter* (2005) 42-43.

Need I relate the experiences? Take the hard things. When faced with a task on which great issues depend, when high hopes lie shattered, when anxieties gnaw deep, or when overwhelmed by grief, where can I turn for help but to God?

Or take the joyful things. A hard task attempted and done, the happiness of family life, or the beauty of nature, where can I turn in thankfulness but to God?

All experiences convince me, not only that God is ever present, but also that it is by contact with the spirit of God that the spirit of man reaches its highest and its best.

7 Conclusion: Nurturing African spirituality and morality

We must now reach our verdict. I have used the 'tools of trade' – the great authors, the classics, great people, life happening all around us – as inspiration to address our theme of 'Law and religion in Africa: Comparative practices, experiences and prospects'. Now, what is it that we can learn and do on the basis of this knowledge? Africa is not monochrome; it is, as some have described it, a 'coat of many colours'. So the laws are a jumble of pieces, much like a jigsaw or a mosaic: customary law, Islamic law, Roman-Dutch law, English law, and so forth. All have to be fitted together to form a single whole, and developed to meet the context and conditions of the times. How is this best to be done? This is a question that this conference must address.

Primarily, I can suggest that as humans – and especially as Africans – we nurture our spirituality. It is the only power that can lift us to our highest and best within ourselves and society. Kofi Abrefa Busia, Prime Minister of Ghana from 1969-1972, was right when he wrote a book entitled *Africa in search of democracy*,²⁰ and placed first in his treatment of factors to be considered in Africa's search for democracy what he termed the 'religious heritage'. He argued that for many people, the questions of religion seem irrelevant and out of place in discussing issues as modernisation and progress. This attitude he contended was prejudicial to a proper appraisal of the problems of Africa as Africans saw them. The 'religious heritage' defines all Africans. John Mbiti, a renowned African theologian, said that Africans are naturally spiritual people.²¹

I think of the 'religious heritage' as not only derived from so-called 'traditional religions', but dating back to the first century. Oden in his book *How Africa shaped the Christian mind*²² enlightens us as to the vital role Africa played in the formation of Christian culture

20 KA Busia *Africa in search of democracy* (1967).

21 See JS Mbiti *African religions and philosophy* (1969).

22 TC Oden *How Africa shaped the Christian mind: Rediscovering the African seedbed of Western Christianity* (2007).

throughout the world. Africa gave theological leadership to the Western church. The great African church fathers, such as Tertullian, Origen, Cyprian and Augustine, were pillars of the African church and the West.

There is a myth that Christianity is foreign to Africa and was brought here by white missionaries 300 or 400 years ago, when in fact it has been part of Africa's heritage for centuries. We also forget that much of Christian history occurred in Africa and that if you remove Africa from the Bible and Christian memory, then you remove many important stories of salvation history. This 'religious heritage' can give immense confidence to both lawyers and religious leaders in helping Africa to address its challenges. This 'religious heritage' is also what the African concept *ubuntu* is about. *Ubuntu* puts emphasis on our common humanity – I am because you are – and therefore we all exist in community and must treat each other with respect and dignity. This respect for one another also means respect for the core values that hold society together.

The nurturing of spirituality can instil reverence for God, which brings about *integrity* and *honesty* in people to not only curb corruption, but also to instil a reverence for law. The reverence for law is the heartbeat of the rule of law, which is critical for Africa to develop. Within the heart of the rule of law we must include respect for diversity of which many communities are comprised.

We see law and religion in Africa in concord as living expressions of people's desire to create channels of co-operation, in other words, seeking to do the right thing at every turn and religion as focusing on the ultimate meaning and purpose in life, so that people can live to their highest and best potential in life. This is only possible with the gift of wisdom working in men and women who are wise and good, who are courageous and just, who love kindness and walk humbly with God. Such can bring about respect for the rule of law and development for the benefit of all God's people in Africa. This is the dream of God and our duty to realise it.

Religion and the republican state in Africa: The need for a distanced relationship

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Summary

This article argues for a separation of religions from governance in the republican states. In this era of expansion of the concept of sovereignty and the generalisation of human rights, the influence of dominant religions on legislation and governance cannot be justified. Religion, if it is to be true to itself, should not allow its use for political gain and neither should it seek to usurp political power to advance its goals. To do otherwise will set the stage for the abuse of the rights of sections of citizens. The majority of African states are republican and it is argued that, having regard to the diverse nature of these states, it will be better for national cohesion if religions are excluded from the political and legal systems.

1 Introduction: A secularist proposal

The republican state is inherently a democratic one in which the equality of all should constitute a fundamental tenet. A state is republican because it is the citizens that are sovereign¹ and each is equal in all respects, including thought and conscience. Certainly, it would be a contradiction to think of a republican state that imposes a dominant religious belief either expressly or insidiously on all its citizens.

A denial of religious liberty is perhaps the most invidious means available for those that contrive to dehumanise other fellow human

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1 Art 4(1) of the 1992 Constitution of Ghana, eg, proclaims that '[t]he sovereign state of Ghana is a unitary republic', while art 1(1) declares that '[t]he sovereignty of Ghana resides in the people of Ghana'. See also art 3 of the Constitution of the Republic of Benin.

beings, and the most devastating weapon that can be deployed for that purpose is the law operating, as it does, through the instrumentality of the state. The use of law and state for such purposes can be brazen and open, whereby the state proclaims open support for a particular religion, while others are tolerated or prohibited outright. An example can be found in the Constitution of Mauritania, which proclaims Islam not only as the state religion, but also says that a citizen can only aspire to be head of state if Muslim. Similarly, the Preamble of the Constitution of Malawi declares Christianity to be the state religion, but without expressly limiting the presidency to Christians.

Apart from outright proclamation of a state religion, there can also be the more subtle subjection of sections of a population to the obedience of laws and policies that are inherently the tenets of one religion. Minorities, in fact, become disadvantaged in conscience, because they feel inhibited from challenging the religious beliefs of the majority of the dominant group, while the latter takes it for granted that by the mere fact of their dominant position, whatever agrees with their conscience should constitute the law for all.

Conceptually, it is possible, like the human rights law theorist, Louis Henkin, following the steps of other theologians, philosophers and academics, does, to endeavour to distinguish between 'religion' and 'religions'² according to which distinction 'religion' becomes general and abstracted as compared to 'religions', which is a reference to particular 'concrete historical communities with members, practices and boundaries'.³ This article is not against the right to 'religion' being guaranteed by the state. Rather, what it seeks to argue against is any open or subtle legislation in support of 'religions' in African countries. This position follows from the strong belief that the socio-economic and political circumstances of Africa do not favour a marriage between the state and religions and that any such relationship is subject to exploitation and could be dangerous for the image of the particular religions and for the cohesion and stability of the state. This is especially the case in a republican state that is built on the principles of equality.

This article calls for secularism, but not secularism as conceived as 'the disappearance of religion altogether'.⁴ According to legal scholar Pimor, secularism is capable of having many meanings for, as she observes:⁵

2 L Henkin 'Religion, religions and human rights' (1998) 26 *Journal of Religious Ethics* 229-239.

3 As above.

4 A Pimor 'A collection of states or a state of mind: The religious and spiritual dimensions of European citizenship' in N Doe & R Sandberg (eds) *Law and religion: New horizons* (2010) 212.

5 As above.

Secularism can refer to the institutional separation between state and church; to the disappearance of religion altogether; or to the displacement of religion in the public sphere. It can indicate a state of neutrality between religion and the state, and between religions within states, and it can also place itself as the rival of religion.

This idea of a separation of the state and religion has exercised the minds of great philosophers of yore. John Locke advanced a number of reasons why the civil ruler should not get involved with the spiritual aspect of the individual's life, the chief one being⁶

because the care of souls is not committed to the civil magistrate, any more than to other men. It is not committed unto him, I say, by God; because it appears not that God has ever given any such authority to one man over another as to compel anyone to his religion. Nor can any such power be vested in the magistrate by the consent of the people, because no man can so far abandon the care of his own salvation as blindly to leave to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace.

Similarly, Durham and Scharffs describe the view of the modern political philosopher, John Rawls, as being based in the notion that⁷

in a liberal constitutional democracy, when citizens or officials seek publicity to justify their policies, they should rely only on reasoning accessible to all rational citizens, and should refrain from invoking reasons, such as religious justifications, that are not cogent to all rational people.

A state that imposes the tenets of one religion either directly or indirectly on others is nothing but bankrupt of spirituality, and that state has no common soul upon which to build its democratic essence. It is possible to give recognition to the spirituality of a group of people without requiring of them some particular religious belief. Moreover, if the relationship between religions and the political authority is left unchecked, politically-hungry individuals or groups can manipulate religion to serve their political ends. There is always the possibility that secularism itself could be viewed as 'a kind of substitute religious conviction and an ideology in the service of power politics'.⁸ But in the circumstances of Africa, secularism would be a better political ideology than religion.

2 Religion and human rights

The right to religious freedom is a fundamental prerequisite for every other right, both physical and conceptual, and the worst form of abuse and discrimination that can happen to any human being is to

6 J Locke *A letter concerning toleration* trans W Popple (1796), quoted in WC Durham Jr & BG Scharffs (eds) *Law and religion: National, international and comparative perspectives* (2010) 15.

7 Durham & Scharffs (n 6 above) 551.

8 Pimor (n 4 above) 212, quoting T Halik 'The public role of religion in a united Europe: A Central-European perspective' (2006) 7 *Political Theology* 361.

be persecuted for the reason of how one conceives and practically relates to God. A person whose physical liberty is restrained is very much alive if his or her religious conviction remains strong, but that person who has been denuded of his or her faith is dead. This is the reason why the laws of the land should not impose one religious tenet on every citizen and use state infrastructure to compel conformance. It is for this reason that international human rights instruments and the constitutions of a number of African states guarantee the right to freedom of thought, conscience and belief in addition to religion.⁹

Admittedly, this republicanist or secular approach carries the danger of various religious groups challenging seemingly innocent legislation of the state directed at one national issue or the other. Legislation to control the use of certain drugs have become subject to religious challenge. Examples of these exist in a number of American judicial decisions, as well as African jurisdictions, in which attempts have been made to balance the secularity of the state against that of the right to religious manifestation of individuals or groups. In the Ghanaian case of *Nyameneba & Others v The State*,¹⁰ for instance, the appellants were members of a religious sect charged with possessing Indian hemp, a banned herb. According to evidence that was freely given by the appellants, they had been cultivating the herb and using it as incense for invocation at their worship, making soup out of it, boiling and using it as medicine for all kinds of ailment with success. They called it the 'herb of life'. Indeed, it is not disputed that the appellants were honestly ignorant of the fact that the herbs in question were Indian hemp. The Supreme Court reversed their conviction on the principle that, although ignorance of the law is no defence, ignorance of facts is a complete defence. Without expressly stating so, the Court avoided what could have been a clash between religious inclination and a secular legislation by resort to principle of ignorance of facts as a defence. The Court thereby established a balance between the law and the genuine belief of the appellants; although it is obvious that the appellants could no longer claim ignorance of fact for any future use of the herb. Similarly, in the United States case of *Smith v Board of School Commissioners of Mobile County*,¹¹ the Court refused to accede to a request that a number of school textbooks be withdrawn from the school system because they allegedly promoted secular humanism. The Court satisfied itself that the use of the particular history and social studies books was purely secular.¹² From these examples alone, enough direction can be distilled to guide African states to pursue a relatively neutral path of secularism in conformity with the secularism that is required of the modern state.

9 See, eg, arts 21(1)(b) & (c) of the 1992 Constitution of Ghana.

10 [1965] GLR 723.

11 827 F.2d 684.

12 See also the *Nigerian case of Archbishop Okogie v The Attorney-General of Lagos State* [1981] 2 NCLR 337.

3 Relationship between religion and the state

In his paper 'Religion, the state and law in Africa',¹³ the Ugandan jurist, Daniel Nsereko, identified three broad categorisations of the relationships between religion and the state in Africa as follows: (1) separation of church and state; (2) supremacy of religion over the state; and (3) subordination of religion to the state. A study of the various constitutions of the countries of Africa will place some in the first category and others in the second. The third phenomenon is operative in cases where we find some particular individuals utilising the influence of religion for political purposes.

In the first group are a number of states whose constitutions are categorical in the separation of church from the state. Examples are Angola, Benin and Ethiopia, among others. The Constitution of Angola provides with no ambiguity in article 8:

- (1) The Republic of Angola shall be a secular state, and there shall be separation between the state and churches.
- (2) Religions shall be respected and the state shall protect churches and places and objects of worship, provided they abide by the laws of the state.

Similarly, the Constitution of Ethiopia states clearly in article 11:

- (1) State and religion are separate.
- (2) There shall be no state religion.
- (3) The state shall not interfere in religious matters and religion shall not interfere in state affairs.

The Constitution of Benin goes even further in the direction of secularism, prohibiting in article 156 any revision of the Constitution that would undermine the republican form of government and the secularity of the state. The Constitution of Ghana in article 55(4) provides that membership of a political party 'shall not be based on ethnic, religious, regional or other sectional divisions', and in article 56 prohibits Parliament from legislating to impose a 'common programme or a set of objectives of a religious or political nature'.

Nsereko contends that absolute separation of church and state is unattainable, particularly in the circumstances of African states, because of the obvious fact that the various religions are needed to provide or supplement educational, medical and other social services.¹⁴ In the strict sense, being secular should not mean a total exclusion of these religions from those areas of social service. It is possible to conceive their involvement as that of an ordinary individual's or group's involvement in the provision and management

13 D Nsereko 'Religion, the state and the law in Africa' (1986) 28 *Journal Church and State* 269.

14 Nsereko (n 13 above) 272.

of such services, without such individual necessarily exercising any political influence. Secularisation does not therefore necessarily exclude religions from participation in the provision of social services. In their bid to serve society, however, religions must keep within the law as set forth by the political authorities.

In the sphere of education, for instance, the right to establish educational institutions as a means of propagation of one's ideas has been upheld in various jurisdictions.¹⁵ The Court of Appeal in Nigeria, for example, affirmed the claim that a private person or organisation could establish an educational institution for this purpose. In its description of the relationship between the state and the citizen, the then President of the Court of Appeal, Justice Mamman Nasir, explained:¹⁶

It is not our system that a child or any citizen, for that matter, is a mere creature of the state. In our system the state has no right to interfere with the freedom or any other constitutional right of the citizen save as allowed by the Constitution itself. In our system there is a mutual and co-existing relationship in which the state owns the citizen and the citizen also owns the state and each must protect the interest of the other.

Within that relationship there should be freedom within which the individual should operate without being unnecessarily inhibited by the state just because of the religious idiosyncrasies of some dominant groups within the state.

It should be possible to create a balance to the effect that where the religious practice of a group does not derogate essentially from the overall interest of the rest of the society, then the state should be circumspect in its compulsion of the group to adhere to what the majority may perceive as the best for the generality of society. This approach can create some difficulties when it comes to the determination of what accords to the strictly-secular interests of the society for, as noted by the American Chief Justice Warren Burger in *Wisconsin v Yoder*:¹⁷

A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.¹⁸

In that case, the Supreme Court upheld the contention of the Amish religious group that the conviction of parents who declined to send their children to school after the eighth grade was a violation of their free exercise of their right to religious freedom. There was evidence to the effect that a strict application of the law requiring compulsory school attendance of children to age 16 for Amish children 'carries with it a very real threat of undermining the Amish community and

¹⁵ See *Archbishop Okogie* (n 12 above).

¹⁶ *Archbishop Okogie* (n 12 above) 352.

¹⁷ 406 US 205 (1972).

¹⁸ See extract in *Durham & Scharffs* (n 6 above) 216.

religious practice as they exist today'.¹⁹ In balancing the interest of the state and that of the Amish, Justice Byron White argued:²⁰

Since the Amish children are permitted to acquire the basic tools of literacy to survive in modern society by attending grades one through eight and since the deviation from the state's compulsory education law is relatively slight, I conclude that respondents' claim must prevail, largely because religious freedom – the freedom to believe and to practice strange and, it may be, foreign creeds – has classically been one of the highest values of our society.

The difficulty is in the determination of the degree of departure of a group's interests from that of the larger society. However 'relatively slight' that departure might be, it should not justify a complete subjugation of the interests of minority religious groups to the power of the state.

4 Supremacy of religion over the state

It is when a dominant religion or religions control a state and its institutions that those social services, particularly education, become tools for proselytising, and individuals who are not adherents become compelled to subject themselves to the overwhelming influence of the dominant religious groups. That was the situation in the old monarchies that were built around some religious convictions. Those were the periods when the monarch determined the religious leaning of the subjects and other non-religionists existed at the pleasure of the monarch. Religion and law were two very essential and intertwined normative sources for the management of human societies. The monarch's religious beliefs determined the nature of the laws that govern the domain. This policy was couched in the maxim *cuius regio, eius religio* – whose realm, his religion.²¹

The consequence of this model for religious liberty and human rights is obvious: The monarch's commitment to respect for other religious faiths could determine the degree of respect for the rights of others. During the sixteenth century, the principle was adopted to end the religious wars in Europe, but it nevertheless failed to secure religious freedom in an increasingly pluralistic religious environment. Within our contemporary republican systems, the conception of *cuius regio, eius religio* can no longer hold.

In traditional African societies, there has been an even stronger connection between religion and legal norms. Every aspect of life in traditional African society had a religious connotation; therefore religion regulated legal norms as well. Even the planting and

19 Durham & Scharffs (n 6 above) 215.

20 Durham & Scharffs (n 6 above) 217.

21 Durham & Scharffs (n 6 above) 78. See also M Evans 'Historical analysis of freedom of religion or beliefs as a technique for resolving religious conflicts' in T Lindholm *et al* (eds) *Facilitating freedom of religion or belief: A deskbook* (2004) 4.

consumption of certain crops was often determined by religio-legal norms. Among some traditional people in Ghana, the newly-harvested yam could not be consumed until after the yam festival, which was intended as a religious programme or thanksgiving to God for a fruitful year. Nevertheless, the fact of pluralism and the growth of and transformation of many otherwise traditional enclaves into the national cosmopolis has led to a derogation from strict adherence to these religious and social imperatives.

5 Consequences of intermingling of state and religion

A strong linkage between religion and political orientation was introduced into Africa by both Christians and Islamic colonial powers. The temptation for the misuse of religion by dominant groups to attain political or social influence in such circumstances is great. The religions themselves might deem such collaboration as apt for the political influence that would inure to their particular group. However, when such a marriage exists between the state and a religious group, any failure by the political authorities also taints the image of the religious group. The possible consequences of the marriage of religious and political authority were well stated by Archbishop Anastasios of Albania, who has observed:²²

In a pluralistic society, religious communities maintain a certain power but they must be careful to avoid the temptation to identify religion with a particular political party. This can prompt them in a dangerous direction. Political parties are mixed with many other interests, and the rules of politics are quite different from the rules of religion. Religion must promote external values and not allow political programmes and persons to use it for egotistical interests at the expenses of others. We must focus on how to make religious values instruments for a better society. Religion should promote freedom, justice, care for the creation and respect for the freedom of conscience-for all, not only for those who belong to our religious group.

The human propensity, as further captured by Archbishop Anastasios, is that²³

too often we underscore human rights as long as we are minorities. But when we become majorities, we suddenly take on a different attitude – forgetting about the equal rights of people, the other faith, or life stance.

In American history, the question of the nature of the relationship that should exist between the state and religion was said to have had two broad approaches,²⁴ the first of which was associated with Roger Williams, founder of the colony of Rhode Island, who called for a 'separation of religion from state to protect the "garden" of the

22 Archbishop Anastasios 'Developing shared values and common citizenship in a secular and pluralistic society: How religious communities can contribute' in Lindholm *et al* (n 21 above) 693.

23 Archbishop Anastasios (n 22 above) 697.

24 Durham & Scharffs (n 6 above) 18.

church from the “wilderness” of the secular order’.²⁵ The second was Thomas Jefferson’s support for a separation approach informed by the French experience, according to which he ‘defended separation with the aim of protecting state institutions from excessive religious influence’.²⁶ These two views also apply in Africa, where the experience has been that of a political game defined by the struggle of political groups to control political power at all costs, not necessarily for the benefit of the generality of the populace, but as a step towards the control of economic power for personal gain.

Religion is ‘a source of value-, identity- and meaning-making processes’,²⁷ and the influence of the modern state on the lives of its inhabitants is quite pervasive. To allow a particular religious faith to ride on the back of the state under these circumstances could create a state in which the influence of that religion becomes tied to the political interests, and the political interests become the tools for the religious elites. The blood-chilling evidence of the genocide committed against the Bosnian Muslims in Srebrenica and Potocari in 1995 is a stark reminder of the fact that even in modern times, where one religion has the absolute support of the state, religious intolerance could easily degenerate into pogrom. A less violent example is the case of *Manoussakis & Others v Greece*,²⁸ in which the European Court of Human Rights took the view that the required process for the registration of places of worship has in its application in Greece shown ‘a clear tendency on the part of the administration and ecclesiastical authorities to use these provisions to restrict the activities of faiths outside the Orthodox Church’.²⁹ There was evidence that the Greek Orthodox Church, which is the dominant church in Greece and has a historic place in Greek society, has led to allegations of interference with and oppression of minority religions by the state and the dominant Greek Orthodox Church.³⁰

The rather unbelievable extent to which religious faiths could be abused for political gain was evidenced in the South African apartheid system, which was proclaimed to be predicated on the biblical rights of the Afrikaners to rule over all others and therefore was justification for its policy of racial segregation and discrimination.³¹ The ridiculousness of this assertion would have been more clearly exhibited if, as pointed out by human rights law scholar Courtney Howland, the apartheid state had been allowed to argue before the

25 As above.

26 As above.

27 Pimor (n 4 above) 192.

28 European Court of Human Rights, Application 18748/91, Eur Ct HR (26 September 1996).

29 See Durham & Scharffs (n 6 above) 276, for extract.

30 As above.

31 Durham & Scharffs (n 6 above) 341, quoting CW Howland ‘The challenge of religious fundamentalism to the liberty and equality rights of women: An analysis under the United Nations Charter’ (1997) 35 *Columbia Journal of Transnational Law* 271 347-349.

International Court of Justice in its Advisory Opinion on Namibia³² that 'that Afrikaners' freedom of religious belief would be deeply infringed if they were not able to assert their divinely-ordained supremacy over Africans'.³³ Yet, still, some religions believe that it is their right as the dominant religion to impose their rule on the whole country. We can see signs of this in rebel movements such as the Lord's Resistance Army of Uganda and the Boko Haram group in Nigeria. These are the extreme manifestations of the tendency to conjoin religious faith with political authority, but it can also be seen in such forms as the creation of political parties based on particular religious faiths.

From the perspective of states of Africa that have become religiously diverse and politically democratic, the question that needs to be addressed is whether the republican system will not be better served if religious conceptions are excluded from the legal system. Does not the multi-cultural and multi-religious nature of the modern state necessitate a distancing of constitutions and legal norms from the influence of religious convictions? Why should Judeo-Christian religious principles underlie the legal norms that apply in a country with mixed religious affiliations that include Christians, Muslims and Traditionalists? In the same vein, why should Islamic principles underlie the legal norms in multi-religious states? Is it not possible to have a state that supports religious freedom in principle without unwittingly or overtly imposing some particular religion? In an increasingly diverse world, where populations and people of diverse religious persuasions are becoming more and more mixed, it has become more imperative to delink religious beliefs from governance systems. To do otherwise will be to keep aglow the fire of religious intolerance and its consequences of discrimination and fanaticism, which eventually infect the state's stability and democratic enterprise, as has been experienced in African countries such as Sudan, Rwanda, Côte d'Ivoire, Egypt and Tanzania.

Unfortunately, the perception is that the parochial interests of dominant religious groups seem to be on the increase in Africa. According to a 2010 poll carried out in a number of African countries,³⁴

in virtually all the countries surveyed, a majority or substantial minority (a third or more) of Christians favour making the Bible the official law of the land, while similarly large numbers of Muslims say they would like to enshrine Islamic law.

32 In 1971, the International Court of Justice (ICJ) heard the case concerning the legality of the South African occupation of Namibia. The ruling of the Court is what is known as the Advisory Opinion on Namibia.

33 As above.

34 Pew Forum on Religion and Public Life *Tolerance and tension: Islam and Christianity in sub-Saharan Africa* (2010).

In Nigeria, for example, 70 per cent of Christians favour biblical support for civil laws, while 71 per cent of Muslims favour making Shari'a the official law - in Uganda the preference for law based on their own religion gets the approval of 64 per cent of Christians and 66 per cent of Muslims; in Ghana the approval of 70 per cent of Christians and 58 per cent of Muslims; in Liberia 63 per cent of Christians and 52 per cent of Muslims.³⁵ These figures confirm the deep religious nature of Africans and their desire to have their religious norms integrated into their ways of life. It is, however, my proposition that the modern African state, particularly the republican state, will better be served if religions and their respective norms are kept out of the regime of the law and governance. This proposition follows from the conviction that the infusion of religions and their tenets into the ordinary laws and their further influence in governance would increasingly generate conflicts within the body politic. It would create the opportunities for politically-ambitious individuals and groups to endeavour to utilise the powerful institutions of religion to achieve and perpetuate their interests in increasingly multi-religious societies of Africa.

The colonial experience of African countries brought in its trail the infusion of civil laws with religious injunctions. Governance systems came to reflect the influence of the colonising nation's religious inclinations. These religious influences persist even into these modern times in which various communities have become increasingly mixed. Even in relatively less religious, modern Europe, the temptation for religious majorities to want to impose their conscience on the rest is still evident. In the case of European Union in 2004, a number of states proposed that the constitutional treaty should include reference to 'Europe's Christian roots'.³⁶ Indeed, Poland's foreign minister was said to have urged support of the proposal for the reason that '[i]t is the Christian faith that has shaped European culture and is inseparably linked with its history'.³⁷

Proponents of this approach maintain that the reason for this proposition is 'not to profess Europe to be Christian but merely to acknowledge the pivotal role played by Christianity in the history of Europe, and as the source of its values'. By way of compromise, the Preamble to the Treaty on the European Union was amended to make reference to the 'cultural, religious and humanist inheritance of Europe'. That perhaps was a better approach, for the original proposal would have been, as observed by Bruce Robinson of the Ontario Consultants on Religious Tolerance, a huge and serious mistake and created barriers to unity.³⁸

35 As above.

36 Pimor (n 4 above) 205.

37 Quoted in Pimor (n 4 above).

38 BA Robinson 'Do "God" and "Christianity" have a place in the European Union Constitution?' (2003), http://www.religioustolerance.org/const_eu.htm (accessed 31 January 2014), referred to in Pimor (n 4 above) 205.

The temptation to promote one religion over and above others in the political domain is not, therefore, an issue for Africa alone; other regions of the world have tasted it and strenuous efforts have been made to contain it. Another example of confronting this tendency to promote religious dominance using political authority was replicated in the events leading to the Turkish case of *Refah Partisi (Welfare party) & Others v Turkey*,³⁹ in which the Turkish Constitutional Court dissolved the Refah Party and also suspended the political rights of some of its leaders for the reason that its leaders advocated and made proposals tending towards the abolition of secularism in Turkey, including a call by its leaders for the secular political system to be replaced by a theocratic legal system and a warning that 'blood will flow' if there was an attempt to close theological colleges. The charges against Refah also included its leaders' advocacy of the wearing of Islamic headscarves in state schools contrary to judicial decisions of the Constitutional Court. Based on these allegations, the Constitutional Court dissolved the Refah Party, confiscated its assets, and banned its leaders from holding office in other political parties. The decision of the Constitutional Court was based on the position that secularism was an indispensable condition for democracy guaranteed by the Constitution. A further consideration was that the principle of secularism was safeguarded by the Constitution in light of the country's historical experience. The Court took the view that the rules of Shari'a were incompatible with the democratic regime and further that the principle of secularism prevented the state from manifesting a preference for a particular religion or belief. Aggrieved by the decision of the Constitutional Court, leaders of the party filed an application with the Strasbourg Court which concluded that⁴⁰

[t]he acts and speeches of Refah's members and leaders cited by the Constitutional Court were imputable to the whole of the party, that those acts and speeches revealed Refah's long-term policy of setting up a regime based on Shari'a within the framework of a plurality of legal systems and that Refah did not exclude recourse to force in order to implement its policy and keep the system it envisaged in place. In view of the fact that these plans were incompatible with the concept of a 'democratic society' and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court ... may reasonably be considered to have met a 'pressing social need'.

In this case, both the Turkish and European courts took decisive steps to nip in the bud what would otherwise have degenerated, to make an African analogy, into a Sudan-like scenario in which religious intolerance became state policy.

39 Applications 41340/98, 41343/98 & 41344/98, Eur Ct HR (Grand Chamber Decision, 13 February 2003). See extract in Durham & Scharffs (n 6 above) 575 ff.

40 As above.

6 Lessons from Sudan and Rwanda

When a religion rides on the back of political authority, it runs the risk of some other political group devouring it when the tide turns. It is in the nature of political power to want to annihilate both real and perceived opponents – at least that has been the political experience in much of Africa. The catastrophe that can befall a modern state when religious people ride on the political authority inherent in the state has been clearly demonstrated in Sudan and Rwanda, in favour of Islam in Sudan and in favour of Christianity in Rwanda. Although the two examples are not strictly speaking similar in terms of their factual situations, they nevertheless provide examples of how, when we allow religions to use state authority for parochial interests, both the state and religion generally lose their values to debauchery.

The war in Sudan has been blamed principally on religious differences and described as possibly 'the worst humanitarian disaster in the world today'.⁴¹ The policies since 1955 of Arabisation and Islamisation of the whole country, including the dominantly Christian south, eventually plunged the country into war. Several efforts to patch up the differences failed. The example of the Sudan shows how difficult it can be to attempt a peaceful settlement of conflicts underlined by religious differences because religious beliefs are a matter of faith that most often have no regard for reason. For the Sudanese Islamic government, the whole country was to be governed according to Islamic tenets and therefore Shari'a was imposed on the whole country, to govern even the non-Muslims. For the predominantly Christian southerners, therefore, 'Islam is not just a religion, but also Arabism as a racial, ethnic, and cultural phenomenon'.⁴²

For these two groups, it was each side's respective position that their interests should dominate. For the Islamic north, the Sudan had to be Arabised and Islamised at all costs; for that was the only way the ideal Islamic state could be realised. For the Southerners, Islam and Arabisation were simply the continuation of the domination of their lives. These positions could not favour amicable resolutions for peaceful co-existence. The eventual split of Sudan into two different countries should therefore not surprise us. The lesson is clear that we should de-link religious interests from national interests.

The role of some religious leaders in the Rwandan genocide exists as one of the most embarrassing incidents of religious failure in Africa. A 1991 census put the number of Christians in Rwanda at just under 90 per cent of the total population.⁴³ It has, however, been recorded that '[n]ot only were the vast majority of those who participated in the killings Christians, but the church buildings themselves also served

41 FM Deng 'Sudan – Civil war and genocide' (2001) 8 *Middle East Quarterly* 13–21.

42 As above.

43 T Longman *Christianity and genocide in Rwanda* (2010) 4.

as primary killing fields'.⁴⁴ Indeed, it is reported that '[m]ore Rwandese citizens died in churches and parishes than anywhere else'.⁴⁵ While the Roman Catholic Church has been castigated for its failure to protect hundreds of Tutsis and moderate Hutus, the Islamic leaders in Rwanda have been extolled for their endeavours to protect the persecuted.

The men of God and their followers could not have been responding to the tenets of the church. They must have been responding to some other factors, but nonetheless using the church as a facilitator of the crime of genocide. In the words of one survivor who was hidden in the sanctuary of a church, '[p]eople came to Mass each day to pray, then they went out to kill'.⁴⁶ Killing cannot be a part of the religious injunctions of the Catholic Church, for instance, thus the response of Pope John Paul II to the accusation of the Church's complicity in the genocide was to argue that '[t]he Church itself cannot be held responsible for the misdeeds of its members who have acted against evangelical law'.⁴⁷

Without doubt, it is far-fetched to claim that the church officially sanctioned the genocidal acts in Rwanda, but the fact remains that churches were extensively used in the course of the pogrom. In the conclusion to his analysis of the complicity of the churches in the Rwandan genocide, the political scientist Timothy Longman cautioned that '[i]f religious institutions become too closely tied to state power, they have the capacity to legitimise abhorrent state actions'.

7 Conclusion: The African secular republic

When monarchs had absolute power, the people were subjects. Under the republican democratic systems, the people are citizens with equal rights. Some of these citizens are elected or appointed to preside over the affairs of state. Therefore, if the republican state derives its authority from the people collectively, then no particular religion could take precedence over others – each citizen must be at liberty to conceive and worship God as he or she pleases. Assignment of official roles to particular religious groups by the state, especially through the constitution, is bound to create a feeling of privileged position in the psyche of the particular religious groups, to the discomfiture of those not so specifically accorded such a position. The misapplication of religion for personal, secular gain is a phenomenon that cannot be ignored, particularly when the influence of religion is manipulated to secure the passage of legislation and policies that would serve parochial interests.

44 As above.

45 Quoted in Longman (n 43 above).

46 Quoted in Longman (n 43 above) 7.

47 'Pope says church cannot be blamed in Rwanda' *New York Times* 21 March 1996 A3, quoted in Longman (n 43 above) 7.

Governments should have the authority and capacity to provide for the individual's material wellbeing; but the individual's spiritual wellbeing should be left to be determined between that individual and God, so long as it does not impinge on the rights of others. The whole idea of a political group vesting itself with authority to determine the faith of others is nothing but a skewed way of usurping spiritual authority for political superiority. Republicanism supports the guarantee of the right to religious freedom, but not religious control of political life, nor political control of religious life. Such will not inure to the stability of the republican states of Africa. It is the case that we should take conscious steps to de-link the religions from the state and governance, but without throwing out the idea and practice of religion from our lives. The law should endeavour to serve the interests of all – not just a section.

From social hostility to social media: Religious pluralism, human rights and democratic reform in Africa

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Summary

This article examines the new terrain of religious freedom and human rights in Africa, with particular attention to the role of social hostilities in restricting religions. In the current environment of 'post-secularism' and the global resurgence of religion, the relationship between government restrictions and social hostilities is particularly complex in Africa, in light of the high degree of religiosity and the notably-intertwined relationship of religion, culture, politics and law, in marked contrast to the secularist and separationist paradigms that prevail in Europe and North America. Paradoxically, though the restrictions on religious freedom in many African nations stem from or have been exacerbated by social hostilities, including pernicious and inflammatory uses of social media, solutions to social hostilities may depend a great deal on empowering religious and civil society groups in the creative and constructive use of social media to change the normative perceptions, attitudes and values that underlie successful constitutional and democratic reform. Indeed, some of these creative uses of social media are already happening, but are threatened by crackdowns on freedom of expression and social media by the state. This article examines uses of social media both to inflame and to reduce social hostilities in recent elections and constitutional referenda in Kenya, Tanzania and Zambia and argues the need for a 'socio-legal' paradigm for understanding both perceptions of religious hostilities and religious human rights claims in their full social, political and cultural context.

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1 Religious resurgence, religious pluralism and religious rights

God is back is the title of a recent book by the editors of *The Economist* on the global resurgence of religion in what is now being called the 'post-secular' era.¹ This assertion is perhaps nowhere more true than in Africa, which has been described as one of the 'most religious places in the world' by the Pew Forum on Religion and Public Life in its 2010 report *Tolerance and tension: Islam and Christianity in sub-Saharan Africa*.² In fact, many, if not most, Africans would likely argue that God never left. Over centuries of colonisation and missionary expansion, particularly in the course of the twentieth century, the world's two fastest growing religions, Christianity and Islam, both gained large numbers of adherents in Africa, effectively dividing the continent between Muslim north and Christian south.³ Religious concerns over a number of issues, including homosexuality, religious pluralism and Muslim-Christian relations, have manifested themselves in recent African political elections and constitutional referenda – sometimes inflaming emotions, offending feelings, and threatening to cross the line into 'hate speech'.⁴ These elections and constitutional reforms have also raised religious tensions between Muslims and Christians in countries with significant Muslim populations and even

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- 1 J Mickelthwaite & A Woolridge *God Is back: How the global revival of faith is changing the world* (2009). For more on the trend of religious resurgence and its international political implications, see MD Toft *et al* (eds) *God's century: Resurgent religion and global politics* (2011); TS Shah *et al* (eds) *Rethinking religion and world affairs* (2012). For discussions of post-secularism and its implications for contemporary society, see PL Berger *The desecularization of the world* (1999); C Calhoun *et al* (eds) *secularism* (2011); E Mendieta & J van Antwerpen (eds) *The power of religion in the public sphere* (2011); EK Wilson *After secularism: Rethinking religion and global politics* (2011); P Gorski *et al* (eds) *The post-secular in question: Religion in contemporary society* (2012). See also M Naim *The end of power* (2013) esp ch 9, for a fascinating chronicle of the decline of traditional sources and sites of power that includes a keen analysis of the 'competition for consumers and for believer in the great religions' as they have sought to hold onto and even expand their authority.
 - 2 For statistics on the growth of Islam and Christianity in Africa and the high levels of religious affiliation, particularly of Islam and Christianity in Africa, see Pew Forum on Religion and Public Life *Tolerance and tension: Islam and Christianity in sub-Saharan Africa* (2010) i-ii 3 and chs 1-2.
 - 3 This pattern of religious division can even be seen within individual countries, on a north-south axis, as in the case of Nigeria and Sudan, and on an east-west axis in places like Kenya and Tanzania, where Muslims inhabit the eastern coastal areas. For an excellent account of these north-south divisions, see E Griswold *The tenth parallel: Dispatches from the fault line between Christianity and Islam* (2010). For a briefer synopsis focused on Nigeria, see also E Griswold 'God's country' *The Atlantic* 1 March 2008.
 - 4 For a detailed review of these religion and constitutionalism developments in Kenya, Tanzania and Zambia, see MC Green 'Religious pluralism in recent African constitutional reform' (2013) 28 *Journal of Law and Religion* 401-39. For a discussion of some of the emerging literature on the relationship between religious freedom and freedom of expression, particularly the problem of hate speech, see MC Green 'Between blasphemy and critique: Freedom of religion and freedom of speech' (2014) 29 *Journal of Law and Religion* 176-96.

in countries where the Muslim population remains relatively small but fears of Islamic incursion loom large.

At the same time that religious tensions and social hostilities have been on the rise in some parts of Africa, so have new means of communication and social interaction. Access to the internet and various online social media has been fuelled in many African countries by the proliferation of cellphones and smartphones, which surpass computers in many cases as the most common means of African access to the digital world.⁵ These social media have played a major role in facilitating democratic and constitutional debate, but in some cases their use has exacerbated social tensions and raised hate speech concerns. The profusion of African digital discourse has also prompted new laws and government initiatives limiting freedom of expression in the name of preventing hate speech prevention. Some of these measures risk threatening important forms of inter- and intra-religious critique, even as they are aimed at defusing religious and ethnic tensions. The clampdown on freedoms of religion, expression and the press in some countries also threatens journalists, activists and religious leaders and organisations, who often serve as key defenders of human rights. Concerns about social hostilities and social media, when they are converted into laws limiting freedoms of religion and expression, thus place in jeopardy larger goals of democracy, religious pluralism and human rights in Africa.

In this article, I examine this new terrain of human rights in Africa around freedom of religion and freedom of expression, with particular attention to the effects of social hostilities around religion and ethnicity – two categories of communal identity which often go hand-in-hand in Africa – with a focus on the potential of social media to either fan the flames of intercommunal conflict or to be a means toward democratic reform. The relationship between government restrictions and social hostilities is particularly complex in Africa, in light of the intertwined relationship between religion, culture, politics and society that can often exist, in marked contrast to the secularist and separationist paradigms of religion and state that exist in Europe and North America. I argue that the current context of global religious resurgence and technological advances in communication, coupled to the weak, corrupt and increasingly authoritarian governments in some African nations, has created situations in which social hostilities around religion and ethnicity and their expression, particularly in social media, warrant close attention. Yet, even as social hostilities around religion and ethnicity are at risk of exacerbation through pernicious uses of social media, the solutions to these hostilities may also lie in civil society and religious organisations being empowered to use social media creatively and constructively to disrupt and transform in a more positive direction the normative perceptions, attitudes and

5 See T Shapshak 'Africa not just a mobile first continent – It's mobile only' *CNN.com* 4 October 2012.

values that are the necessary underpinning for democratic reform and the development of an African human rights culture.

With these ideas in mind, I examine the current context of religious human rights, social hostilities around religion and ethnicity, and the rise of social media, in the context of recent political elections, constitutional referenda and civil discourse in Kenya, Tanzania and Zambia. I pay particular attention to Muslim-Christian relations in these countries,⁶ as well as to more general questions of religious freedom and religious pluralism, especially where these have manifested themselves in social media. In that connection, I analyse the prospects for religious freedom and religious pluralism in these countries in connection with the larger context of human rights - especially freedoms of religion and expression - that are increasingly at risk in these East and Southern African nations. I conclude with some remarks on the need to develop a 'socio-legal paradigm' for understanding religious human rights in Africa that goes beyond the prevailing secularist and separatist paradigms of religion-state relations and is capable of taking into account perceptions, attitudes and values that might seem imperceptible, intangible, and even illusory, but which nevertheless have a profound effect on religious pluralism, democracy and human rights in Africa today.

2 A Durban epiphany: Religious human rights and the rise of social hostilities

In its ongoing examination of global religious forces, the Pew Forum on Religion and Public Life (recently renamed the Religion and Public Life Project) has in recent years kept a tally of global restrictions on religion, including both *government restrictions* on religion and religious restrictions due to *social hostilities*. In its 2009 report, *Global religious restrictions*, Pew Forum researchers reported that one-third of the world's countries, containing 70 per cent of the world's population, had 'high or very high' restrictions on religion.⁷ The Pew Forum's 2011 follow-up report, *Rising religious restrictions*, reported that one-third of the world's population lives in places where restrictions on religion are increasing.⁸ This most recent Pew study reported that social hostilities around religion reached a six-year peak in 2012 – with Africa among the four out of five world regions where religious social hostilities have increased.⁹ Among Africa's two largest religious groups, 68 per cent of Christians and 57 per cent of Muslims

6 Again, for additional and expanded analysis of Muslim-Christian issues, see Green 'Religious and legal pluralism in recent African constitutional reform' (n 4 above).

7 See Pew Forum on Religion and Public Life *Global religious restrictions* (2009) 1.

8 Pew Forum on Religion and Public Life *Rising religious restrictions* (2011). The statistic is contained in the report's subtitle.

9 Pew Research Center Religion and Public Life Project *Religious hostilities reach six-year high* (2014) 7 25.

reported experiencing some form of governmental or societal harassment.¹⁰

It is especially significant that the recent Pew Forum studies are not limited to government restrictions, but also take into account social hostilities.¹¹ The reports list a number of social hostilities which restrict religious freedom, including 'mob or sectarian violence, crimes motivated by religious bias, physical conflict over conversions, harassment for attire for religious reasons, and other religion-related intimidation and violence, including terrorism and war'.¹² The two categories of religious restriction are not airtight or mutually exclusive. Social hostilities around religion are sometimes actively fomented or passively tolerated by government actors, but they also importantly involve a range of private individuals and groups whose actions serve to restrict religion – including restrictions that religions seek to impose on each other.

Sub-Saharan Africa is not the worst region in the world when it comes to religious restrictions. The Middle East-North Africa (MENA) region, the Asia-Pacific region and Europe all ranked higher than Africa on social hostilities restrictions, with the Americas having the lowest number of both governmental and social restrictions.¹³ Indeed, from 2011 to 2012, sub-Saharan Africa and the Asia-Pacific region were the only regions to show significant decreases in social hostilities around religion, but these decreases were often attributable to improved conditions in just a few countries, whereas 58 per cent of countries in Africa saw rising social hostilities overall.¹⁴ The latest Pew data indicates that the level of social hostilities in sub-Saharan Africa rose slightly above the global median in 2011-2012.¹⁵ Indeed, by some measures, such as the relative length of accounts of the social hostilities section in the International Religious Freedom Reports published by the US State Department, levels of social hostilities around religion in sub-Saharan Africa seem to be increasing even as the levels of government restrictions are decreasing.¹⁶ And it turns out that Kenya, a key country examined in the article, had the second highest increase in its score on the Pew Social Hostilities Index from 2007 to 2012 – exceeded only by Mali, which subsequently plunged

10 Pew Forum (n 8 above) 66.

11 The distinction actually predates the Pew Forum reports, as the United States State Department's International Religious Freedom Reports have, since their inception in 1999, distinguished between religious restrictions that come from legal and policy frameworks, on the one hand, and those that come from 'societal attitudes', more recently referred to under the category of the 'status of societal respect for religious freedom'.

12 Pew Forum (n 7 above) 17.

13 Pew Forum (n 7 above) 14.

14 Pew Forum (n 9 above) 24. African countries in which social hostilities had decreased in the 2011 report covering the period up to mid-2009 included Chad, Liberia and Tanzania. See Pew Forum (n 8 above) 55-57.

15 Pew Forum (n 8 above) 26.

16 Pew Forum (n 8 above) 48.

into civil war.¹⁷ So, social hostilities around religion in Africa may not be as high as in some areas of the world, but they appear to be increasing and are difficult – sometimes deadly – for those who experience them. The near-genocide of Muslims taking place in the Central African Republic is the most recent example.

This recent Pew Forum research on the impact of social hostilities on religious freedom is consistent with earlier research conducted at the Center for the Study of Law and Religion (CSLR) at Emory University. In the spring of 2008, the CSLR convened a consultative workshop in Durban, South Africa, on the topic of 'Law, religion and human rights in Africa'.¹⁸ Our legal, religious and academic consultants at the Durban conference all affirmed the importance of religious human rights in Africa as manifest in constitutions modelled on US, European and international religious freedom norms, generally including constitutional protections of freedom of conscience, religion and belief. Yet, when it came to matters of religious freedom, our Durban consultants emphasised not so much the standard US constitutional concerns about preventing government establishment of religion or protecting the free exercise of religion from state restriction, as reflected in the First Amendment to the US Constitution, but rather the ways in which both religion and the state have proven equally capable of mutual manipulation, co-optation and exploitation of each other in the quest for power and authority. In this larger social, political and cultural context of social hostility and mistrust – sometimes between religion and state, but more often between religious and ethnic groups – our consultants tended to be skeptical of *both* religion and the state.

Indeed, our conversation at Durban would have been much less lively if we had limited ourselves to a discussion of matters of governmental restrictions on religion and religion-state relations. What was fascinating to watch was the way in which our Durban consultants, mostly lawyers and scholars of the law, morphed into cultural anthropologists, sociologists of religion and political scientists in attesting to the complex social and political realities of religion and human rights and the heightened sense of religious competition in Africa in the post-secular resurgence of religion. In these discussions, the focus was less on government restrictions than on religious hostilities and intergroup relations - in other words, what religions do to one another. Our consultants spoke at length, not so much of a 'clash of civilisations',¹⁹ but of perceptions of an intergroup and often

17 Pew Forum (n 8 above) 67. Kenya's more than 6-point rise in social hostilities based on religion exceeded even Nigeria's 4-point increase. Tanzania's social hostilities increased by only 2,5 points, but was significantly exceeded by Zambia's more than 3-point gain.

18 The papers from the consultation were published in JD van der Vyver & MC Green (eds) Symposium Issue on 'The foundations and future of law, religion, and human rights in Africa' (2008) 8 *African Human Rights Law Journal*.

19 See SP Huntington's still-controversial thesis in *The clash of civilizations and the remaking of world order* (1996).

interethnic 'competition of monotheisms' taking place between Christianity and Islam, both religions with a longstanding presence in Africa, but who were now sharpening their rhetoric and stepping up their efforts at proselytisation to convert or re-convert adherents to their religion – and all this despite recent studies showing little religious conversion actually taking place on the ground, as demonstrated in the Pew Forum's report on *Tolerance and tension: Islam and Christianity in sub-Saharan Africa*. Our Durban consultants spoke of the ways in which competitive religious 'branding' involved tended to emphasise religious distinctiveness and religious differences in ways that converted each religion into its most orthodox – and sometimes extremist – forms in ways that both increased group polarisation between Christians and Muslims and tended to marginalise African traditional religions. Many of the concerns about religious and social hostilities that emerged at the CSLR's 2008 Durban consultation were confirmed and validated by the *Tolerance and tension* report.

Another issue that made its way into the Durban discussion was the question of hate speech, including legislation proposed in various parts of the world that would extend the definition of hate speech to include speech that 'offends religious feelings' without rising to the higher standards of harm, incitement to harm, or the promotion or propagation of hatred. At Durban, the consultants highlighted the contrast between the perceived need to place limits on freedom of expression and the strong protections of free speech that exist in the United States.²⁰ The American perspective came under criticism by some of our African consultants, particularly those hailing from conflict or post-conflict zones like the Democratic Republic of the Congo and Liberia, and particularly from Nigeria with its recent and bloody history of religious tensions. Our African colleagues argued energetically against American 'free speech absolutism', arguing that in the multi-ethnic, multi-linguistic, multi-cultural and multi-religious states of post-colonial Africa, restrictions on freedom of expression are justified to preserve public order, public safety and social harmony.²¹

20 The strong constitutional protection given to freedom of expression in the United States was recently reaffirmed in the decisions in *United States v Stevens* 559 US 460 (2010) (upholding First Amendment protections of depictions of animal cruelty); *Snyder v Phelps* 562 US 131 S Ct 1207 (2011) (upholding the right of the Westboro Baptist Church to picket funerals with messages against homosexuality); and *McCutcheon v Federal Election Commission* 102-536 (slip opinion), decided 2 April 2014 (striking down regulations limiting aggregate contributions to federal election campaigns as restrictions on political speech).

21 It is worth noting that the recent Pew reports have pointed out that relatively few countries in Africa (15%) have laws against blasphemy, so it was interesting to hear argument for restrictions on speech potentially offensive to religious believers being invoked and recommended by our Durban consultants; see Pew Forum (n 8 above) 71. On the other hand, our Durban consultants' sensitivity to the potential problem of offending religious sensibilities, without rising to the level of blasphemy laws, could pave the way to a more moderate way to impose limits on speech that promotes religious, ethnic and other forms of hatred, without

As we shall see, 'hate speech', increasingly conveyed through social media and especially along the combustible lines of religion and ethnicity, has become a big issue in the recent elections, constitutional referenda and proposed legislative reforms in a several Eastern and Southern African nations.

3 Texts, tweets and toleration: Recent issues of social hostilities and social media

Recent concerns about hate speech and social media demonstrate the considerable power of social media, in Africa and elsewhere, to alter the political and democratic landscape. Kenya, Tanzania and Zambia are the focus of analysis in this article, but similar issues have arisen in other countries of East and Southern Africa, particularly Rwanda, Uganda and Zimbabwe, where specifically religious hostilities have not been pronounced, but where increasing authoritarian tendencies among leaders Paul Kagame, Yoweri Museveni and Robert Mugabe have led to crackdowns on political opposition and freedom of expression. These threats could eventually extend to religious freedom, since religious leaders and organisations are often leading critics of the state. Recent social science data suggests the existence of important correlations between religious freedom and conflict prevention. In this context, if the eroding human rights climate in some countries eventually restricts religious freedom, the result could be highly combustible. The countries of East Africa, particularly Kenya, Tanzania, Uganda and Rwanda, are linked together by political and legal associations that monitor human rights issues in the region, and they frequently look to each other for lessons on how to conduct elections and constitutional referenda.²² The Southern African nations of Zambia and Zimbabwe also frequently look to their East African neighbours to the north for examples of democracy and development. While restrictions upon space limit the discussion to Kenya, Tanzania and Zambia here, these countries should be seen in terms of their regional relations and spheres of influence. We proceed first to the Kenyan story, since it is the most developed – mostly because legal and constitutional observers of Tanzania and Zambia have been thwarted in recent years by protracted debates over constitutional reform which have so far not borne fruit, but could

suppressing legitimate religious and political critique. This could be part of what is being worked out in the recent concerns about 'hate speech' in many African countries.

22 K Jeffang 'Human rights defenders decry lack of press freedom, etc' *FOROYAA Newspaper* (The Gambia) 21 October 2013. Kenya, Tanzania, Uganda and Zimbabwe, in particular, have shared many of the same human rights problems in recent years and have collaborated in monitoring them, exchanging consultants and monitors to observe democratic processes. Zambia, as the southernmost nation included in this study, is somewhat of an outlier, but has also begun to pay attention to politics among its Eastern and Southern African neighbours.

change considerably the situation of religion and other fundamental freedoms in both countries.

3.1 Kenya: Hate speech and high tech in the 'Silicon Savannah'

Kenya is the number one country for any consideration of the impact of social hostilities and social media on religious freedom and human rights. Kenya has led the region in both social conflict and technological development in recent years. The recent Kenyan 2010 constitutional referendum and 2013 general elections have been bellwethers for both destructive and constructive uses of social media. Both of these recent polls were haunted by the spectre of the violence that followed the elections of 2007 into 2008 – with even earlier precursors in the unsuccessful 2005 referendum to replace Kenya's 1963 Constitution. In the run-up to the 2005 referendum, two human rights organisations, the Kenya National Human Rights Commission (KNHRC) and the Kenya Human Rights Commission (KHRC), took out a newspaper advertisement accusing rival political parties of 'using derogatory, insulting and degrading statements' and 'language that constitute[d] the crimes of incitement to violence and hate speech along ethnic or racial lines' in contravention of section 96 of the Kenyan Penal Code.²³ Many of these insults concerned male circumcision – a religious and cultural ritual practised by the majority and largely Christian Kikuyu ethnic group, but not by the more religiously-mixed Luo, among whom can be found adherents of Christianity, Islam and African traditional religions. They also exposed the interrelatedness of three factors – religion, ethnicity and race – in the Kenyan imaginary of intercommunal and intersectional identities.²⁴ Much of the violence related to the 2007 elections and was also along Kikuyu-Luo lines. Most of the attacks were said to have come from supporters of the draft Constitution and its proponent, President Mwai Kibaki, a Kikuyu, and were directed at Raila Odinga, a Luo, and the leader of the opposition party. In this way, ethnic division in Kenya took on a religious cast in connection with aspersions over the ritual of circumcision.

In 2007, the Kenyan government attempted preemptive action against hate speech before the elections in drafting the Prohibition of Hate Speech Bill 2007, which was criticised by international freedom of expression monitoring groups at the time.²⁵ The Prohibition of Hate Speech Bill was reintroduced in 2008 and eventually enacted

23 'Kenyan leaders accused of hate speech in advance of the referendum' *BBC* 16 November 2005.

24 For a discussion of the fluidity of African notions of identity in the Nigerian context, see MC Green 'Religion, family law, and recognition of identity in Nigeria' in Symposium Issue 'Shari'a, family, and democracy: Religious norms and family law in pluralistic democratic states' AA An-Na'im & MC Green (eds) (2011) 25 *Emory International Law Review* 945-966.

25 Article 19 'Comment on Prohibition of Hate Speech Bill, 2007, Kenya' (2009).

into law in 2009.²⁶ It is worth noting that in neither of these Bills was hate speech against religion specifically differentiated from hatred on the basis of ethnicity, race, culture and other categories of identity.

The Media Council of Kenya also attempted to address the issue of hate speech in advance of the 2007 elections by publishing a set of guidelines for journalists that included a provision that advised the media to 'refrain from giving space or airtime to hate speeches or utterances that might incite violence or cause social turmoil' and to 'avoid using language or expressing sentiments that may further discrimination or violence on any grounds, including race, sex, language, religion, political or other opinions, and national or social origins'.²⁷ These guidelines were directed mostly at the traditional print and broadcast media, as Kenya's social media revolution had not yet reached the point that it would three years later in the 2010 constitutional referendum.

These media measures, coming on the heels of the failed Prohibition of Hate Speech Bill, proved inadequate to prevent the eruption of religiously and ethnically-tinged post-election violence. Violence first erupted in the Rift Valley Province between Kikuyu supporters of Kibaki and the Luo and Kalenjin supporters of Odinga. The violence reached its apogee in the burning of a Christian church in the town of Eldoret that resulted in the fiery deaths of several dozen Kikuyu, half of whom were children.²⁸ There were also riots by Kenyan Muslims in the city of Mombasa.²⁹ Overall, the post-electoral violence is said to have resulted in the deaths of more than 1 100 people and the displacement of 650 000 from homes and villages that were often burned to the ground. There were also hundreds of reports of sexual violence against women, girls, boys, and men – including cases of forced circumcision of men – that finally began to

26 See Prohibition of Hate Speech Bill, 2008, <http://www.knchr.org/ReportsPublications/Bills.aspx>. See also Article 19 *Commentary on the regulation of 'hate speech' in Kenya* (2009). For a good summary of other recent Kenyan laws pertaining to freedom of expression, hate speech, the media and other recent issues pertaining to democracy in Kenya, see TL Lansner *Countries at the crossroads, 2012* (2012), esp 9-10. See also OC Nyambane 'Prosecuting hate speech in Kenya' 21 August 2012, https://www.academia.edu/2554800/Prosecuting_Hate_Speech_In_Kenya. For a survey of hate speech regulations in African countries, see H Maina 'The prohibition of incitement to hatred in Africa: Comparative review and proposal for a threshold' (working paper) (a study prepared for the regional expert meeting on Article 20, organised by the Office of the High Commissioner for Human Rights, Nairobi, Kenya, 6-7 April 2011), http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/HenryMaina (accessed 31 March 2014).

27 Media Council of Kenya *Guidelines for election coverage in Kenya* (2007) 3 para 7, <http://www.cohesion.or.ke/index.php/resources/downloads> (accessed 31 March 2014).

28 J Gettleman 'Fire set by mob at Kenyan church, killing dozens' *The New York Times* 2 January 2008.

29 J Gettleman 'Opposition protesters clash with police in Kenya' *The New York Times* 17 January 2008.

make their way to formal and informal 'truth-and-reconciliation' style courts in 2014.³⁰

A key social media technology that grew out of the violence was the Ushahidi (Swahili for 'testimony' or 'witness') project, which used crowdsourcing and interactive mapping technology to collect eyewitness reports of the post-election violence.³¹ These reports were submitted by e-mail and text message and then uploaded to mapping software that created a temporal and geospatial account of the events. Ushahidi has become a leading Kenyan software development company and a spearhead of technological innovation that has led to Kenya's recent rise as Africa's 'Silicon Savannah'.³² Ushahidi crowdsourcing technology for the purpose of citizen journalism and 'activist mapping' of events using geospatial information systems (GIS) has since been used worldwide to chronicle a range of situations of civil unrest, natural disasters and human rights violations - including the 2010 earthquake in Haiti, the 2011 Arab Spring uprising in Egypt, the 2011 earthquake, tsunami and nuclear disaster in Japan, the 2012 Syrian civil war, and the 2013 attack by Al-Shabaab-affiliated terrorists at Kenya's Westgate Mall in Nairobi.³³

As part of the power-sharing agreement between President Mwai Kibaki and Prime Minister Raila Odinga in the aftermath of the post-electoral violence of 2007-2008, the Kenyan government also established a statutory body known as the National Cohesion and Integration Commission (NCIC) to promote national reconciliation, cohesion and integration through the 'elimination of discrimination based on ethnic, religious, racial and social origin' and the facilitation of 'laws, policies and practices that counter racial, ethnic and religious tensions'.³⁴ The National Cohesion and Integration Act 2008, the NCIC's founding instrument, does not specifically distinguish religious

30 See C Chumo 'Community meetings address legacy of Kenya violence' *Capital News* (Nairobi) 25 March 2014; J Nyanyuki 'Kenyan women want justice over post-election sexual violence' *The Guardian* (UK) 25 March 2014. For a comprehensive account of the 2007-2008 post-electoral violence, see Kenya National Commission on Human Rights 'On the brink of the precipice: A human rights account of Kenya's post-2007 election violence: Final report' 15 August 2008, otherwise known as the 'Waki Report'.

31 See the Ushahidi website at <http://www.usahidi.com>.

32 D Smith 'Kenya building a digital future in Africa's Silicon Savannah' *The Guardian* (UK) 30 October 2012; G York 'The entrepreneurs of the Silicon Savannah' *The Globe and Mail* (Canada) 3 September 2013; M Amore 'Kenya sees the light with tech; Mobiles open up Silicon Savannah' *The Sunday Times* (London) 15 September 2013; J Puhl 'Silicon Savannah: Africa's transformative digital revolution' *Der Spiegel* 5 December 2013.

33 P Meier 'New Kenyan technology can map outbreaks of crises' *The Global Post* 29 November 2009; DK Were 'Nairobi mall attack inspires new apps to aid in an emergency' *The Guardian* (UK) 26 September 2013. For the wider implications of this technology in war and peace and the rise of the 'PeaceTech' movement, see also S Himelfarb 'The quiet revolution' *Foreign Policy* 3 October 2013.

34 For more on NCIC, see the Commission's website at <http://www.cohesion.org.ke>. Other Kenyan government bodies charged with monitoring hate speech include the Communications Commission of Kenya (CCK) (www.cck.go.ke) and the National Steering Committee on Media Monitoring (NSCMM).

discrimination from these other forms of discrimination.³⁵ A training manual produced by the NCIC was informed by a variety of religious and civil society groups, including the Inter-Religious Council of Kenya.³⁶ The manual describes culture as an 'important superstructure in a nation with many subcultures such as ethnicities and religions' and encourages dialogue that 'brings together all religions in search of sustainable peace', and cautions against 'politicisation of ethnicity and religion'.³⁷ The manual also recommends programmes of 'interreligious dialogue' and 'ecumenical dialogue among religious orders' with a view to 'promoting ethnic and cultural diversity'.³⁸ It particularly emphasises the need, among other measures, of a programme of 'religious empowerment' that involves 'enlightening members of the community to understand their own beliefs and appreciate and tolerate the belief systems of others' and which 'abhors religious extremism and embraces religious dialogue to settle differences'.³⁹ In the same vein, the manual identifies 'religious fanaticism and religious bigotry' as 'challenges to national values and good governance'.⁴⁰ These are the main mentions of religion in the NCIC's 185-page training manual. Elsewhere, religion mostly falls within the standard rubric of ethnic, racial, linguistic and cultural differences to be addressed. The manual did include brief mentions of the internet in its analysis of best practices for communication, but these were limited as Kenya's technological revolution was not yet at its current peak.⁴¹

In 2010, looking ahead to the 2013 presidential election, the NCIC produced a revised set of media guidelines for election coverage

35 See National Cohesion and Integration Act 12 of 2008, 24 December 2008, <http://www.cohesion.or.ke/index.php/resources/downloads>.

36 See Kenya Ministry of Justice, National Cohesion and Constitutional Affairs *National Cohesion and Integration training manual* November 2011 xxi 7, <http://www.cohesion.or.ke/index.php/resources/downloads>.

37 Kenya Ministry of Justice, National Cohesion and Constitutional Affairs (n 37 above) 18 19 87.

38 Kenya Ministry of Justice, National Cohesion and Constitutional Affairs (n 37 above) 132. The NCIC's implementation matrix for its strategic plan for 2013-2016 recommends similar efforts at religious dialogue and consultation, including bi-annual meetings of religious leaders, toward the outcome of 'religious community propagating national unity' and to be measured in performance indicators that include, eg, 'sermons spearheading acceptance for diverse religious orientations' NCIC *Strategic Plan (July 2013-July 2016)* (2013) 37. Mapping and monitoring of hate speech are also components of the strategic plan, which includes funds for the purchase of geographical information system (GIS) software along the lines of the Ushahidi model. See Kenya Ministry of Justice, National Cohesion and Constitutional Affairs 28 36 55.

39 Kenya Ministry of Justice, National Cohesion and Constitutional Affairs 114.

40 Kenya Ministry of Justice 146.

41 Kenya Ministry of Justice, National Cohesion and Constitutional Affairs 95 99. It is worth noting that a separate training manual on hate speech for the police does not include specific or extended discussions of questions of religion or of online speech via social media. See NCIC *Police training manual: On the enforcement of the law of hate speech* (2011) <http://www.cohesion.or.ke/index.php/resources/downloads> (accessed 31 March 2014).

noting that religious organisations, civil society, international organisations and government agencies had all been critical of the role that the media had played in fanning the flames of violence in 2007. Radio stations, in particular, were accused of⁴²

incitement, promoting stereotypes and perpetuating hate messages, misreporting events and general misrepresentations ... which is now seen as one of the causes of the post-election violence and can also be blamed for heightening negative ethnicity.

In its detailed list of forbidden hate speech, the guidelines specifically forbid 'speech or utterances that encourage ethnic, religious or group violence', the adjudicative standard being that the 'speech must encourage the audience into some negative action', as well as forbidding other forms of speech and publications in the media that might lead to discrimination or ridicule on the basis of religion or other categories of group identity.⁴³ The 2010 guidelines were also notably expanded to include all electronic media, reflecting the technological advances in communication and social media that had taken hold in Kenya since 2007. The expansion of the 2010 hate speech guidelines was well timed to coincide with the rise of communication technology and social media, as access to the internet in Kenya (in addition to the ubiquitous cellphone usage) has reportedly doubled each year since 2010.⁴⁴

In advance of the 2010 constitutional referendum, predictions of a repeat of the 2007-2008 post-electoral violence were at a fever pitch, particularly in the international press. Whereas religious organisations had led the call to prevent further social hostility after the 2007-2008 electoral violence, the role of religion in the 2010 referendum was more ambiguous. On the one hand, religion was a positive force, with religious organisations playing instrumental roles both in calling for a referendum and in engaging popular participation in the referendum process. On the other hand, in its 2009-2010 annual report, the NCIC observed:⁴⁵

The referendum competition pitted the 'NO' team mostly fronted by Christian churches and 'YES' side led by President Mwai Kibaki and Prime Minister Raila Odinga. The Christian churches were opposed to the draft Constitution over the issues of abortion and the inclusion of Islamic courts. The religious slant to the referendum debate portended a big challenge to the NCIC being the institution charged with the responsibility of addressing matters of ethnic, racial and religious discrimination and victimisation.

42 NCIC *Guidelines for monitoring hate speech: Monitoring hate speech in the electronic media in Kenya* (2010) 5. It is perhaps worth noting that the 2010 guidelines lump discrimination on the basis of 'colour, race, religion, nationality or ethnic or national origins' under the category of 'ethnicity' NCIC (above) 4.

43 NCIC (n 42 above) 14.

44 Institute for War and Peace Reporting 'Tackling online hate speech in Kenya' *ACR* 340 26 February 2013.

45 NCIC *Annual Report 2009-2010* (Nairobi, 3 May 2011) 17.

In the end, the 2010 constitutional referendum largely defied predictions of violent conflict by unfolding peacefully and productively and with two-thirds of the population ultimately supporting the draft Constitution.

Much as the post-electoral violence of 2007-2008 spawned the Ushahidi movement, the 2010 referendum also gave rise to new civic innovations in the technology of democracy. This time the focus was preventative, rather than *post hoc*, and led to the creation and peaceful deployment of novel social media initiatives aimed at fostering education on and participation in the referendum process. In addition to these new proactive civic education platforms, new technologies and social media were also used forensically in the 2010 referendum to report and collect data on problems and irregularities in the referendum process.⁴⁶ The NCIC, for example, set up an SMS text-messaging service to which citizens could text reports of hate speech during the period preceding the referendum.⁴⁷

One especially innovative social media venture, Katiba Mobi, was designed to allow Kenyans to access the proposed Constitution article by article, in both English and Kiswahili, over the screens of mobile phones.⁴⁸ This public dissemination of information via mobile phone was well-suited to Kenya – and other African nations – where the cellphone is a major means of access to the internet. The Katiba Mobi initiative was not limited to one-way dissemination. Kenyans could text in their own commentary on the proposed Constitution. An accompanying website collected information on public access to the service, including the number and kind of searches performed on the website by Kenyans seeking more information about particular proposed provisions. The website tracked both most-read constitutional provisions and searches of specific terms, the latter of which tended to cluster around issues of religion, particularly the issue of the Islamic Shari'a courts, known as Kadhis' courts, which had been the subject of much public opposition from Kenyan Christian leaders in the period before the referendum. In fact, the top ten searched words and phrases on the Katiba Mobi site included religion, marriage, and no fewer than three variations on the topic of Kadhis' courts. Thus, fully half of the top ten terms of interest – and controversy – in the Kenyan constitutional reform had to do with religion.

The concern over Kadhis' courts, particularly among leaders of Kenya's majority Christian community, focused on provisions of the

46 The 2010 referendum was monitored in part through the use of an Ushahidi-based citizen-reporting website at <https://uchaguzi.co.ke>.

47 'Kenya launches text service to stop hate speech' *BBC News* 14 July 2010.

48 See the Katiba Mobi website at <http://katiba.mobi>. The Katiba Mobi Twitter site reported the website's launch on 10 May 2010, and subsequently reported on 26 May 2010 that the site had drawn 100 000 views. On 4 August 2010, the day of the referendum, the site drew 4 000 views. See <https://twitter.com/#!/katibamobi>.

draft Constitution that favoured the courts' recognition and expansion. While the proposed Preamble to the Constitution expressed Kenya's pride in its 'ethnic, cultural, and *religious diversity*' and its determination 'to live in peace and unity as one indivisible sovereign nation',⁴⁹ it also committed the government to protecting 'vulnerable groups in society', including 'members of particular ethnic, religious or cultural communities'.⁵⁰ A general constitutional provision on equality and non-discrimination was qualified to allow the 'application of Muslim law before the Kadhis' courts to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce or inheritance'.⁵¹ Two new provisions on freedom of conscience prohibited the denial of access to 'any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion' and the compulsion of any persons 'to act, or engage in any act, that is contrary to the person's belief or religion'.⁵² Even more controversially, the new Constitution proposed to extend the jurisdiction of the Kadhis' courts over all of Kenya, far beyond their earlier limitation to the Muslim coastal regions of the Zanzibar Protectorate.⁵³ Katiba Mobi and similar initiatives likely played important roles in the 2010 referendum, and the proposed Constitution passed with an overwhelming majority of the vote.⁵⁴ In highlighting the significance of the Kadhis' courts issue to the Kenyan electorate, the Katiba Mobi application and website are an important source of information on issues of religious pluralism and Muslim-Christian concerns in the 2010 referendum process.

More recent Kenyan history, following on the success of the 2010 constitutional referendum, seems to be a case of 'one step forward, two steps back' in terms of the social unity and pride that many Kenyans took in the successful constitutional referendum. In July 2012, several churches in Kenya's majority-Muslim northeastern province were attacked by groups thought to be associated with the Somali Al-Shabaab Islamist terrorist organisation. Muslims and Christians in the region condemned these attacks, and Muslims formed patrols to guard the churches of their Christian neighbours.⁵⁵ In August 2012, Kenya was engulfed in an outburst of tribal violence, some of it said to have been inspired by political hate speech.⁵⁶ The

49 Preamble Constitution of Kenya (27 August 2010).

50 Sec 21(3) Constitution of Kenya.

51 Sec 24(4). The equality and freedom from discrimination provision is at sec 27(4).

52 Secs 32(3)-(4).

53 Sec 170.

54 For more on the Kenyan constitutional history and referendum and the Kadhis' Courts issue, see Green 'Religious pluralism in recent African constitutional reform' (n 4 above).

55 See T Odula 'Kenyan Muslims, Christians vow to prevent violence' *The Huffington Post* 3 July 2012; F Nzwili 'After attacks, Kenyan Muslims guard Christian churches' *The Christian Science Monitor* 10 July 2012.

56 See 'Kenyan President calls for responsible use of social media' *BBC* 3 May 2012; 'Analysis: Taming hate speech in Kenya' *IRIN News* 24 August 2012.

scheduled 2012 Kenyan general elections were postponed in August and then again in December. The election was finally held on 4 March 2013, resulting in the victory of Uhuru Kenyatta, a deputy prime minister and the son of Kenya's first independence President and founding father Jomo Kenyatta. Uhuru Kenyatta had been named by the International Criminal Court (ICC), along with his running mate, William Ruto, as a suspect in crimes against humanity committed in the post-2007 election violence. Among other things, the two were specifically accused of funding death squads of the mysterious political-religious group known as Mungiki, said to have perpetrated much of the violence in 2007-2008.⁵⁷ Kenyatta and Ruto ultimately did prevail in the elections and were sworn into office in April 2013. By March 2014, Kenyatta was being said to have prevailed at the ICC, as well, with the trial against him being described as on the 'verge of collapse'.⁵⁸ But later that month, the ICC rescheduled Kenyatta's trial date for 7 October 2014, to give the Kenyan government more time to provide evidence in the case – so Kenyatta, and Kenya, are not yet out of the woods when it comes to international human rights scrutiny.⁵⁹

When the drumbeat of foreign prognostications of electoral violence began again in connection with the March 2013 presidential elections, social media savvy Kenyans countered the pessimistic narratives of violence with counter-narratives on Twitter, under the hashtags #TweetLikeAForeignJournalist, #Kenyadecides and #proudlykenyan.⁶⁰ Nonetheless, even though the 2013 elections went off peacefully on the ground, they featured concerns about hate

57 Mungiki is a secretive Kikuyu quasi-religious and political group that advocates a return to Kikuyu indigenous religious traditions, opposes Kenyan modernisation, and calls for revolution and resistance against the government. It is also known for beheading, skinning, and even drinking the blood of its victims, and has been banned as a terrorist group and criminal organisation since 2002. For a description of Mungiki's suspected role in the 2008 post-election violence, see Kenya National Commission on Human Rights 'Waki Report'. For general information on the Mungiki and recent Kenyan affairs, see 'Profile: Kenya's secretive Mungiki sect' *BBC News* 24 May 2007; J Gettleman 'Might drink your blood, but otherwise not bad guys' *The New York Times* 22 June 2007; S McCrummen 'Brutal Kenyan sect aims to provoke strife' *The Washington Post* 2 July 2007; S Childress 'Kenyan gang revives amid political disarray' *Wall Street Journal* 1 May 2008; C Goffard 'Court sheds light on scary Kenyan gang' *Los Angeles Times* 27 November 2011; 'Police warn of new Mungiki violence plot' *The Daily Nation* (Nairobi) 3 June 2012; H Makori 'Kenya: Fears of poll violence as Mungiki reemerges' *Pambazuka News/AllAfrica.com* 21 February 2013.

58 T McConnell 'How Kenya took on the International Criminal Court' *MinnPost/The Global Post* 26 March 2014.

59 'Hague Court sets trial date for Kenyan President' *Reuters* 31 March 2014.

60 For an analysis of the Twitter campaign, see AX Mina 'Hashtag memes: Breaking the single story through humour' *Al-Jazeera* 23 March 2013; D Musegwa 'How Kenyans used #TweetLikeAForeignJournalist in response to global coverage of elections' *TechPost.ug* 11 March 2013.

speech online, some of it aimed by and toward religious groups. As one blogger puts it:⁶¹

After the 2007 general election, some Kenyans went after each other with clubs and machetes. For the 2013 poll, the war has taken a different shape; it has gone online, in the form of 'hate speech'.

In the weeks leading up to the 2013 elections, the NCIC reportedly deployed 400 hate speech monitors and 1 500 police officers to conduct investigations and prosecutions of those engaging in offensive speech.⁶² Under the new monitoring programme, a number of politicians, musicians, broadcasters and bloggers were charged with and prosecuted for hate speech violations. In addition to these forensic uses, SMS texting platforms and other social media technologies were being used affirmatively by organisations transmitting mobile phone text messages advocating peace and non-violence to conflict-prone regions.⁶³ Kenya's religious groups took part in these peacemaking uses of social media. A group of Christian and Muslim religious leaders in Kenya's Rift Valley, the site of much of the post-2007 election violence, called upon the government to take action against those using social media to spread ethnic and religious hatred, and they were joined in this call by separate statements from the National Council of Churches of Kenya (NCCK) and the bishops of the Catholic Church.⁶⁴ During the 2013 elections, NCCK sponsored a SMS platform on its website so that people could text reports of any issues, irregularities or issues or hate speech they were observing in

61 M Wasamu 'Kenya's political cyber war' *New Internationalist Blog* 9 April 2013, <http://newint.org> (accessed 31 March 2014). For more on the recent escalation of hate speech in Kenya in connection with the 2013 elections, see M Gathigah 'Kenyan media magnifies hate speech - Again' *Inter Press Service News* 19 February 2013; M Pflanz 'In Kenya, social media hate speech arises as nation awaits election ruling' *The Christian Science Monitor* 21 March 2013; 'Social media become Kenya's new battleground' *Die Welt* 21 March 2013. See also the report titled 'Umati: Monitoring online dangerous speech: February and March 2013 Report' (Nairobi: iHub Research, March 2013) http://www.research.ihub.co.ke/uploads/2013/april/1365508815_819_823.pdf (accessed 31 March 2014). The Umati hate speech monitoring project was co-ordinated by Ushahidi.

62 For more on the initiatives of the NCIC and other organisations against hate speech, see D Jorgic 'Kenya tracks Facebook, Twitter for election "hate speech"' *Reuters* 5 February 2013; R Gojineni 'Kenya cracks down on hate speech before elections' *Voice of America* 26 February 2013; 'Kenya cracks down on hate speech ahead of poll' *BBC News* 26 February 2013; R Wanjiku 'Kenyan government takes cautious approach toward social media' *Computerworld Kenya* 2 March 2013; M Malakata 'Kenya petitions Facebook and Twitter over senders of hate speech' *Computerworld Zambia* 19 March 2013; A Jamah 'Four to be arrested over hate speech on social media' *Standard Digital* (Nairobi) 20 March 2013.

63 For more information on the deployment of these peace-texting technologies, see the various Kenya reports on the website of PeaceTXT, one of the leaders in this movement, <http://poptech.org/peacetxt> (accessed 31 March 2014).

64 See M Waruinge 'Kenya: Churches on hate speech' *The Star* (Nairobi) 17 March 2013; M Ndany & J Bore 'Kenya: Rift valley religious leaders decry hate speech on social media' *The Star* (Nairobi) 19 March 2013; 'Clerics call end to hate speech on social media' *The Nation* (Nairobi) 22 March 2013.

the elections.⁶⁵ Overall, the situation in Kenya seems to be one in which, while there are religious divisions over particular issues, such as abortion, homosexuality and the status of the Islamic Kadhis' courts, the recent experiences of violence have prompted religious and civil society organisations, along with government agencies, to use social media to address social hostilities.

A key question that emerges from the Kenyan context has to do with the way in which social hostilities are described as falling along lines of 'ethnicity, race and religion' that are often intertwined and undifferentiated categories of social, cultural identity. The triadic reference to 'ethnic, racial and religious' hatred is repeated frequently in Kenyan anti-hate speech efforts, but rarely in a way that questions the distinctiveness of these categories. Is religious identity, for example, different from ethnic and racial identity because it is often as much a matter of choice as of birth in the modern, post-secular context? This seems to be the implication of concerns over proselytism and conversion in many parts of Africa. Is advocacy of religious hatred different because it invokes specific constitutional guarantees of religious freedom? Even though the Kenyan constitutional provisions often conflate ethnicity, race and religion, religion also receives specific protection through provisions on freedom of conscience and belief and non-discrimination.⁶⁶ Is there something about religious hatred that makes it important to address in a way that is qualitatively different from ethnicity, race, culture, or other category of identity? Recent studies have suggested that the addition or superimposition of religion can increase levels of intergroup conflict, which could itself be an important and pragmatic reason for treating religion differently.⁶⁷

A leading statement of freedom of expression in connection with religion produced by the international monitoring organisation, Article 19, emphasises that '[s]tates should not prohibit criticism directed at, or debate about, particular ideas, beliefs or ideologies, or religions or religious institutions, unless such expression constitutes hate speech'.⁶⁸ And it is here that restrictions on speech about religion in criminal codes and other areas of the law need to be taken into account alongside general constitutional projections. For example, analysing section 138 of the Kenya Penal Code on 'offences

⁶⁵ See the NCKK website at: <http://www.ncck.org> (accessed 31 March 2014).

⁶⁶ Some of the consultants at the CSLR Durban conference argued that constitutional protections of religion are sometimes strategically used to ratchet up conflicts based on other criteria to take advantage of religious freedom protections.

⁶⁷ See SL Neuberger 'Religion and intergroup conflict: Findings from the Global Group Relations Project' (2014) 25 *Psychological Science* 198-206.

⁶⁸ See Article 19 *Camden Principles on Freedom of Expression and Equality* (April 2009) para 12.1, <http://www.article19.org/resources.php/resource/1214/en/camden-principles-on-freedom-of-expression-and-equality#downloads> (accessed 31 March 2014).

relating to religion', the East Africa office of Article 19 has concluded:⁶⁹

This provision essentially provides for the criminalisation of insult to religious feelings and in this way is similar way to laws prohibiting blasphemy or 'defamation of religions' which protect religious ideas or tenets. Such laws are in clear contravention of international standards on freedom of expression. Hate speech on religious grounds can only be prohibited under international law if it meets the criteria of article 20 of the ICCPR. In other words, there needs to be actual incitement to hatred against individuals or groups on account of their religion. The 'wounding of religious feelings' does not meet this test.

With this in mind, the Kenyan context is one where it would be worth thinking further about the precise nature of religious freedom and the relation of religion to ethnicity, race and other identity categories. Nevertheless, this level of reflection is often elided by the tendency to bury religion within long lists of identity categories reflexively, but perhaps unreflectively.⁷⁰

So far it appears that recent legislative efforts in Kenya to combat social hostilities and hate speech in the media, particularly in the burgeoning realm of social media, have avoided the crackdowns on freedom of expression that have been proposed or taken place in other East and Southern African nations. The Kenyan government has continued to be supportive of technological development in media and communications in a way that other African countries have not, even with the political challenges of management and monitoring that these require. Still, in light of the ongoing ethnic and religious tensions in Kenya, there remains the risk of these regulations running afoul of international protections of freedom of expression if they are strengthened or expanded in the name of reducing social hostilities along religious and ethnic lines. But this possibility could also prompt some necessary self-policing in the mainstream and new media. As the leading Kenyan journalist and media commentator, Charles Onyango-Obbo, expresses it while attending an international media and democracy conference in 2011:⁷¹

Though there are still bad apples amongst us, I sense that many more media managers and editors are aware that we have one last shot at this. With the growing popularity of blogs, a new generation of Kenyan websites, and Twitter and Facebook, I think, if some of the media become battle-wielding ethnic warriors in 2012, our audiences will abandon us and never return.

69 See Maina (n 26 above) 13-14.

70 For an important discussion of the problems attendant in classifying conflicts, see L Hovil 'Why do we continually misunderstand conflict in Africa?' *African Arguments* 10 February 2014. See also N Nyabola 'Why do Western media get Africa wrong?' *Al-Jazeera* 2 January 2014; P Gathara 'If Western journalists get Africa wrong, who gets it right?' *The Guardian* (UK) 24 January 2014.

71 C Onyango-Obbo 'Will the nation burn or not in 2012?' *The Citizen* (Dar es Salaam) 18 May 2011.

3.2 Tanzania: Sovereignty, separatism and social trust in the 'juju nation'

On 31 July 2010, Tanzania's mostly Muslim, semi-autonomous island province of Zanzibar held a constitutional referendum of its own. There was pronounced debate over a proposed Zanzibar sovereignty amendment, which some considered to be a serious threat to Tanzanian unity. Indeed, one mainland Tanzanian constitutional law scholar observed: 'If the amendments are implemented, there is not going to be a united republic of Tanzania. The nation has broken up.'⁷² The referendum passed with two-thirds of the vote, with the sovereignty amendment winning wide support. The government of Zanzibar has since sought to have its sovereignty recognised in the Constitution of Tanzania, most recently in the newly-proposed Constitution based on a three-tiered government plan in which there would be a separate mainland, Zanzibari, and unity governments.⁷³

The Zanzibari referendum came at a time when Tanzania was in the midst of ongoing national debates over the proposed Constitutional Review Act of 2011 that has recently produced a (presumably) final draft in 2014. Early drafts drew wide criticism from academics, students, legislators, government leaders and other stakeholders in both mainland Tanzania and Zanzibar. Concerns included issues of freedom of expression and a perceived unwillingness of the government to listen to the views of an increasingly diverse and pluralistic society.⁷⁴ The Zanzibaris, in particular, felt that their representatives had been excluded from the process. The Constitutional Review Act 2011 was finally passed in February 2012, clearing the way for the appointment of a commission to draft and propose a new Tanzanian Constitution.⁷⁵ In April 2012, President Jakaya Kikwete appointed a new constitutional commission, which in December 2013 produced a second draft Constitution, now expected to be enacted some time in 2014.⁷⁶

Until recently, religion had not been thought to have a particularly strong role in Tanzanian politics. Christians and Muslims were divided on some issues, but boundaries were observed and religious and

72 'Tanzania; After Zanzibar referendum comes constitution dilemma' *The Citizen* (Dar es Salaam) 10 August 2010; F Kimboy 'Why Katiba team has proposed three-tier government again' *The Citizen* (Dar es Salaam) 31 December 2013.

73 'Zanzibar reportedly seeks to have Constitution changed' *BBC* 14 August 2010; 'Tanzania; Zanzibar renews bid for independence' *East African Business Week* (Kampala) 16 August 2010.

74 The Zanzibar concerns have been ongoing. See P Kajwanja 'Grievances galore: Zanzibar remains critical to EA federation' *The East African* 24 February 2014.

75 L Liganga 'MPs reach consensus on Constitution review Bill' *The Citizen* (Dar es Salaam) 11 February 2012.

76 'Tanzania unveils 2nd Draft Constitution, proposes 4-year transition period' *Sabahi/AllAfrica.com* 31 December 2013; 'Tanzania to enact a new constitution this year' *The Saturday Monitor* 14 January 2014. For a critique of the constitutional process in Tanzania, see I Shivji 'The pitfalls of constitution making in Tanzania: Lessons so far' *IPPmedia.com*, 1 December 2013.

political differences generally respected. As all constitutional deliberations were taking place at the national level in 2012, Tanzanian Muslim leaders were discussing the need to educate Muslims in their communities about their constitutional rights and the need for recognition of Kadhis' courts, along Kenyan constitutional lines, so that they could fulfil their religious obligations in matters of family law and inheritance.⁷⁷ The Muslim mobilisation around sovereignty and the Kadhis' courts continued throughout 2012 and is said to have been a motivating factor behind the Islamist riots that broke out in the fall of that year.⁷⁸ Tensions between Muslims and Christians in Tanzania over issues such as Kadhis' courts and Zanzibar sovereignty have been described as 'too complex to be labelled as a fundamental antagonism based on religion'.⁷⁹ Even so, President Kikwete, a Muslim, has spoken publicly of the threat posed by some religious rhetoric to Africa's fragile democracies, of political divisions to be based on religion, and of the need to resist attempts to 'Islamise' the government, so as to avoid the sort of political violence that has occurred elsewhere. Contrasting the electoral unrest in Kenya in 2008 with the less volatile political scene in Tanzania, he has cautioned: 'Tribalism is almost alien in Tanzania, although we are multi-ethnic. However, Tanzania has *udini* [religionism], which is not as pronounced in Kenyan politics.'⁸⁰

In light of Kenya's history of overt conflict in recent years, President Kikwete's suggestion that there are tensions lying beneath the Tanzanian surface seems rather ominous. In Tanzania, as in Kenya, the Muslim population is outnumbered by a Christian majority and geographically clustered in the Zanzibar islands and adjacent coastal regions. This geographical clustering gives Muslims a more outsized influence than they might have if they were more integrated into these societies. Kenya and Tanzania also shared international attention in the aftermath of 1998 US embassy bombings in Nairobi and Dar es Salaam and more recently for their geographical and possibly ideological proximity to the Al-Shabaab terror network in Somalia. More recently, acid attacks, alleged to have been carried out by Muslims on two British teenage girls and a Catholic priest, have raised

77 'Clerics urged to educate Muslims on Constitution' *The Guardian* (Dar es Salaam) 14 February 2012.

78 See 'The Swahili coast: Contagion of discontent: Muslim extremism spreads down East Africa's coastline' *The Economist* 3 November 2012; 'Tanzania: Islamist riots threaten Zanzibar stability' *IRIN News* 24 October 2012. These coastal tensions have also spread to Kenya. See K. Kay 'Muslim-Christian relations strained by violence in Kenya's coastal region' *PBS News* 4 April 2013.

79 Shari'a Debates in Africa Project 'Tanzania' <http://www.sharia-in-africa.net> (accessed 31 March 2014).

80 'Religionism a threat to East African unity' *East African Standard* (Nairobi) 30 March 2008. See also the transcript of President Kikwete 'Managing religious diversity in a democratic environment: The Tanzanian experience' speech at the 5th Anniversary of the African Presidential Archives and Research Center (APARC), at Boston University, 25 September 2012, <http://www.ajabuafrica.com/TZPresident'sSpeech.html> (accessed 31 March 2014).

concerns about religious extremists and rattled relations between Muslims and the small (5 per cent) Christian minority in Zanzibar.⁸¹ Increasingly, Tanzania, like Kenya, has been riven by interreligious hostilities in a way that could turn out to be combustible, absent intervention, in what some have called the '*juju* nation'.⁸²

The '*juju* nation' moniker comes from a finding in the Pew Research Center's 2010 survey of African nations that Tanzania scores especially high in belief in witchcraft and in the protective value of the *juju* magic of fetishes, charms and amulets to protect oneself from the 'evil eye' of others.⁸³ Significantly, Tanzania also stood out among the Pew survey countries, not only for its penchant for *juju*, but also for its apparently high levels of social distrust.⁸⁴ It does not seem far-fetched to think that there might be correlations between belief in the black and white magic of *juju* and high levels of distrust. But in the case of Tanzania there are also indications of the potential for social hostility to be tempered by social solidarity among religious groups. Tanzanians also ranked high in the Pew study in trusting people with different religious values from their own.⁸⁵ This baseline repository of religious pluralism and social solidarity could turn out to be a very important foundation for Tanzanian unity, stability and democracy.

One leading facilitator of religious debate over the proposed Constitution has been the Tanzanian office of the German non-governmental organisation (NGO), Konrad Adenauer Stiftung (KAS). KAS sponsored a forum in November 2011 on 'Faith-based organisations and the constitutional reform in Tanzania', with the aim of discerning 'how religious diversity and tolerance can be reflected appropriately in the new Tanzanian Constitution'.⁸⁶ In November 2013, KAS convened its third interreligious forum, which brought ten delegates from Zanzibari interreligious organisations to meet with the Inter-Religious Council for Peace in Dar es Salaam. The meeting produced the report 'Faith is the fountain of peace, love and

81 See D Bergmann 'Threatened paradise: Growing religious and political violence on Zanzibar' *Konrad Adenauer Stiftung Country Report, Tanzania*, 25 October 2013. But for a critique of Western coverage of these events, see Mtega 'Zanzibar acid attack: UK media not letting the facts get in the way of a story' *mtega* (blog) 11 August 2013.

82 'Welcome to Juju nation!' *The Citizen* (Dar es Salaam) 27 February 2011.

83 See Pew Research Center *Tolerance and tension* 4 34 181-182.

84 Pew Research Center (n 83 above) 83. Tanzania was followed by Cameroon (82%); Senegal (74%); and South Africa (70%) in levels of distrust, but these four nations were the only ones of the 19 nations surveyed in which percentages ran above the sixties. Most responses were in the fifties and low sixties, so the higher scores, including Tanzania's, are quite significant.

85 Pew Research Center (n 83 above) 130.

86 See Konrad Adenauer Stiftung 'Katiba Moja kwa Watanzania Wote – Interreligious dialogue: Religious leaders and their contribution to the constitutional reform' 26 March 2014, <http://www.kas.de/tanzania/en/events/58956>.

understanding'.⁸⁷ In January 2014, KAS and the Friedrich Ebert Stiftung and Jukwaa la Katiba organisations hosted a roundtable conference of civil society organisations to discuss the newly-released second draft of the proposed Constitution.⁸⁸ In February 2014, KAS hosted the Maendeleo Dialogue on 'Building a national consensus for the new Constitution', which brought together more than 250 participants, including representatives of religious groups. Among other recommendations, the dialogue urged that '[r]eligious bodies should continue to mobilise, inform and sensitise their followers on the importance of the constitutional reform for peace and sustainable development'.⁸⁹ In March 2014, KAS sponsored another forum titled '*Katiba Moja kwa Watanzania Wote* – Interreligious Dialogue', on the topic of religious leaders and their contribution to the constitutional reform.⁹⁰ KAS has also held fora on political communication on the internet.⁹¹ So, there do appear to be significant interreligious movements afoot in Tanzania that can contribute to peace, constitutionalism and the elimination of religious hostilities.

These interreligious efforts may be bearing fruit. According to the recent Pew Forum studies of global religious restrictions, Tanzania actually saw an overall reduction in social hostilities around religion from 2006 to 2009.⁹² Even so, the Pew researchers did report continuing tensions between Muslims and Christians in Tanzania, and these seem to have increased since the time of the study, so there remains work to be done on the interreligious front.⁹³ The most recent draft of the Constitution commits the government to taking 'appropriate measures' to 'build a culture of co-operation, consensus and compromise, tolerance and respect to customs and traditions as well as religious faith of everyone', and notes in its provision on freedom of expression the 'important duties of the people' to avoid 'propaganda about war, enticement based on colour, tribe, sexual discrimination, religion or any other affair that may negatively affect the nation', and proclaims in its provision on freedom of religion that '[n]o person, group of people or religious institution shall use the

87 See L Kilimwiko & KV Knobelsdorff 'Faith is the foundation of peace, love and understanding' November 2013, <http://www.kas.de/tanzania/en/publications/36123> (accessed 31 March 2014).

88 See Konrad Adenauer Stiftung 'Second draft of the new Tanzanian Constitution: Round table discussion' 14 February 2014, <http://www.kas.de/tanzania/en/publications/36860> (accessed 31 March 2014).

89 See L Kilimwiko & KV Knobelsdorff 'Maendeleo dialogue - Building a national consensus for the new Constitution: Konrad Adenauer Stiftung' <http://www.kas.de/tanzania/en/publications/36885> (accessed 31 March 2014). See also F Kimboy 'Aim for consensus, assembly urged' *The Citizen* (Dar es Salaam) 7 February 2014.

90 See Konrad Adenauer Stiftung (n 86 above).

91 See Konrad Adenauer Stiftung 'Efficient political communication in the internet: Online strategies and best practices' 13 February 2014, <http://www.kas.de/tanzania/en/publications/36862>.

92 Pew Forum (n 8 above) 12 17 54 60.

93 Pew Forum (n 8 above) 55.

freedom to preach religion for defaming other faith and religions, propagating hatred or disharmony and chaos claiming to be defending a faith or religion' and that 'religion and religious belief shall not be used in any way that shall divide the people, bring hostility or disrupt peace among people', amid many other provisions guaranteeing principles of equality and non-discrimination on the basis of religion and other factors.⁹⁴ On the social media front, Tanzania also seems to be looking toward technological developments in Kenya in much the same way as it looks toward Kenya in anticipating constitutional referenda and elections.⁹⁵ In fact, the bloggers behind Kenya's Ushahidi are said to have met for the first time in Tanzania, and Ushahidi was used for the first time to monitor elections in the 2010 Kenyan referendum and the 2010 Tanzanian elections.⁹⁶ In 2013, Twitter was used as a means of soliciting public commentary on the Tanzanian constitutional referendum process.⁹⁷

3.3 Zambia: Pluralism and inclusion in the 'Christian nation'

Zambia is another African nation that has recently been experimenting with constitutional reform and social media to enhance its democratic development, but in a context that has also featured rising concerns about religious pluralism and social hostilities. The current Zambian Constitution has been in effect since 1991, with substantive amendments in 1996 and three separate constitutional review commissions convened in 1996, 2005 and 2007.⁹⁸ The 2007 National Constitutional Conference finally produced a new constitutional draft in June 2010, but by early 2011 the draft had failed to win parliamentary approval, despite calls from many sectors of Zambian society for a new Constitution to be in place by the time

94 Second Draft Constitution of the United Republic of Tanzania released 31 December arts 10(3)(b)(iii), 30(2)(b) & 32(5-6). The English translation was provided to the author by Jukwaa la Katiba on 4 April 2014, and by Open Society Initiative for East Africa (OSIEA) on 8 April 2014. The translation is unofficial at this time and may be superseded by the subsequent release of an official translation by the Constitutional Review Commission.

95 See also 'Tanzania lauds Kenya's use of technology in the polling, despite failings' *BBC* 7 March 2013. Tanzania is the only country outside Kenya where the electronic currency trend has caught on as an alternative to a poorly-developed banking system. See D McCleod 'Kenya outpaces SA as technology leader' *The Sunday Times* (South Africa) 9 June 2013. The crowd-mapping practice known as 'citizen cartography' by SMS texting has also caught on in Tanzania and Nigeria as a means of reporting water access problems. See D Lewis 'A web of watchdogs and whistleblowers' *Mail & Guardian* (South Africa) 27 January 2012.

96 M Bunting 'Crowdsourcing put to good use in Africa' *The Guardian (UK)* 19 May 2011. See also M Pflanz 'Kenyan referendum monitored by SMS and Twitter' *Christian Science Monitor* 4 August 2010.

97 Tanzanian constitutional review team incorporates Twitter users' views' *BBC* 5 July 2013. See also Twitter hashtag #OSIEAkatibatz.

98 The reports of the earlier Mvunga (1991), Mwanakatwe (1996) and Mungomba (2005) Commissions are accessible at the Zambia Legal Information Institute (ZAMLI) website at <http://www.unza.zm/zamlil/mvunga-1991.html>, <http://www.unza.zm/zamlil/mwanakatwe-1996.html>, and <http://www.unza.zm/zamlil/downloads/mungomba.pdf> (accessed 31 March 2014).

of the general elections scheduled for later that year.⁹⁹ In light of these repeated parliamentary failures to arrive at a new Constitution, an ecumenical religious and civil society group known as the Oasis Forum recommended in April 2011 that the process of drafting a new Constitution be removed from parliament and handed over to a committee of experts for eventual subjection to a national referendum, as had taken place in Kenya the previous year.¹⁰⁰ In November 2011, Zambian President Michael Sata appointed the Technical Committee on Drafting the Zambian Constitution (TCDZC), which was to convene the following month.¹⁰¹ The first draft of the new Zambian Constitution was not released until April 2012, with a final draft promised for June 2013.¹⁰² In October 2013, the final draft was said to be ready for printing the following month. At the time of writing this in April 2014, the TCDZC website still flashes an alert that the final draft Constitution will be released soon.¹⁰³ Thus, the April 2012 draft Constitution remains the only publicly-released version and indicator of where Zambia may be headed with respect to religion in the Constitution.

Amid the various efforts to reform the Zambian Constitution, a perennial topic of discussion and debate has been the 1996 amendment adding a preambular provision declaring Zambia to be a 'Christian nation'. The 2012 draft Constitution, like earlier drafts, retained highly-religious language in the opening of the Preamble, acknowledging the 'supremacy of God Almighty' in the first paragraph and professing in the second paragraph to 'declare the Republic a Christian nation, but uphold the right of every person to enjoy that person's freedom of conscience or religion'.¹⁰⁴ The eighth paragraph of the Preamble appeared to acknowledge religious and other types of pluralism in declaring that Zambia shall remain a 'free,

99 For the National Constitutional Conference's proceedings and the 2010 draft Constitution, see <http://www.ncczambia.org> (accessed 31 March 2014).

100 'Oasis Forum demands Referendum Commission' *The Lusaka Times* 20 December 2011.

101 The proceedings, reports, and materials of the TCDZC, related to the current constitutional draft, are accessible at: <http://zambianconstitution.org> (accessed 31 March 2014).

102 The draft is accessible on the TCDZC website at <http://zambianconstitution.org>. See also 'Final draft Constitution ready by June 1- Kabimba' *The Lusaka Times* 22 November 2012.

103 See Technical Committee on Drafting the Zambian Constitution 'Final draft Constitution ready for printing' 31 October 2013, press release, <http://zambianconstitution.org/component/content/article/35-press-release/104-final-draft-constitution-ready-for-printing-.html> (accessed 31 March 2014). See also <http://zambianconstitution.org/home.html> (accessed 6 April 2014).

104 First Draft of the Constitution of the Republic of Zambia (2012 Zambia Draft Constitution) 30 April 2012, Preamble, paras 1 & 2. The report accompanying the draft Constitution does, however, note that the Preamble has no force of law, art 35 on Freedom of Religion and Conscience being the relevant provision for constitutional protection of religion. See First Draft, Report of the Technical Committee on Drafting the Zambian Constitution, June 2012, <http://zambianconstitution.org> (accessed 31 March 2014).

unitary, indivisible, multi-ethnic, multi-cultural, multi-racial, multi-religious and multi-party democratic sovereign state'.¹⁰⁵ But new provisions in the 2012 draft Constitution seemed to elevate Christianity even further. A section on 'national values, principles and the basis of state policy' was based on 'morality, Christian values and ethics'.¹⁰⁶ Further, article 35 on freedom of religion and conscience contained, along with qualifying clauses limiting religious freedom in cases of 'propaganda to incite religious wars' and 'conduct that infringes the enjoyment of religious freedoms by others', a clause prohibiting any 'anti-Christian teaching and practice'.¹⁰⁷ These provisions of the draft Constitution enhance the status of Christianity, already the only religious tradition to be given specific mention and protection in the Zambian Constitution.

In April 2013, the TCDZC released a Consolidated National Convention Resolutions report collecting and definitively reconciling resolutions taken in consultation with various provincial conventions convened around the country in early 2013. These give some sense of the tenor of discussions that have likely shaped the forthcoming final draft Constitution. The first paragraph of the Preamble, acknowledging the 'supremacy of God Almighty', was retained as written, despite a move to insert the phrase 'the Creator of heaven and earth'.¹⁰⁸ The acknowledgment of God was deemed to be adequate without further description. In the 'Christian nation' paragraph, the language 'but uphold' was replaced with the language 'while upholding' as more inclusive of the religion and conscience rights of all and reflecting the 'co-existence of Christianity with other religions in Zambia'. At the same time, and seemingly contradictorily, the word 'multi-religious' was stricken from the eighth paragraph for being 'contradictory to the affirmation of Zambia [as] a Christian nation' and potentially leading to 'misinterpretation'.¹⁰⁹ More hopeful for proponents of religious pluralism, the prohibition of 'anti-Christian teaching and practice' was stricken from article 35.¹¹⁰ Nonetheless, modifications to subsequent provisions illustrated the constant give-and-take underway in the constitutional drafting process in matters of religion. Three of the provincial conventions recommended that article 60, on affirmative action programmes for minority and marginalised groups, be amended to state that 'undesirable groups

105 2012 Zambia Draft Constitution para 8.

106 2012 Zambia Draft Constitution Part III 9(a).

107 2012 Zambia Draft Constitution Part V, 35(3)(a-c).

108 Technical Committee on Drafting the Zambian Constitution, Consolidated National Convention Resolutions (Lusaka, 10-17 April 2013) 1.

109 As above. The consolidated resolutions somewhat confusingly elaborate: 'The proposal to amend the article by deleting the term "multi-religious" was upheld because it may promote other religions that are not [sic] contrary to provisions of this Constitution. These religions can be provided for through subsidiary legislation.' The term 'multi-religious' was also eliminated from art 4(2). Technical Committee (n 108 above) 8.

110 Technical Committee (n 108 above) 36.

such as homosexuals, terrorists, satanists, witches and any other practices inimical to Christian and cultural values are not allowed', language that was rejected by the National Reconciliation Committee to create a more rhetorically-benign but no less exclusive exception for 'practices prohibited under this Constitution or any other law'.¹¹¹

The problem of ethnic and religiously-tinged hate speech, particularly via the web and social media, does not yet seem to have affected Zambia to the extent that it has Kenya and Tanzania. Zambia has followed Kenya and Tanzania in the technological election-monitoring revolution based on Ushahidi. Coverage of the 2011 presidential election reported that Zambians wary of electoral fraud flocked to the internet and social media to expose any irregularities in a closely-contested presidential and parliamentary poll. As one election day account described it, 'Using text messages, Twitter, Facebook and e-mail, Zambians reported scores of perceived voting glitches and irregular poll practices by early Tuesday afternoon – the first such use of mobile technology in the Southern African nation'.¹¹²

Some recent incidents of hate speech in Zambia have been attributed to political parties hiring 'youth cadres' to intimidate voters. The problem has begun to get the attention of political party leaders, one of whom recently remarked:¹¹³

All genocides start small ... and we are beginning to see the same trends of hate speech and appearances of small arms here in Zambia. This must be stopped before it is too late.

In September 2012, in the course of investigating statements by members of one ethnic group threatening to eliminate members of another, the Inspector-General of the Zambian police, Stella Libongani, warned the public against engaging in hate speech and stated her readiness to enforce section 70(1) of the Zambian Penal Code against those making statements 'expressing or showing hatred, ridicule or contempt for any person or group of persons wholly or mainly because of his or their race, tribe, place of origin or colour'.¹¹⁴ That section of the penal code does not mention religion, but hate speech against religion is addressed in a separate section dealing, much like section 138 of the Kenyan Penal Code, with 'offences relating to religion' and prescribing punishments for 'insult to religion

111 Technical Committee (n 108 above) 64. One province would have limited the art 60 right for groups to 'develop their cultural values, languages, and practices' by adding the phrase 'socially acceptable' before the word 'cultural'.

112 M Bosch 'Zambians watch internet, social media for vote fraud' *Reuters* 21 September 2011. The Zambian initiative was organised by Bantu Watch, whose Facebook and Twitter pages are still accessible, even though the main organisation site seems to have expired.

113 J Kimer 'Rising youth cadre violence threatens Zambian stability' *ThinkAfricaPress.com* 28 November 2012.

114 Laws of Zambia, The Penal Code Act, Cap 87 ch 7 sec 70(1).

of any class' and 'uttering words with the intent to wound religious feelings'.¹¹⁵

In the same month that the Inspector-General of the police issued her call for civility, the Zambia Information Communication and Technology Authority (ZICTA) was directed to draft a law to punish internet users for hate speech. The Zambian government was said to be concerned about abuse of the internet to promote 'hate and corrupt morals'.¹¹⁶ The initiative to criminalise internet hate speech initiatives came after several failed attempts to shut down online media organisations for promoting political hate speech. More recently, Zambia has threatened to revoke radio licences for stations broadcasting hate speech and has blocked two news websites for alleged 'ethical lapses' in reporting, and a major media association has called upon the media to eschew hate speech and to 'concentrate on promoting discussions and debates of real issues affecting the welfare of the country as opposed to concentrating on politics of name calling'.¹¹⁷

Religious leaders in Zambia have themselves recently been implicated in hate speech on the issue of homosexuality. Reports of the Open Society Initiative for Southern Africa (OSISA) have accused politicians and religious leaders of 'gay-bashing' that has created a climate in which Zambia's sodomy laws are now being used to put homosexual people in jail.¹¹⁸ This is said to be taking place in a wider political context in which the government of President Michael Sata has 'cracked down relentlessly on opposition politicians and civil society activists', such that¹¹⁹

Zambia is rapidly sliding down the path ... where an increasingly authoritarian government supported by a repressive police force trample[s] over human rights, democracy, good governance and the rule of law.

Another OSISA report described a radio programme that aired after the release from prison of prominent human rights and HIV activist, Paul Kasonkomona, in which

religious leaders from American-funded and supported radical evangelical churches and one Muslim Imam called for stiff action against homosexuals – even urging the public to take the law into their own hands should the government fail to respond to this vice adequately,

¹¹⁵ Laws of Zambia, The Penal Code Act ch XIV secs 128 & 131.

¹¹⁶ 'Zambia plans law to curb online hate speech' *Telecompaper.com* 18 September 2012.

¹¹⁷ 'Zambia: Government threatens to revoke radio licences' *The Zimbabwean* (Harare) 19 August 2013; 'Media advised against promoting hate speech' *LusakaVoice.com* 26 September 2013. See also N Udoh 'PF moves to intimidate independent radio stations' *Zambia Reports* 20 August 2013.

¹¹⁸ R Lee 'From hate speech to jailing gays in Zambia' *OSISA.org* 7 May 2013. See also T-H Olsen 'Hate campaign against LGBTI persons rises in Zambia' *Pambazuka News* 633 6 June 2013.

¹¹⁹ As above.

a view that was roundly approved by the programme's call-in listeners, the majority of whom 'agreed with them – and called for the burning and killing of all homosexuals in the "Christian nation of Zambia"'.¹²⁰

In these recent actions, the Sata government could end up taking Zambia down the same path that has been taken in recent years by the Musaveni government in Uganda and the Mugabe government in Zimbabwe. In all three countries there have been questions surrounding recent constitutional referenda and presidential elections. Musaveni and Mugabe, with Paul Kagame in Rwanda, are routinely cited as avatars of the 'big man' tradition of African leadership that continues to prevail in some countries and has been bolstered by increasingly authoritarian practices against criticism and opposition. Religious groups have often entered the fray on the side of or in opposition to particular candidates, and religious issues such as homosexuality and interreligious relations (particularly where there are rising Muslim populations) have made their way into politics, where they have been exploited by parties on all sides. In all of these countries, the use of social media is rising along with escalating accusations of hate speech. Zambia is currently positioned somewhere between the Kenyan and Tanzanian efforts at free speech and religious pluralism and the more authoritarian paths being taken by Uganda and Tanzania – thus it will bear watching as these issues of religious freedom, freedom of expression, hate speech and social media continue to be worked out in the Eastern, Southern and other regions of Africa.

4 Conclusion: Perceptions, attitudes, values and human rights – Toward a new 'socio-legal understanding'

As noted toward the beginning of this article, the Pew Forum's *Tolerance and tension* study of religion, politics and society in sub-Saharan Africa confirmed the ongoing nature of the concerns, expressed at the CSLR's 2008 Durban Consultation and at the ICLRS 2013 Ghana Conference, among others, about continuing perceptions of tension between religious groups in Africa today and the implications of these perceptions for religious pluralism, democracy and human rights. Over time, perceptions can harden into attitudes and persistent attitudes can shape normative values. In this way, perceptions can become self-fulfilling realities. Organisations like the Pew Research Center have increasingly found ways to empirically measure and quantify these perceptions, values and attitudes in ways that bear on legal and constitutional views of pluralism, democracy, and human rights – but it is not yet clear that law has found a way to

¹²⁰ C Ukwimi 'Sowing poisonous seeds in Zambia' *OSISA.org* 23 April 2013.

take them into account.

The realm of law has heretofore dealt with causation more than correlations, and principles more than perceptions. Law often sees itself as dealing with empirical facts before getting to deductions of normative values and rules. It is consummately evidence-based. What role do perceptions, particularly interreligious ones, play in this legal paradigm? In matters of religious freedom, political democracy and human rights, perceptions and their expression can be highly sensitive – even inflammatory and combustible – if not managed properly. It is likely this realisation that has led some African nations of late to propose limits on freedom of expression, particularly via instant and global social media, in order to address and manage religious and social tensions. These measures often seem to conflict with international human rights standards governing freedom of religion and freedom of speech. In this African context, the rule of law may require such regimes of ‘perceptions management’, with lawyers stepping into a peacemaking role usually assigned to political scientists and humanitarians in order to broke desired levels of freedom, democracy and rights.

In much the same way that these new perceptual facts challenge the objectivity and neutrality of the law, the ‘religious resurgence’ of the ‘post-secular era’ challenges our understanding of the relationship between law and religion and between religion and the state. While state restrictions on religious individuals and religions themselves will continue to be important sites for human rights monitoring and points of legal challenge, the new factor raised by the recent attention to effects of social hostilities in restricting religious freedom is the problem of interreligious (and sometimes intra-religious) conflict as a major source of human rights violations. The problem of religious human rights is no longer limited to what the state does to religion, but must include attention to what religions do to each other. Religious groups in the advanced but largely secular democracies of Europe and North America, particularly but not exclusively the more orthodox and traditionalist groups, have often laid the blame on secularism and modernity for the exclusion of religion from the ‘public square’ and have sought religious accommodations that would allow them to integrate their religious beliefs into their public lives in a comprehensive way. However, in the often more fragile multi-ethnic, multi-linguistic, multi-cultural and multi-religious societies, a certain amount of secularism, in the form of governmental oversight of religion – particularly religious speech or religious critique that amounts to hate speech – may be necessary in order to preserve the religious and social peace. In such cases, secularism may be not part of the problem, but rather part of the solution.¹²¹

¹²¹ See n 20 above about the low frequency of blasphemy laws in Africa and the possibility of working out the relationship between religious freedom and freedom of expression through less draconian means. See also the arguments of our host in Ghana, Dean Kofi Quashigah, in this article symposium.

There are those who doubt that there can be a role for law when it comes to managing social hostilities based on religion and who object particularly to the idea that the law is capable of defining and delimiting religion at all in a way that raises the possible 'impossibility of religious freedom'.¹²² However, the onus on proponents of this view is to explain what role, if any, the law should play in keeping the peace when human rights and human lives are at stake. The possible incapacity of the law to adjudicate and manage religion may seem especially likely in Africa, where religion and state are sometimes closely intertwined, often by necessity, in the effort to provide for the material needs and common good of the people. The efforts to address hate speech in Kenya and Zambia, and the efforts to bring religious groups together in Tanzania, while not always fully effective in preventing hostilities, suggest that Africans know something about the power of religion in shaping the perceptions, attitudes and values in ways that can lead either to conflict or to peace. It will continue to be interesting to see how African nations strike their own balance between the positive and negative powers of religion in the public sphere, a sector made larger, but also smaller and closer, by the new social media.

Perhaps the most important lesson to take away is that law must step up and develop new theories that take into account the speed and scope of new media and its power to shape perceptions that become new social – and perhaps eventually legal – sources of value and normativity on a context of proliferating sources of data and the profusion of identity and rights claims that come with the proliferation of post-secular religiosity. How does one authenticate a tweet or text message? What is the evidentiary value of crowd-sourced and crowd-mapped human rights violations? How can one verify the truth of these statements and data? How much more difficult is the task of making sense of religious and social claims cast via new media? How is the law, as a site of power and normativity, to take charge of and effectively manage religion, another source of power and normativity, on this basis of these new sources of data that have important perceptions-generating power of their own?

Law has already been said to be behind the times when it comes to understanding the power of statistical information and other indicators in the age of 'big data'.¹²³ As the legal anthropologist Sally Engle Merry writes:¹²⁴

As forms of knowledge, indicators rely on the magic of numbers and the appearance of certainty and objectivity that they convey. A key dimension of the power of indicators is their capacity to convert complicated,

122 See WF Sullivan *The impossibility of religious freedom* (2007).

123 See V Mayor-Schönberger & K Cukier *Big data: A revolution that will transform how we live, work, and think* (2013).

124 SE Merry 'Measuring the world: Indicators, human rights, and global governance' in D Partridge *et al* (eds) *Corporate lives: New perspectives on the social life of the corporate form, current anthropology* (2011) S84-S85.

contextually variable phenomena into unambiguous, clear, and impersonal measures. They represent a technology of producing readily accessible and standardised forms of knowledge. Indicators submerge local particularities and idiosyncrasies into universal categories, generating knowledge that is standardised and comparable across nations and regions. Indicators are a special use of statistics to develop quantifiable ways of assessing and comparing characteristics among groups, organisations, or nations ...

The use of statistical information in general, and indicators in particular, shifts the power dynamics of decision making. Indicators replace judgments on the basis of values or politics with apparently more rational decision making on the basis of statistical information ...

Indicators provide a technology for reform as well as control. Indicators can effectively highlight deficits, areas of inequality, spheres of human rights violations, and other problem areas. Reform movements depend on producing statistical measures of the wrongs they hope to redress, such as human rights violations, refugee populations, disease rates, and the incidence of poverty and inequality. They are a valuable reform tool in their ability to show areas of state failure.

In connection with these ideas of power and reform, it is worth noting the staple of much Christian legal theory that there is a *pedagogical role for the law*. That pedagogical role is a powerful function of law and potentially a tool of reform. Recent movements that unite law and religion in addressing the problems of conflict and post-conflict societies also invoke a *restorative* or even *therapeutic* role for the law. But to restore or heal in a therapeutic sense requires a proper diagnosis of the problem. In thinking of the problem of diagnosis, I return to the perception, widespread in Africa, about religions being out for proselytism and conversion, compared to the scant statistical data that this is actually occurring. How should the law – how should religions, for that matter – respond to such gaps between perceptual and statistical reality in seeking to adjudicate claims of religious rights violation or religious hate speech?

Lack of space prevents the fleshing out of the issues and questions at stake. However, one thing seems clear. In the post-secular profusion of religious and non-religious claims and multiple forms of data and expression, there needs to be a 'socio-legal paradigm' for understanding these new religious human rights claims in their surrounding social, political, economic, and even technological contexts. The expression of religious claims and religious identities will continue to bubble up in the social media sphere – sometimes in expressions of hatred and hostility, sometimes in intentional efforts to promote peace. Given the nexus of social hostilities and social media in pluralistic societies that at least aspire to become peaceful and fully-functioning democracies and with new ways to measure and describe the interaction of various sectors of society and criteria of identity, we are way beyond the standard 'Western church-state' model of understanding religion and human rights. We are in an era of newly resurgent religion, new means of communication, and new tensions between religious freedom and freedom of expression. From social hostilities to social media, the law has some new terrain to navigate –

and Africa may prove to be an especially apt starting point for that exploration.

Constitution, Charter and religions in South Africa

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Summary

This article discusses the status of religious rights and freedoms under the South African Constitution and the South African Charter of Religious Rights and Freedoms. Following a discussion of the demographics of religious and ethnic pluralism in South Africa, the article discusses the relevant provisions of the Constitution and the Charter and historical antecedents in common law and Roman-Dutch law and the historical and contemporary influence of African traditional religion and customary law that have shaped the current relationship of the Christian church to the South African state. The article concludes with an argument for the recognition of a plurality of religions and religious legal systems in Africa.

1 Introduction: Peoples, religions, Constitution and Charter

This article is about the South African Constitution,¹ the South African Charter of Religious Rights and Freedoms (South African Charter)² and religions in South Africa. Unfortunately, I have to limit myself to the constitutional position of just two of the many religions in the country, as space and time do not allow for more. I hope it will become clear why these two religions are important regarding their constitutional position and what the challenges are for South Africa regarding law and religion. The Constitution guarantees freedom of religion for all religious persons and religions in the country.³ What these rights and freedoms entail is the subject matter of the South African Charter. What the current position of Christianity and African

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1 Constitution of the Republic of South Africa, 1996.

2 South African Charter of Religious Rights and Freedoms, <http://academic.sun.ac.za/theology/religious-charter> (accessed 31 January 2014).

3 Sec 15 Constitution of the Republic of South Africa, 1996.

traditional religion is with regard to the Constitution and the laws of the land is the question which this article will try to answer in the light of their guaranteed constitutional rights and the rights formulated in the South African Charter.

2 Peoples and religions of South Africa

South Africa is a country of many cultures and many religions – indeed, a country of pluralities. The total population of about 51 770 560 million is made up of 79,2 per cent black people; 8,9 per cent white people; 8,9 per cent coloured people;⁴ 2,5 per cent Indians/Asians; and 0,5 per cent ‘other’.⁵ The plurality of cultures within the different cultural groups is reflected in the fact of 11 official languages, which are reflected in the percentage of speakers of each language in comparison with the total population. The languages with their percentage of speakers according to the 2011 census are Isizulu 22,7 per cent; IsiXhosa 16 per cent; Afrikaans 13,5 per cent; Sepedi 9,1 per cent; SeTswana 8 per cent; English 9,6 per cent; SeSotho 7,6 per cent; Xitsonga 4,5 per cent; SiSwati 2,5 per cent; Thsivenda 2,4 per cent; isiNdebele 2,1 per cent; and other 1,6 per cent.⁶

As far as religion is concerned, 79,8 per cent of the population profess that they are followers of a form of Christianity. Among the Christian population, Reformed churches make up 7,2 per cent; Anglicans 3,8 per cent; Methodists 7,4 per cent; Lutherans 2,5 per cent; Presbyterians 1,9 per cent; Congregational churches 1,4 per cent; Roman Catholics 8,9 per cent; Pentecostal churches 7,3 per cent; and other churches 12 per cent. African independent churches have a membership of 40,8 per cent of the total Christian population. Apart from Christian followers in South Africa, there are also 0,2 per cent followers of the Jewish religion; 1,1 per cent Islam followers; 1,3 per cent Hindu followers; and 0,1 per cent Buddhist believers. There is also a large segment of African traditional religion. It is estimated that 12 per cent of the total of African traditional religion followers are in South Africa.⁷ In April 1997, Kauuova gave the figure of 17,7 per cent as the percentage of African traditional religions,⁸ but he did not specify whether this percentage was in relation to the total population of South Africa or in relation to the religious population in South

4 ‘Coloured’ South Africans are a people of mixed lineage. They are descendents of slaves who were brought to the country from East and Central Africa; the indigenous Khoisan, who lived in the Cape at the time, indigenous Africans and whites. The majority speak Afrikaans. See <http://www.southafrica.info/about/people/population.htm> (accessed 31 January 2014).

5 As above.

6 As above.

7 *South African Christian handbook 2007-2008* (2007) 69-74.

8 WR Kauuova *The religions of Southern Africa. A synopsis of their basic beliefs* Institute for Reformational Studies Series 1.1, Study Pamphlet 352 (1997) 1.

Africa. Prozesky and De Gruchy, with reference to the 1980 and 1991 census in South Africa, include African traditional religion under the headings of 'Nothing/Object' as being 3,1 per cent in 1980 and 2,97 per cent in 1991 as percentages of the total. With reference to the 1980 census, they mention a figure of 14,4 per cent under the heading of 'Uncertain', which then includes African traditional religion.⁹ It is clear that there is no certainty about the number of believers in African traditional religions. Thus, not only is there a plurality of cultures, as is shown by the fact that the country has 11 official languages, but there is also a plurality of religions which all claim their legitimate share of the public space.

3 The South African Constitution and religion

The South African Constitution of 1996 brought about what can be called a paradigm change for religions in South Africa. It is a Constitution for every citizen of the country, and includes a Bill of Rights. For the first time, all religions in South Africa were guaranteed freedom of religion.¹⁰ Religions, cultures and languages are entrenched in the Constitution in sections 9(3), 15(1) to (3), 30, 31, 185 and 234. Section 7(3) of the Constitution obliges the state to respect, protect, promote and fulfil the rights in the Bill of Rights.¹¹ Religious groups also have the right to limit certain rights of their members in compliance with the conditions set out in the Constitution.¹²

4 South African Charter of Religious Rights and Freedoms

Very soon after the Constitution was enacted in 1996, the question was asked what the implications of article 15 are for the religions of the land as well as for the whole of society. These questions led to the formulation of the South African Charter of Religious Rights and Freedoms.¹³ Already in 1990, Judge Albie Sachs wrote:¹⁴

Ideally in South Africa, all religious organisations and persons concerned with the study of religion would get together and draft a charter of religious rights and responsibilities – it would be up to the participants themselves to define what they consider to be their fundamental rights.

9 M Prozesky & J de Gruchy (eds) *Living faiths in South Africa* (1995) 237.

10 Sec 15 Constitution of the Republic of South Africa.

11 Secs 7, 9, 30, 31, 185 & 234.

12 Sec 36.

13 South African Charter of Religious Rights and Freedoms.

14 A Sachs *Protecting human rights in a new South Africa: Contemporary South African debates* (1990), 46-47.

Without being aware of what Judge Sachs had written, a South African Charter of Religious Rights and Freedoms was drafted over a period of several years by a Continuation Committee of academics, religious leaders, government commissioners and international legal experts in consultation with all the major religions in South Africa, human rights groups and media bodies. The Charter was publically endorsed at a ceremony on 21 October 2010 in the presence of the Honorable Justice Dikgang Moseneke, Deputy Chief Justice of South Africa. At that occasion, 91 leaders, representing religious, academic, legal, human rights and media organisations in South Africa, as well as international advisors, endorsed the Charter. The signatories included representatives of the Jewish religion; 24 Christian denominations; the Muslim Judicial Council; the Ismaeli Community; the Jami'atul 'Ulama (the Council of Muslim Theologians); the Hindu faith (the Arya Samay SA, the Hindu Co-ordinating Council, the Sri Sathya Sai Baba Council, the Tamil Federation); the National Spiritual Council of the Baha'is of South Africa; African traditional religion; African independent churches; the National Commission for Culture, Language and Religion; women's organisations; youth movements; the education desk of the Dutch Reformed Church; the Griekwa National Council; the Griekwa Independent Church; the Commission for Religious Freedom of the Evangelical Alliance of South Africa; the Evangelical Alliance of Southern Africa; Trans World Radio; media production houses; the Christian Network; the Jesuit Institute; the Elected School of Amadlosi; and the Interdenominational Ministries. The total of practising religious believers represented by the signatories is estimated to be approximately 10,5 million of the total South African population of approximately 52 million.

The South African Charter defines the freedoms, rights, responsibilities and relationship between the state of South Africa and her citizens of religious belief. The Bill of Rights recognises that everyone has the right to freedom of religion, while article 234 makes allowance for civil organisations to draw up charters of rights, to be drawn up by civil organisations, which may then be enacted by Parliament. The South African Charter of Religious Rights and Freedoms is the first such charter to be developed in South Africa. Apart from addressing the freedoms and rights of religion over and against the state, the Charter is also very useful for organising the relationship between the different religions of the land. It helps them to understand that the Charter is not trying to bring about one religion in the country. The Charter defines the rights and freedoms that each religion in the country can claim while working together with other religions in the public sphere for the common good of the country. The Charter is also a very useful tool for religions to determine their own identity in terms of the rights and freedoms that they can legitimately claim. If religions do not use this tool, they will find that their rights and freedoms will be determined by the courts. Even if parliament does not enact the Charter, religions can always

make it part of their own body of rules and regulations, which then will have to be taken into account by the courts.

The Charter consists of a Preamble of eight articles which express the needs for a charter. This is then followed by the Charter itself, comprised of 12 articles with sub-divisions, stating the religious rights and freedoms of religious people and communities in South Africa. The Charter expresses what freedom of religion means to religious believers and religious organisations within a South African context, as well as the specific rights, responsibilities and freedoms that are associated with freedom of religion. These include, amongst others:¹⁵

- the right to gather to observe religious belief (article 1);
- freedom of expression regarding religion (article 6);
- the right of citizens to make choices according to their convictions (article 2);
- the right of citizens to change their faith (article 2);
- the right of persons to be educated in their faith (article 7);
- the right of citizens to educate their children in accordance with their philosophical and religious convictions (article 7);
- the right to refuse to perform certain duties or assist in activities that violate their religious belief (article 2(3)); and
- the rights of religions to institutional freedom (article 9).

Currently the Charter is available in Afrikaans, English, Zulu, Xhosa, Sotho, Tswana and also in German.

After the public endorsement of the Charter, a South African Council for the Promotion and Protection of Religious Rights and Freedoms was established to oversee the process of the Charter being formally enacted into South African law. The passing of the Charter into law will officially mean that every religious believer and organisation will have legal impartiality and protection to practise all elements of religious belief under the Constitution. Currently the Council for the Promotion and Protection of Religious Rights and Freedoms is engaging with various financial, academic and cultural bodies in society as well as with various trade and labour unions for their support in taking the Charter to Parliament. Eventually political parties will also be engaged to inform them about the Charter and the effort to have it enacted by Parliament.

5 Christianity in South Africa and the Constitution

Christianity is the religion of the people who follow Jesus Christ as their Saviour and Lord who, together with the Father and the Holy Spirit, is the Triune God. Out of love for this world, the Father sent the Son to the world where He died for the sin of the world. As the Lord who was raised from the dead, Christ is the head of the whole of creation – the kingdom of God. Christ was at the same time also given as the head of the church, His body, the fullness of Him that fills

¹⁵ South African Charter of Religious Rights and Freedoms.

everything in everybody. They who believe in Him are His church and at the same time also members of His kingdom, called to witness to the world in every aspect of their life about Jesus Christ, the Lord of the whole of creation. For Christians, the Bible is the Word of God which guides them in their religious and moral life in all spheres of life. Christianity reached South Africa at a very early time in the Western time calendar. The Reformed religion came to the southern tip of Africa from Western Europe in 1652, through the establishment of a refreshment post for their ships at the Cape of Good Hope by the Dutch East Indian Company.¹⁶

5.1 Church and state: The current situation

In South Africa, official state law consists of a Western and an African component. The Western component entails common law, which is Roman-Dutch law, as influenced by English law and adapted and further developed by court decisions. The African component consists of that customary law which has been incorporated into legislation and the decisions of courts.¹⁷ This constitutes the official legal pluralism in South Africa. Apart from this official state law, there is also a plurality of other unofficial laws, including the laws of the Hindu, Muslim and Jewish religions, as well as the so-called living customary law and the people's law. It is very interesting that legal scholars¹⁸ mention only the Hindu, Muslim and Jewish laws as so-called unofficial legal systems, but do not include the numerous other religions that also exist in South Africa, all of which have their own laws on how they are structured, what they expect from their members and according to which they claim the right to operate in society. Even stranger is the fact that Christianity is not mentioned as a separate unofficial legal system. This is probably due to the history of the relationship between church and state in South Africa, according to which the legislation of the state was, and perhaps still is, uncritically seen and accepted as complying with Western values which are, in turn, equated with Christianity. How did this come about?

5.2 From history

When the Protestant Reformation of the sixteenth century took place under the leadership of people like Martin Luther and John Calvin, much of the theological content of the teachings of the Roman Catholic Church was translated into a new paradigm of salvation through faith in Christ alone. However, when it came to the important issue of the relationship between church and state, it can

16 For a list of important events in the history of South Africa's religions, see Prozesky and De Gruchy (n 9 above) 229.

17 C Rautenbach *et al* *Inleiding tot regspluralisme in Suid-Afrika* (Introduction to legal pluralism in South Africa) (2010) 3.

18 As above.

be said that the Reformers did not formulate profound new insights. They simply went back to the old paradigm of the relation between church and state that existed since the time of Constantine. This meant that they accepted it as the duty of the state to protect the church and its teachings, even with the power of the sword, thereby granting the worldly authorities the power to control the church.

This teaching can clearly be seen in the *Confessio Belgica*¹⁹ (1561), a very important Reformed confession from the sixteenth century, also known as the Dutch Confession of Faith. Article 36 of this Confession sets forth how God has placed the sword in the hands of the government to punish evil people and protect the good (Romans 13:4). It then continues:

And the government's task is not limited to caring for and watching over the public domain but extends also to upholding the sacred ministry, with a view to removing and destroying all idolatry and false worship of the Antichrist; to promoting the kingdom of Jesus Christ; and to furthering the preaching of the gospel everywhere; to the end that God may be honored and served by everyone, as He requires in His Word.

With regard to the duty of subjects of the church, we read the following:²⁰

Moreover everyone, regardless of status, condition, or rank, must be subject to the government, and pay taxes, and hold its representatives in honour and respect, obey them in all things that are not in conflict with God's Word praying for them that the Lord may be willing to lead them in all their ways and that we may live a peaceful and quiet life in all piety and decency (1 Timothy 2:2).

This is not to say that the theocratic rule by the Roman Catholic Church that had prevailed since 1075, in which the teachings and order of the church controlled the whole life of state and society,²¹ was simply accepted by the different rulers in the West.²² There is much historical evidence to the contrary. After the Council of Basel (1431), the national states asserted their guardianship over the church. In England, the national church that had existed since the fourteenth century in 1531 became the Anglican State Church under the rule of Henry VIII. In 1478, the Inquisition in Spain was taken over by the state. In Germany, the different provincial rulers had authority over the church within their boundaries – an approach that was formalised with the Peace of Augsburg in 1555.²³ In Geneva, Calvin did try to introduce greater freedom for the church from the worldly authorities, but even there the political authorities insisted on their position of authority over the church. We find proof of this in article

19 *Confessio Belgica* (1561) <http://www.ccel.org/ccel/schaff/creeds3.iv.viii.html> (accessed 31 January 2014).

20 Art 36 *Confessio Belgica* (n 19 above).

21 J Witte Jr 'Introduction' in J Witte Jr & FS Alexander (eds) *Christianity and law: An introduction* (2008), 9-15.

22 H Berkhof & O de Jong *Geschiedenis der Kerk. Negende druk* (1978) 168.

23 Berkhof & De Jong (n 22 above) 115 160.

165 in both the Church Orders of 1541 and 1561.²⁴ In the Netherlands, we also find that, after many years of fighting and bloodshed, the Reformed Church became the privileged church, protected by, but in fact also subjected to, the political rulers.²⁵

This was also the case in South Africa where a situation of Constantinianism in a stricter or lesser sense endured from 1652 to 1994 – first from 1652 to 1795 under the Dutch, and then from 1806 to 1910 under the English. After 1910 came the Union of South Africa, a period in which different governments to a large extent continued the Constantinian model of church state relations through their political agendas. In 1996, South Africa got a new Constitution in which, for the very first time, freedom of religion was guaranteed.²⁶ Even more importantly, article 234 of the Constitution provides that Parliament can accept separate Bills of Rights in order to enhance democracy.²⁷

It can be said that the historical development of the relationship between state and church in the Western world since the sixteenth century, in which the state protected the church but also controlled it, brought about policies of the state that were equated with the Christian point of view. This view was followed in South Africa, too, and that is probably the reason why, given the current legal position in the country, it is deemed unnecessary to pay special attention to the Christian point of view, as in the case of other religions, such as African traditional religion, the Jewish religion, the Muslim religion and the Hindu religion. There is clearly a lot more thinking to be done if we want to speak of real freedom of religion for Christianity as well as other religions in South Africa.

6 African traditional religion and the South African Constitution

6.1 What is African or African traditional religion?

Dr Nokuzola Mndende, a believer and a diviner in African religion herself,²⁸ uses both the terms 'African religion' and 'African traditional religion' in her writings to define the religious beliefs and practices of the indigenous peoples of Africa, south of the Sahara desert.²⁹ According to her, these beliefs and practices permeate all aspects of life of both the individual and of society. One does not convert into

24 Art 165 *Ordonnances Ecclésiastiques* (1541, 1559).

25 See P Coertzen 'Dordt and South Africa – Church and state relations in the Netherlands and in South Africa' (2012) *Dutch Reformed Theological Journal*.

26 Sec 15 Constitution of the Republic of South Africa.

27 Sec 234 Constitution of the Republic of South Africa.

28 N Mndende *An introduction to African religion* (2006) 1; N Mndende *I will not surrender!* (2012) Foreword.

29 Mndende, *An Introduction to African Religion* (n 28 above) 1.

this religion. Everyone in African society is believed to be born into the religion and thus becomes an active participant in a spiritual journey which originates from the spiritual world and eventually goes back to the spiritual world.

Mndende argues that African religion includes fundamental beliefs which are common to all Africans, despite the fact that Africa consists of a multitude of nations, complex cultures and dialects. Because of these commonalities based on religion, she suggests that it must always be spoken of in the singular. Kiernan, on the other hand, prefers to speak of African traditional religions in the plural, thereby denoting all the indigenous religions in South Africa, and not only the faiths of the various black African, Bantu-speaking peoples, but also the faiths of people like the San and the Khoikhoi.³⁰ The term 'indigenous religions' would, of course, apply not only to South Africa, but also to the whole of Africa.

It is believed that African beliefs and practices originated from the spiritual world and were handed down to the physical world by forbears by word of mouth, by practical participation in ritual activities and by the day-by-day teachings of the elderly. There is no founder of African religion. The religion was revealed to the first generation, who were directly created by the supernatural power, or God. It was this supernatural being that gave the first generation all the laws and taboos how to live in harmony with God, other human beings and nature. People were instructed to marry for reproductive reasons and parents were tasked to lead their children by example in a manner that promotes good moral values. When the first generation died, their spirits joined the spiritual world where the Creator lives. This marked the beginning of ancestors who became the messengers of the Creator and also the supervisors of the physical world. The ancestors looked after the welfare of the living mainly through the elderly, who taught the youth orally and through rituals. In this way, the religion got passed on from generation to generation. From time to time, the elders also revealed themselves to the living of all ages through visions and dreams.

According to Mndende, the concepts of *Creator, ancestors* and *ritual performances* for the spiritual world are the basic beliefs for believers in Africa. She discusses these and other aspects of African religion in her book *An Introduction to African religion*.³¹ Kauunova notes the core beliefs of African religion as being belief in a *Supreme Being*. Then there are *Divinities* who are derivatives from the Deity. The Divinities each have their own local name 'and were brought into being as functionaries in the theocratic government of the universe'.³² Theocratic government means that it is the religion that lays down the

30 J Kiernan 'African traditional religions in South Africa' in Prozesky & De Gruchy (n 9 above) 15-27.

31 Mndende *An Introduction to African Religion* (n 28 above) 1-19.

32 Kauunova (n 8 above) 1.

rules for the whole of society as well as for the whole existence of people. There is also belief in *ancestors* and *spirits*. The dead continue their existence as ancestors in the forms of 'shades' or spirits and these possess the power to affect the living. Some of the spirits are generalised ancestral 'shades', while others are associated with particular animals or other natural objects – there can be ghost spirits, spirits of wishes and guardian spirits.³³ Some of the spirits are witches. Witchcraft is a very serious and often a rude disillusioning reality in Africa. It is said that for Africans, witches are the essence of that which is evil and diabolical.³⁴ Although Kauunova also mentions their view of life, sin, salvation and ethics as core beliefs of African religion, Kauunova describes salvation as referring to physical welfare and the cosmic saving activities of God. Salvation in African religion 'is not related to Christ, but to rituals which seek to promote fertility, fecundity, healing and other modes of being emblematic of cosmological harmony'.³⁵ Oosthuizen is of opinion that African religion consists of five core components: (1) belief in a Supreme Being; (2) belief in lesser gods; (3) belief in spirits; (4) ancestral belief; and (5) the practice of magic and medicine, each with its own cult. Oosthuizen also points out that these core components relate to each other, because African thought is always in terms of totalities. Everything is part of a whole and each individual thing only makes sense in as far as it is connected with everything else. This would mean that the physical and the spiritual world are very closely connected in African religion.³⁶

Rituals, controlled patterns of action, also play an important role in African religion. There are communal rituals referring to practices like rainmaking, rites with regard to agriculture, purification rites, communion sacrifice and temples and altars, and then there are also personal rites relating to birth, puberty, marriage and death.³⁷ Just how important these rituals can be in South African society is seen in a report that was published on 29 December 2012 in a national newspaper. It is reported that President Zuma intended to have a national day of cleansing to restore the national morals of the country. Some of the reasons for calling for this ceremony were the Marikana tragedy in which 45 mineworkers died during a strike and encounter with police, the rape of women and the assassination of politicians. The South African National Civics Organisation (SANCO) asked that all the deaths on South African roads also be included in the ceremony. Mr Dumisane Mthlane, the spokesperson for SANCO, asked that the ritual 'Ukuvala Umkhoka' be performed to stop the repetition of bad things. These traditional and cultural customs are used by the

33 Kauunova (n 8 above) 1-2.

34 GC Oosthuizen *Godsdienste van die Wêreld* (1977) 272.

35 Kauunova (n 8 above) 2.

36 Oosthuizen (n 34 above) 263-264.

37 Kauunova (n 8 above) 2.

ancestors to deal with matters like road accidents and unusual patterns of behaviour:³⁸

A national cleansing ceremony will be a positive step for the people of the country and will help to bring back normality through the respect for moral and important African values which will be placed at the forefront of our nation.

Looking at the above-mentioned characteristics, one can say that the main elements of African religion are (1) belief in a Supreme Being or a Creator; (2) belief in lesser divinities who are functionaries in the theocratic government of the universe; and (3) belief in ancestors, belief in spirits, belief in the practice of magic and medicine (each with its own cult) and the performance of all kinds of rituals.

6.2 African traditional religion and African customary law

The question to be answered in this section is whether there is a link between African religion and African customary law. Bennett does not mention religion explicitly in his book *Customary law in South Africa*. In his book *Human rights and African customary law*, he states that culture, on the one hand, implies high intellectual and artistic endeavour. At the same time, Bennett argues:³⁹

‘[C]ulture’ may also denote a people’s entire store of knowledge and artefacts especially the languages, systems of belief, and laws that give social groups their unique characters. This meaning would encompass a right to customary law, for customary law is uniquely African, in contrast with law of a European origin.

Bennett links this definition of culture very closely to a ‘system of religion’. He also refers to section 14(3) of the draft 1994 Constitution (section 15(3) of the final 1996 Constitution), which provides that nothing in the Bill of Rights precludes legislation recognising ‘a system of personal and family law adhered to by persons professing a particular religion’.⁴⁰ Although this provision was especially intended to promote the cause of Islamic and Hindu law, it would in the light of section 31 of the Constitution also apply to African culture, which would then also include the African religious system.

In *Customary law and the new millennium*,⁴¹ Mqoke argues that in African legal systems there is no separation between culture, law and religion.⁴²

is widely regarded as an integral part of the African culture. Customary law is reputed as being the law that was handed down from time immemorial from the ancestors and as such represents a collection of precedents and decisions of the bygone chiefs and councillors.

38 ‘Zuma wil die nasie nou laat reinig’ *Die Burger* 29 December 2012 2.

39 TW Bennett *Human rights and African customary law* (1995) 23-24.

40 Bennett (n 39 above) 24.

41 RB Mqoke *Customary law and the new millennium* (2003).

42 Mqoke (n 41 above) 3.

This means that customary law, as embedded in African religion, can be viewed as part of African morality.⁴³ Although the African legal tradition has been influenced by many factors, including the colonial experience, Western norms and globalisation it is still a force to reckon with – it reflects the African world view and the corresponding conception of law. As a legal tradition in own right, it has a customary and religious basis, a communal tradition and a sense of collective responsibility. In the field of dispute resolution, it features flexibility and reconciliation. It also reflects a non-separation of law, religion and morality, and it makes strong use of symbolism in making the law an effective instrument of social control.⁴⁴ This coheres with Mndende's claim that the African beliefs and practices 'permeate all sections of life of both the individual and of the society'.⁴⁵ Oosthuizen pointed out that, in African religion, everything is part of a whole and each individual thing only makes sense in as far as it is connected with everything else. This would mean that the physical and the spiritual world are very closely connected in African religion.⁴⁶ The remark of Kauuova that the role of divinities in the African religion is that of 'functionaries in the theocratic government of the universe'⁴⁷ also underlines the very close relationship between African religion and, for instance, the government of a state. All of this means that African religion as described above is a force to be reckoned with in South African society, the South African legal world, and the relationship between religions, as well as the relationship between the state of South Africa and the other religions in the country.

6.3 South African Constitution and African customary law

As mentioned before, in South Africa, official state law consists of a Western and an African component. The Western component entails common law, which is Roman-Dutch law as influenced by English law and adapted and further developed by court decisions. The African component consists of that customary law which has been incorporated into legislation; the decisions included in legislation or confirmed by the courts.⁴⁸ According to article 211(3) of the Constitution and article 1(1) of the Law of Evidence Amendment Act 45 of 1988, this includes all customary law which is readily ascertainable with sufficient certainty, not opposed to the Western perceptions of natural justice and public policy and not in conflict with the Constitution. It excludes indigenous law which is found to be discriminatory in terms of the Promotion of Equality and the

43 As above.

44 Mqoke (n 41 above) 16-28.

45 Mndende *An Introduction to African religion* (n 28 above) 1.

46 Oosthuizen (n 34 above) 263-264.

47 Kauuova (n 8 above) 1.

48 GJ van Niekerk 'Regsppluralisme' in Rautenbach *et al* (n 17 above) 3 10.

Prevention of Unfair Discrimination Act.⁴⁹ All of this constitutes the official legal pluralism in South Africa.

Throughout the years in which the official customary law was recognised as part of the official state law, it was, however, never seen as equal to common law. Western common law was always seen as the dominant law and the official customary law as the inferior law. Legislation by the state could at any time scrap the customary law and in the case of legal obligations, the common law would always be the victor. It was also the classifications of the common law that was used to explain customary law. Apart from this official state law, there is also a plurality of unofficial laws like the laws of the Hindu, Muslim and Jewish religions as well as the so-called living customary law and the people's law.

Throughout the years, the unofficial laws of the different communities were ignored and provision was made for only the official state law pluralism. In the years after 1994, the courts showed a more lenient approach towards unofficial laws, including unofficial customary law. Nevertheless, someone like Van Niekerk finds it necessary to point out that, even though the Constitution recognises customary law as a source of South African law, it still needs to be awarded official status. The Western legal system is still seen as the dominant system and any development must take place under the guidance of Western values.⁵⁰ Bennett, on the other hand, argues that in 1988 the Law of Evidence Amendment Act⁵¹ made customary law applicable in any court of the country. But this did not stop it from still being treated as a subordinate element of the legal system. It was only after 1993 that matters started to change with the new Constitution, when articles 30 and 31 gave litigants the right to demand respect for their culture. There are those who see the treatment of African customary law in the legal system as racist because a particular group continues to be subject to what is nearly always a disadvantageous standard of treatment. Bennett, however, goes on to argue that the Constitution put an end to the assumption that Roman-Dutch law was the general law of the land and that the state had complete discretion in deciding whether to recognise customary law or not. Article 211(3) of the Constitution and *dicta* by the Constitutional Court in cases like *S v Makwanyane & Another*⁵² indicate that customary law is a core element of the South African legal system, on par with Roman-Dutch law.⁵³

In fact, because customary law is associated with culture, in terms of sections 30 and 31 of the Constitution, its status is now even stronger than

49 GJ.van Niekerk 'Legal pluralism' in JC Bekker *et al* *Introduction to legal pluralism in South Africa* (2002) 1.

50 Van Niekerk (n 48 above) 4.

51 Sec 1 Act 45 of 1988.

52 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) paras 365-383.

53 TW Bennett *Customary law in South Africa* (2004) 42-43.

that of Roman-Dutch law; however, an argument could be made for deeming the latter a system of personal law, associated with settler culture.

At the moment some very interesting developments are taking place on the legal scene in South Africa. In a very recent report, the newspaper *Die Burger* of 19 October 2012,⁵⁴ in an article 'Voorvadergeeste is 'n geldige rede' ('Ancestors are a legitimate reason') wrote about a woman, Johannah Mmoledi, who had been working for the Kievits Kroon Country Estate for the past eight years. In her own time she attended a course to qualify as a *sangoma* (traditional healer). After this course, she asked for a month's leave of absence from work to attend a full-time course to qualify as a *sangoma*. Her employers refused her request. She decided to attend the course anyway. Before her departure, she handed a letter from a traditional healer to her employers in which the healer declared that he had examined her and had found her to be plagued by the ancestors. On her return to work, there was a disciplinary hearing. She was found guilty of unauthorised absence and fired. She appealed to the Commission for Conciliation, Mediation and Arbitration who found that her dismissal was unfair and reappointed her in her post. The employers appealed to the Labour Court, where three judges found that the employers showed contempt for her culture and religion when they rejected her letter from the traditional healer explaining why she had to attend the course. In their judgment, the judges found that the argument that Western standards were opposed to African culture was misplaced.⁵⁵

It would be disingenuous of anybody to deny that our society is characterised by a diversity of cultures, traditions and beliefs. This being the case, there will always be instances where these diverse cultural and traditional beliefs and practices create challenges within our society, the workplace being no exception. The Constitution of the country itself recognises these rights and practices. It must be recognised that some of these cultural beliefs and practices are strongly held by those who subscribe [to] them and regard them as part of their lives. A paradigm shift is necessary by the state and also by the courts of the land; one must appreciate the kind of society we live in. Accommodating one another is nothing else but *botho* or *Ubuntu* which is part of our heritage as society.

54 'Voorvadergeeste is 'n geldige rede sê die hof' *Die Burger* 19 October 2012 6.

55 'Changing traditional views' (2012) *De Rebus* 53-54. The case referred to is *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & Others* (LAC) (unreported case JA78/10, 24-7-2012) (Tlaetsi JA). Other cases in which the same trend can be found are *Bhe v Magistrate, Kayelitsha* (Commission for Gender Equality as *Amicus Curiae*); *Shibi v Sithole & Others* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC); *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) BCLR 1 (KH); and *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (KH).

7 Conclusion: Recognition of a plurality of religions and religious legal systems

The Constitution of South Africa allows for freedom of religion, indeed, the freedom of all religions in South Africa. There is no established religion which has certain advantages before the law of the land. Neither can any religion in the country claim any theocratic advantages from the state and the courts. Before the law, all religions are equal and must be treated as such.⁵⁶

Every citizen and every legal person in South Africa must take note of the freedom that was granted to religions and they must respect, protect, promote, and fulfil this right towards other citizens, just as the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

A Working Committee drew up the South African Charter of Religious Rights and Freedoms. In this document, which was officially endorsed on 20 October 2010 by most of the religions and Christian denominations in South Africa, the rights and freedoms which can be claimed under the guarantee of religious freedom in the Constitution⁵⁷ are spelled out in greater detail. The Charter was formulated after a thorough study of what freedom of religion means, taking into account various other sections of the Constitution, international declarations and scholarly works, and hearing what the signatories themselves had to say about their religious rights and freedoms. The existence of a South African Charter of Religious Rights and Freedoms compels every religious person and organisation to take note of the content and to make sure that they take possession of the rights and freedoms. Failing to do that will result in the government of the country determining religious rights and freedoms and their scope for religious persons and bodies through legislation and the courts of the land deciding what freedoms the religions of the land can claim in terms of the laws of the country.

An examination of the position of Christianity in South Africa reveals that, in spite of the fact that the Constitution allows for a plurality of cultures and religions in South Africa, Christianity is not seen to have an officially-recognised separate religious legal system. The same can be said with regard to African religion although, as we have seen, there are attempts to treat African religion in a separate way and to bring their rights into the legal system of the country. What is clearly needed is a fully recognised system of religious legal pluralities in South Africa, a system where the plurality of religious legal systems are truly recognised and taken into account. This will ask from religions in the country to avail themselves of their position with regard to their religious rights and freedoms and also to avail themselves with regard to their legal position *vis-à-vis* the laws of the

⁵⁶ Sec 7(2) Constitution of the Republic of South Africa, 1996.

⁵⁷ Sec 15 Constitution of the Republic of South Africa, 1996.

land. There is clearly a lot of work to be done within the religions of South Africa to ensure that their religious freedom is fully utilised. On the other hand, the legislator will have to take serious note of what freedom of religion entails and will have to make an effort to reflect the fact of religious freedom in the legal structures of the land.

South Africa has never officially had an established religion, although it can be said that for many centuries Christianity was a privileged religion in the country. This changed in 1994 when freedom of religion became the privilege of all religions in the country. We must not move back to a situation of a privileged religion or a theocratic control by one religion over the whole of society. Both the state and the religions in South Africa must take it upon themselves to respect, protect, promote and fulfil the rights and freedoms of all religions in the country.

African traditional religion and the Catholic Church in light of the Synods for Africa: 1994 and 2009

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Summary

This article describes the relationship between African traditional religions and the Catholic Church as it has evolved following the two Synods for Africa in 1994 and 2009, which themselves followed from and reflected the new openness to interreligious dialogue in the wake of the Second Vatican Council. The article chronicles the various actions and pronouncements of the Pontifical Council for Interreligious Dialogue concerning relations with ATR, as well as the post-Synodal exhortations of Pope John Paul II and Pope Benedict XVI on evangelisation and African religions.

1 Introduction: A new order

Described as fetishism, animism and paganism, African traditional religion (ATR) has not been in the good graces of the Catholic Church or other Christian denominations since the beginning of evangelisation in Africa. It fell to the Second Vatican Council (Vatican II) in the 1960s to mark an official change in attitude in relation to non-Christian religions. Since then, this new order has had a profound impact on the work of the Catholic Church in Africa, which had a historic and unprecedented moment in 1994 with the first Special Synod for Africa of the Synod of Bishops. This gathering was followed by another in 2009. During the course of these conferences, serious consideration was given to the relations between the Catholic Church and ATR. A new era had begun.

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In this article, after a brief description of the history from Vatican II to the 1994 Synod, I analyse the current state of relations between the two religions in light of the two Synods for Africa. In the course of the second Synod for Africa, held at the Vatican from 5 to 25 October 2009, Cardinal Jean-Louis Tauran, President of the Pontifical Council for Interreligious Dialogue, observed:¹

African traditional religion still exercises a strong influence over Africans, who are naturally religious ... In order to respond to the question, what new things does the evangelist have to say to Africans, it is indispensable to understand and appreciate the religious roots of the people of the continent since, according to African wisdom, 'it is in pushing its roots into nourishing earth that the tree grows'.

The cardinal's declaration explains well, in my view, the current state of the soul of the Catholic Church in the face of Africa's religious heritage. It can no longer ignore the 'religious roots' of the continent in its evangelising mission. A page has turned in the relations between the two creeds and, as the President of the Pontifical Council for Interreligious Dialogue seemed to acknowledge, the change is radical. But the arrival at this conviction was not easy.

2 African traditional religion and the beginning of evangelisation

As is well known, the religious roots of the African peoples manifested in their rituals (passage to adulthood; cult of death; cult of ancestors; relation with spirits), their music and dance, and their prayers and other observances were considered by the first missionaries to be barbarism, fetishism, idolatry² – something diabolical 'whose exact contours were unknown'.³ All of this was contrary to the new religion that the missionaries had brought, and they forbade these practices and devotions among the faithful, under pain of exclusion from the Christian community. It was all purely and simply to be abandoned. The first faithful followed the prescriptions of the 'Father' during the day, but nightly returned to the practices of their ancestors. A fundamental question was posed: how to live with the prescriptions of the new religion, which spoke of brotherly love, justice, equality and peace, without renouncing the 'religious roots' that had been left to them by their ancestors and had served to cement their communities

1 J-B Sourou *L'ora della maturità, la Chiesa in Africa ai tempi del secondo Sinodo* (2010) 39.

2 See JH Kwabena Nketia 'African Christian spirituality and African culture' *The World Missionary Conference Edinburgh* (2010); FB Nyamnjoh & J Fokwang 'Entertaining repression: Music and politics in post-colonial Cameroon' (2005) *104 African Affairs* 251-274.

3 B Bujo *Introduction à la théologie africaine* (2008) 41.

up to that point. A very important question was posed: Could they be African and Christian?⁴

3 Second Vatican Council

At the Second Vatican Council (Vatican II), a global gathering of the Catholic Church convened by Pope John XXIII in 1962, many African clergy took part and they brought with them the fundamental question of African 'religious roots' to the heart of the Church. For many Africans who had become Christians, the imposition of the missionaries provoked a real question of identity, many of which were collected in 1956 in the theological manifesto 'The black priests question themselves'.⁵ This document had, in effect,⁶

marked a historic break ... [f]rom an age in which, the priests said, 'We thought for ourselves, outside of ourselves, and in spite of ourselves'; there was an awareness of a responsibility: African theology was born as a will to think for us, by us, and in complete consent to the mission of the faithful quest for the intelligence of faith. A will to relate the mission of evangelisation led by foreign missionaries to African culture was thus expressed.

This awareness of the people appeared in several documents of the Council, notably, the Vatican declaration *Nostra Aetate* of 28 October 1965 on the relationship of the Church to non-Christian religions. There, one reads:⁷

The Catholic Church rejects nothing that is true and holy in these religions. She regards with sincere reverence those ways of conduct and of life, those precepts and teachings which, though differing in many aspects from the ones she holds and sets forth, nonetheless often reflect a ray of that truth which enlightens all men.

Nostra Aetate continues:⁸

The Church, therefore, exhorts her sons, that through dialogue and collaboration with the followers of other religions, carried out with prudence and love and in witness to the Christian faith and life, they recognise, preserve and promote the good things, spiritual and moral, as well as the socio-cultural values found among these men.

Such a declaration marked an important break in the conduct of missionary practice to that point, which I have described above. Henceforth, the Catholic Church spoke of sincere respect toward other religions, because there was nothing at all evil in them, and it

4 J-B Sourou *Comment être africain et chrétien?: Essai sur l'inculturation de mariage en Afrique* (2009).

5 See A Abble *et al Des prêtres noirs s'interrogent* (1956).

6 B Adoukonou 'La théologie africaine aujourd'hui' conference presentation to the Faculty of Theology of Fu Jen Catholic University, Taipei, Taiwan, 29 April 2010.

7 Pope Paul VI *Nostra Aetate* (Declaration on the Relation of the Church to Non-Christian Religions) 28 October 1965 para 2.

8 As above.

invited the faithful to charity, dialogue and collaboration toward the progress of moral, social, and cultural values – but with prudence. This invitation to prudence meant that a road remained to be travelled to remove every shadow of a doubt in the understanding of non-Christian religions, among them African traditional religions. The effect was not total but, henceforth, one could use African musical instruments in church, celebrate mass in the vernacular, and sing and translate the Bible into African languages. This gave birth to a flowering of choirs, for example. Before Vatican II, the official liturgical language of the Catholic Church in African villages had been Latin.

The Vatican II Council touched on many of the questions that had been raised in earlier years by missionary practice, but in these general conferences, there had not been sufficient time devoted to the Church in Africa. It was thus with a feeling of half-success that the African bishops left Rome at the end of the Council. They began, from that point onwards, to toy with the idea of a Special Council for their continent. Such a conference could serve as a venue for a deeper discussion of the identity of the Church in Africa, of African 'religious roots', and of the place of Africa in the heart of the universal church. There would not be a Council, but rather a Synod in 1994.⁹

4 First Synod of Bishops for Africa

The Synod of Bishops is a permanent institution in the Catholic Church, established by Pope Paul VI in September 1965, following the Vatican II Council. It is an advisory body, composed of bishops representing the Episcopal conferences of the whole world and the presidents of Roman Curia dicasteries, or departments. A sort of 'miniature council', it demonstrates the collegiality of the bishops. It reconvenes periodically to discuss major questions for the Church.¹⁰ The Pope convenes these synods in three different forms: ordinary, extraordinary and special. The Synod for Africa was convened as a special synod.

Well before convening the Synod, which would be an important stage for the Christian Catholics of Africa, on 25 March 1988, the Pontifical Council for Interreligious Dialogue led by the Nigerian archbishop, Cardinal Francis Arinze, under Pope John Paul II, published a new document on ATR, titled 'Pastoral attention to

9 See J-B Sourou *Ecclesia in Africa à la lumière de l'Esprit d'Assise: Essai de lecture du premier Synode pour l'Afrique en marche vers le second* (2008).

10 See [http://en.wikipedia.org/wiki/Synod_of_Bishops_\(Catholic\)](http://en.wikipedia.org/wiki/Synod_of_Bishops_(Catholic)) (accessed 31 January 2014).

African traditional religions'.¹¹ The brief document, just seven pages in all, focused on how¹²

[t]he better ATR is understood by the heralds of the Gospel, the more suitable will be the presentation of Christianity traditional to Africans ... In this way, the Church will be more and more at home in Africa, and Africans will be more and more at home in the Church.

In fact, the Catholic Church more than realised that to want to separate the African man from his religious universe, from his 'religious roots', was to replant a tree without its roots, because the African was born, lived, grew and died in a religious universe and the transfer of this to Christ was particularly delicate. The idea so well synthesised by Amadou Hamapaté Ba, when he declared that to attempt to understand Africa and the African without the contribution of traditional religion would be like opening a large armoire devoid of its most precious contents.¹³

Pope John Paul II, who encouraged the drafting of the document, in the words of Cardinal Arinze, the President of the Pontifical Council, 'appreciated the African soul which searches for God through traditional religion, which was the religion of the majority of Africans before the arrival of Christianity and even Islam in Africa'.¹⁴ He realised well, the Cardinal continued,¹⁵

that the search for the divine through the African soul in these traditional religions was not without some errors here and there, but with a clear idea that there is one God and that there are good and evil spirits and that there are ancestors to be honored. This is not a bad preparation for Christianity. This does not surprise the many Christians in Africa who come from this religion, because it is a providential preparation of the people of God for Christianity. It is the human spirit that is in search of God.

Pope John Paul II had the opportunity to publicly express himself on these points, for example, in the course of his historic meeting with representatives of the Vodun religion on 4 February 1994 at Cotonou in Benin. It was a rare gesture during the 15 pastoral trips that he made to Africa.

In light of this, the Synod stressed the question of inculturation as an implantation of the Gospel message in the culture of a people. As

11 Pontifical Council for Interreligious Dialogue 'Pastoral attention to African religions' letter to the Episcopal conferences of Africa and Madagascar, Rome, 25 March 1988, *Bulletin* 1988/XXIII/2 para 1, <http://www.afrikaworld.net/afrel/vatican.html> (accessed 31 January 2014). The document is composed of four points: (1) reasons for pastoral attention to African traditional religion; (2) some elements of African traditional religion; (3) some key doctrinal points; and (4) proposals for action to be taken by the Episcopal conferences. See also J-B Sourou *Jean-Paul II: Pape blanc et Africain* (2009), 43-57.

12 Pontifical Council for Interreligious Dialogue (n 11 above) para 1.

13 See http://www.vatican.va/holy_father/john_paul_ii/speeches/1993/february/documents/hf_jp-ii_spe_19930204_vodu-cotonou_fr.html (accessed 31 January 2014).

14 Sourou (n 11 above) 52.

15 As above (quoting Cardinal Francis Arinze).

Pope John Paul II described it in his post-synodal apostolic exhortation, *Ecclesia in Africa*, inculturation is 'a process that includes the whole of Christian existence – theology, liturgy, customs, and structures'.¹⁶ It is meant to address the deep sense in many Africans of having received a faith not totally rooted in culture and life.¹⁷ It is an 'urgent priority ... for a firm rooting of the Gospel in Africa'.¹⁸ To give a striking symbol, the Synod chose a powerful image: the Church as the Family of God. Cardinal Hyacinthe Thiandoum, then Archbishop of Dakar in Senegal and Secretary-General of the Synod, proposed that that inculturation concerned all aspects of life. He mentioned worship and liturgy, marriage and family, sickness and health, and initiation rites.¹⁹ The unceasing importance that belief in ATR has on the quest for evangelisation that takes account of the African man led the Synod to insist on dialogue with it: 'Dialogue with its adherents and followers constitutes a challenge for the Church.'²⁰ As Pope John Paul II himself put it:²¹

With regard to African traditional religion, a serene and prudent dialogue will be able, on the one hand, to protect Catholics from negative influences which condition the way of life of many of them and, on the other hand, to foster the assimilation of positive values such as belief in a Supreme Being who is Eternal, Creator, Provident and Just Judge, values which are readily harmonised with the content of the faith.

A great leap seems to have been taken in the very important document *Ecclesia in Africa*.

Pope John Paul II insisted as well on 'profound respect' and he wrote that 'adherents of African traditional religion should therefore be treated with great respect and esteem, and all inaccurate and disrespectful language should be avoided'.²² As a means toward a better understanding of ATR, the Synod invited research projects and publications by experts, 'especially for matters concerning marriage, the veneration of ancestors, and the spirit world, in order to examine in depth all the cultural aspects of problems'.²³ The domains of social development, peace and respect for life were points on which Catholic Christians could work and adapt from ATR.²⁴

In short, with the 1994 Synod, there officially began an engagement on the part of the Catholic Church toward cohabitation in dialogue with ATR. African Christians were called to discern what

16 Pope John Paul II *Ecclesia in Africa* 14 September 1995, para 78.

17 M Cheza (ed) *Le Synode africain: histoire et textes* (1996) 238 (citing Cardinal H Thiandoum, Introductory Report to the Synod, para 16).

18 John Paul II (n 16 above) para 59.

19 See Cheza (n 17 above).

20 Cheza (n 17 above) 207 (citing Cardinal H Thiandoum, Second Report to the Synod, para 28).

21 John Paul II (n 16 above) para 67.

22 As above.

23 John Paul II (n 16 above) para 64.

24 See Sourou (n 11 above).

was good in their 'spiritual roots' and to make peace with them. It was only in this way that faith could become culture and touch all the sectors of life in Africa, since 'a faith that does not become culture is not fully accepted, not entirely thought out, not faithfully lived'.²⁵

5 Second Synod for Africa: October 2009

In the course of these conferences, there were questions of justice, peace and reconciliation in Africa. Most of the participants were very clear: 'Justice, peace, and reconciliation cannot be achieved without taking account of their contents in social life in Africa.'²⁶ Citing numerous examples, the bishops from Côte d'Ivoire, from Sierra Leone and from Guinea-Bissau showed that in these matters, if no others and in order not to fail at its plan in these domains, the Catholic Church should stay in permanent dialogue with Islam and African traditional religions.²⁷ The Archbishop of Conakry, Monsignor Vincent Coulibaly, for example, stressed the 'urgency of tripartite interreligious dialogue between Christianity, Islam and African traditional religion to make peace and to bring further into the light the spirit of fraternity and solidarity in the African cultural essence'.²⁸

In his post-Synodal apostolic exhortation, *Africae Munus*, Pope Benedict XVI emphasised the elements of the preceding Synod, such as inculturation, dialogue and scientific research to come to terms as well with 'the vital distinction between culture and cult and to discard those magical elements which cause division and ruin for families and societies'.²⁹ Witchcraft and other evil rites were implied here. Several participants put into perspective the fear and the damage that witchcraft created in African societies. Many in Africa and outside of the continent thought that these evil behaviours against life are a part of ATR, but it is very important to maintain that they are inherent contradictions in African culture which, in their essence, love and protect life. Deaths supposedly due to jealousy, envy and the will to be the first in all things and not to accept the success of others are contrary to the true values contained in ATR. The real ATR is a force for life and its respect.³⁰ Discernment is not always easy. This is why, with a view to making a well-founded project and deep research, the Pope emeritus urged:³¹

It is worth singling out knowledgeable individual converts, who could provide the Church with guidance in gaining a deeper and more accurate knowledge of the traditions, the culture and the traditional religions.

²⁵ John Paul II (n 16 above) para 78.

²⁶ Sourou (n 1 above) 35.

²⁷ As above.

²⁸ Sourou (n 1 above) 39-40.

²⁹ Pope Benedict XVI *Africa Munus* 19 November 2011 para 92. See also para 93.

³⁰ Pope Benedict XVI (n 29 above) para 69.

³¹ Pope Benedict XVI (n 29 above) para 92.

On the other hand, *Africae Munus* also condemned practices that were justified a part of the ancestral tradition, but which 'debate and degrade' African women.³²

Overall, Pope Benedict XVI expressed in *Africae Munus* not only the desire to continue in the same line as preceding documents, particularly *Ecclesia in Africa*, but also to adapt to new demands in the era of globalisation. 'It is very important that this continue,' Benedict emphasised, above all 'at a time when the intermingling of peoples, while a source of enrichment, often weakens cultures and societies.'³³ 'The identity of African communities is at stake in these intercultural encounters,' Benedict emphasised. 'It is imperative therefore to make a commitment to transmit the values that the Creator has instilled in the hearts of Africans since the dawn of time.'³⁴ These values, *Africae Munus* insists, 'have served as a matrix for fashioning societies marked by a degree of harmony, since they embody traditional formulae for peaceful coexistence'.³⁵ This is rather positive.

6 Final considerations: African *and* Christian

In my opinion, relations between ART and the Catholic Church have evolved from atrocious to a point of no return in terms of encouraging perspectives for the future and for Africa as a continent in the sense of research on African culture and for African Christians. It is this to which the Church invites the African faithful through inculturation, dialogue, research, and the promotion of humanity as a challenge for African Christians. African Catholics have everything to gain from this and must do it after years of suspicion and resistance. African Christians can and must be African *and* Christian. This will enrich our continent.

32 Pope Benedict XVI (n 29 above) paras 56-57.

33 Pope Benedict XVI (n 29 above) para 38.

34 As above.

35 As above.

Exploring the contours of African sexualities: Religion, law and power

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Summary

This article explores of the diverse ways through which organised religion, personal spiritual convictions, culture and the law shape, challenge and potentially transform the sexualities of African peoples. I argue that, through the intersection of religion, statutory law and reinterpreted traditional customs, the complexity of African sexualities (particularly those of women) is instrumentalised, controlled and regulated by the patriarchal state. As sources of power, the institutions of culture, religion and law structure sexual morality in such a way that it congeals into states of domination. Attempts to assert sexual citizenship have spawned social movements on the continent, challenging the dominant sexual discourses and demanding increased sexual autonomy and freedom. These movements have the potential to profoundly reshape our understanding of the links between sexualities and religion.

1 Introduction: Linking religion, culture, law and sexuality

Plurality is simultaneously the boon and the bane of Africa. The cultural diversity and richness found between and within the continent's religious and cultural communities lend to its versatility and beauty. Our historical and colonial legacy of pluralistic legal systems and multi-religious traditions holds both advantages and disadvantages. The plurality is further multiplied and problematised by the many permutations of religious beliefs/jurisprudence and the evolution of culture. It becomes even more complicated when one considers that organised religions on the continent operate at a global scale, albeit with a distinctly African flavour when transplanted to the continent.

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African religious and cultural plurality spawns many contradictions and some absurdities. So one can only imagine the complexity involved in exploring varied African sexualities within such shifting paradigms and crosscurrents of discourses.¹ In order to make sense of such exploration, we approach the topic from a common ground where the plurality of laws, culture, religions and religiosity finds convergence in their engagement with African sexualities. Such common ground can be found in the twin forces of patriarchy and capitalism – forces that support and reinforce each other, while also introducing new tensions and contradictions to the situation.

My use of the term 'African sexualities' in this article is not because I am unaware of African people's heterogeneity and the significance of such differences. I know that, because of the rich and diverse socio-cultural, as well as some political differences across African societies, the statuses of African peoples differ based on gender, class, race, ethnicity, religion, age, sexual orientation, and so forth. However, my reference to Africans as a collective in relation to sexuality stems from two important factors. The first is to highlight those aspects of cultural ideology – the ethos of community, solidarity and *ubuntu* – that are widely shared among the vast majority of people within the geographical entity baptised 'Africa' by the colonial map makers. More importantly, the term is used politically to call attention to some of the commonalities and shared historical legacies inscribed in cultures and sexualities within the region by forces such as colonialism, capitalism, imperialism, globalisation and fundamentalism.² The African philosophy of *ubuntu* or humaneness refers to understanding diversity and the belief in a universal bond and sharing.³ Justice Yvonne Mokgoro of the South African Constitutional Court elaborated this difficult-to-translate concept as follows:⁴

In its most fundamental sense it translates as personhood and 'morality'. Metaphorically ... [it describes] the significance of group solidarity on survival issues so central to the survival of communities. While it envelopes the key values of groups solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality.

1 Sexuality, as used in this article, encompasses a wide array of complex elements, including sexual knowledge, beliefs, values, attitudes and behaviours, as well as procreation, sexual orientation, and personal/interpersonal sexual relations. It touches a wide range of other issues, including pleasure, the human body, dress, self-esteem, gender identity, power and violence. It is an all-encompassing phenomenon that involves the human psyche, emotions, physical sensations, communication, creativity and ethics. The pluralistic use of the term is in recognition of the complex structures within which sexuality is constructed as well as its pluralistic articulations. S Tamale (ed) *African sexualities: A reader* (2011), especially S Tamale 'Researching and theorising sexualities in Africa' in Tamale (above) 11-36.

2 Tamale (n 1 above).

3 M Ramose *African philosophy through ubuntu* (1999).

4 Quoted in A Sachs *The strange alchemy of life and law* (2009) 106-107.

We speak of sexualities in the plural in recognition of the complex structures within which sexuality is constructed and in recognition of its pluralist articulations on the continent.⁵

A careful mapping of religions on the continent reveals that 86 per cent of its population subscribe to the imported monotheistic Abrahamic religions of Islam and Christianity.⁶ All Abrahamic faiths believe that God is male, described in their different holy scriptures. They are also messianic in that they anticipate the coming of a God-sent Messiah. Islam had penetrated the continent by the twelfth century, while serious attempts to introduce Christianity only happened in the eighteenth century.⁷ Historically, the process of proselytisation subverted, overthrew and demonised African traditional religions (ATR), which formed an integral part of African sexual culture.⁸ Nevertheless, and despite the concerted effort to undermine its relevance to the African psyche, it is important to note that ATR currently exercise considerable influence on the populations and the tendency is for a significant number of people to practise them concurrently, even if discreetly, with the Messianic religions.⁹ Mutua refers to this debilitating phenomenon as being 'suspended between a dim African past and a distorted, Westernised existence'.¹⁰ This constitutes one of the inherent contradictions (and hypocritical deceptions) of plurality referred to earlier.

Although most African traditional religions are also monotheistic,¹¹ their Supreme Being is beyond gender – being neither male nor female, and they are non-Messianic.¹² Moreover, ATR is not located in sacred text and cannot be isolated from people's holistic and everyday existence. In that sense, ATR can be viewed as 'religion-plus', a *modus vivendi*. It is, as Mbiti tells us,¹³

lived (not read), it is experienced (not meditated), it is integrated into the life of the people: Wherever they are, their religiosity, their religion, is with them.

5 Tamale (n 1 above).

6 See Pew Forum on Religion and Public Life *Tolerance and tension: Islam and Christianity in sub-Saharan Africa* (2010); D Barrett (ed) *World Christian encyclopaedia: A comparative study of churches and religions in the modern world* (2001). Out of a total population of 820 million in Africa, approximately 234 million (28%) are Muslims, while 470 million (57%) are Christians (Pew Forum (above) i), with the remainder professing ATR.

7 J Trimingham *The influence of Islam upon Africa* (1968).

8 M Mutua *Human rights: A political and cultural critique* (2002).

9 C Izugbara 'Sexuality and the supernatural in Africa' in Tamale (n 1 above) 531; Pew Forum (n 6 above); LO Sanneh 'The domestication of Islam and Christianity in African societies' (1980) 11 *Journal of Religion in Africa* 1-12.

10 Mutua (n 8 above) 110.

11 E Evans-Pritchard *Nuer (African people) religion* (1956).

12 J Mbiti 'General manifestations of African religiosity' paper presented at the First Meeting of the Standing Committee on the Contributions of Africa to the Religious Heritage of the World, <http://www.afrikaworld.net/afrel/mbiti.htm> (accessed 12 October 2012).

13 As above.

In other words, African traditional religions cannot be delinked from culture. For that reason, it is important to emphasise the distinction made in this article between 'religion' and 'religiosity'. Religion refers to 'a system of beliefs, practices, institutions, and relationships that provides the primary source of moral guidance for believers' (for example, Christianity, Islam, Hinduism and Judaism).¹⁴ On the other hand, religiosity is one's pious conformity to a religion through practice and conduct (for example, how often one goes to church or mosque).¹⁵ Both are of significance in understanding the diverse ways in which African peoples translate their sexualities within the contemporary world.

While noting the above distinction, it is also important to recall that several philosophers of ATR argue that there is continuity between the Abrahamic religions and ATR and, indeed, there are elements of convergence and mutual appropriation in the two forms of religion.¹⁶ The positive convergence between ATR and notions of Christianity includes the belief in a Supreme Being that is responsible for the creation of humans and other living things and communication between the Supreme Being and the spirits on behalf of humans. However, the perceived negative spiritual entities of ATR have also been actively incorporated into the image of the Christian Devil.¹⁷ The commonalities between Islam and ATR culture are seen in the practices of polygyny, male circumcision and bride wealth and their admission to evil forces.¹⁸ However, a significant rupture between Abrahamic religions and ATR is that, while the former often views the female body as the seat of sin, moral corruption and a source of distraction from godly thoughts,¹⁹ ATR celebrates and valorises the female body as a reproductive or sexual icon.

The influence of Messianic religions on African sexualities (practices, feelings, ideas, fantasies, excitements and aesthetics) has been enormous. Traditional sexual practices that were informed by ATR and indigenous culture have been seriously threatened. This article will

14 AA An-Na'im 'The politics of religion and the morality of globalisation' in M Juergensmeyer (ed) *Religion in global civil society* (2005) 24.

15 M McGuire *Religion: The social context* (1997).

16 F Wijsen 'Popular Christianity in East Africa: Inculturation or syncretism?' (1999) 29 *Exchange* 37-60; M Ojo 'The contextual significance of the charismatic movements in Western Nigeria' (1988) 57 *Africa* 175-92; Sanneh (n 9 above); B Kato *Theological pitfalls in Africa* (1975); J Mbiti 'Christianity and traditional religions in Africa' in D McGavran (ed) *Crucial issues in missions tomorrow* (1972) 91; J Mbiti 'The encounter of Christian faith and African religion' (1980) 97 *Christian Century* 817-820.

17 B Meyer 'Christianity in Africa: From African independent to pentecostal-charismatic churches' (2004) 33 *Annual Review of Anthropology* 447-474; Y Droz 'Si Dieu veut ... ou suppôts de Satan; incertitudes, millénarisme et sorcellerie parmi les migrants kikuyus' (1997) 145 *Cahiers d'Etudes Africaines* 85-114.

18 W Arens 'Islam and Christianity in sub-Saharan Africa: Ethnographic reality or ideology' (1975) 15 *Cahiers d'études africaines* 443-456.

19 J Entwistle *The fashioned body: Fashion, dress and modern social theory* (2000) 84; B Bakare-Yusuf 'Nudity and morality: Legislating women's bodies and dress in Nigeria' in Tamale (n 1 above) 122.

demonstrate that the positive conceptualisations of African sexualities (including the African female body) have largely been negated and overtaken by the state-supported advocacy of the Messianic religions. Mutua explains how African traditions were delegitimised by a new socio-political and religious order:²⁰

Africa – from top to bottom – was remade in the image of Europe complete with Eurocentric modern states. Christianity played a crucial role in this process: weaning Africans from their roots and pacifying them for the new order. Utilising superior resources, it occupied most political space and practically killed local religious traditions and then closed off society from other persuasions ... Islam, which had invaded Africa at an earlier date, was equally insidious and destructive of local religions. Its forceful conversions and wars of conquest, together with its prohibition of its repudiation, were violative of the rights of Africans as well ... Progress, culture and humanity were identified entirely in Islamic or Christian terms, never with reference to indigenous traditions.

Far from suggesting that African cultural norms or ATR were universally egalitarian, I argue that many sexual practices that were acceptable in pre-colonial, pre-Islamic and pre-Christian Africa were encoded with the distinctive tags of 'deviant', 'illegitimate' and 'criminal' through the process of proselytisation and acculturation. African sexualities were reduced to a universalised, essentialised culture and integrated into the wider 'enlightened' culture.

Throughout this article, any reference to 'law' should be understood broadly to include codified or statutory law, as well as religious laws and uncoded customary laws rooted in culture.²¹ All countries on the continent have pluralistic legal systems where codified law – formally or informally – operates side by side with customary law and/or Shari'a (Islamic law). Even where it is not explicitly stated that religion has the force of law, many religious principles find expression in the legal codes of most jurisdictions and are often used to justify and legitimise culture and law. Hence, in most African states, Christian and Islamic laws have been effectively domesticated. Indeed, the lines that separate law, culture and religion in Africa can sometimes be extremely blurred. Given how critical law and sexuality are to the lives of Africans, it is surprising how little scholarly attention has been paid to the intersection between these areas of our existence and how the complex relationships are played out. How do/can organised religion, personal spiritual convictions, culture and the law shape, challenge and potentially transform the sexualities of African peoples? How are religious norms and values institutionalised within African sexualities? How do people come to accept the rules that govern their sexuality and what explains the actions of those that resist or subvert such rules?

²⁰ Mutua (n 8 above) 109 110.

²¹ It must be noted, however, that in most African legal systems and jurisdictions, customary law is overridden by received colonial laws; Mutua (n 1 above).

In addition to this introduction, the article is divided into four parts. The second part of the article provides a discursive framework within which to articulate the conceptual link between power and knowledge in the construction of African sexualities. The third part of the article illustrates how law, culture and religion are used to strip certain people of sexual citizenship. The fourth part discusses the growth of the sexual rights movement on the continent, tracing its activism from the margins and demonstrating the small but significant gains that it has so far tucked under its belt. The final part of the article constitutes concluding remarks.

2 Law, culture and religion viewed through the lens of power

As the old adage goes, 'knowledge is power'. The saying can be interpreted in multiple ways: that knowledge equips one with potential power or that knowledge itself is power. In other words, behind the mask of knowledge lies real power dynamics. Knowledge reflects the 'truths' of the powerful, of those that pen and record history. The Italian theorist, Antonio Gramsci,²² introduced the concept of 'hegemony' to illustrate how systems of power are constructed through knowledge. Hegemonic power convinces people to subscribe to the social values and norms of an inherently exploitative system.²³

Contrary to popular belief, sexuality is not exclusively driven by biology; a very significant part of it is socially constructed through legal, cultural and religious forces driven by a politico-economic agenda.²⁴ Sexuality is very much a socio-cultural invention that is closely linked to power and to the processes of subjugation. As Africans, how we 'do' and experience sexuality is heavily influenced by society and culture. How and with whom we have sex, what we desire, what we take pleasure in, how we express that pleasure, why, under what circumstances and with what outcomes, are all forms of learned behaviour communicated, *inter alia*, through the institutions of culture, religion and law.²⁵ It is through these social institutions and social relationships that sexuality is reified or given meaning.

So, who 'sets the agenda' and imparts these 'sexual truths' as the universal norm? These are mainly people who, at a particular historical point in time, exercise power and control discourse – politicians,

22 A Gramsci *Selections from the prison notebooks of Antonio Gramsci* trans Q Hoare & GN Smith (1971); A Gramsci *Prison notebooks Volume I* trans JA Buttigieg (1992); A Gramsci *Prison notebooks Volume II* trans JA Buttigieg (1996).

23 M Stoddart 'Ideology, hegemony, discourse: A critical review of theories of knowledge and power' (2007) 28 *Social Thought and Research* 191-225.

24 A Dallery 'The politics of writing (the) body' in A Jagger & S Bordo *Gender, body, knowledge: Feminist reconstructions of being and knowing* (1989).

25 As above.

media houses,²⁶ cultural leaders, religious leaders, mainstream educationists, multilateral institutions – using tools such as the law, culture, religion, media and educational textbooks to disseminate and legitimise these ‘truths’, thereby enforcing compliance. ‘Truth’ frameworks about good, respectable, normal sexuality as well as those for bad, immoral and unnatural sexuality are constructed by hegemonic discourses.²⁷

Apart from the social and historical contexts that inform African sexuality and its relationship to law, culture and religion, there are also some developments at the international level that have cast their shadow over this phenomenon. During the past 50 years or so, in North America and Europe, there has emerged a new-fangled school of natural lawyers who seek to integrate a distinctive approach of Catholicism into law and legal systems.²⁸ Proponents of New Natural Law, such as John Finnis,²⁹ have breathed fresh life into anachronistic arguments against contraception, abortion, sexual activity outside of the heterosexual marriage (for example, fornication, masturbation, homoeroticism, adultery and prostitution)³⁰ and sexual acts between spouses that lack reproductive potential. Jurists such as Nicholas Bamforth and David Richards have challenged this school of thought for its fundamentalism which is rooted in patriarchal religious authority.³¹ During the same period, fundamentalist doctrines also took root in Islam with moral teachings and sacred interpretations of gender and sexuality similar to those of the New Natural Law. And despite the doctrinal differences between the two religions, they often come together and lock arms when defending ‘conservative’ perspectives on sexuality. Such reinvigorated religious fundamentalism has infiltrated Africa via a highly-organised born-again evangelical movement and Christian groups as well as conservative branches of various Islamic sects.³²

26 There are thousands of popular media houses that are privately owned by mainstream religions as well as charismatic and pentecostal denominations all over the continent. Eg, in Uganda we have Top TV, Lighthouse TV, Channel 44 and over 40 religious broadcasting radio stations.

27 G Rubin ‘Thinking sex: Notes for a radical theory on the politics of sexuality’ in C Vance (ed) *Pleasure and danger: Exploring female sexuality* (1984).

28 G Grisez *et al* ‘Practical principles, moral truth and ultimate ends’ (1987) 32 *American Journal of Jurisprudence* 99-151.

29 J Finnis *Natural law and natural rights* (1980).

30 We use the term ‘prostitution’ on account of the structured and stigmatised official/legal uses of the term. ‘Sex work’ is the preferred reference to adult transactional sex in order to highlight its professional aspects and to move away from its derogatory associations.

31 N Bamforth & D Richards *Patriarchal religion, sexuality and gender: A critique of new natural law* (2007).

32 K Kaoma *Globalising the culture wars: US conservatives, African churches and homophobia* (2009); A Imam ‘The Muslim religious right (‘fundamentalists’) and sexuality’ in P Ilkkaracan (ed) *Women and sexuality in Muslim societies* (2000); P Gifford *The new crusaders: Christianity and the new right in Southern Africa* (1981).

The adjective 'conservative' is advisedly placed in quotes because, when used in relation to religions, it masks the political interests behind the so-called traditional interpretations of the sacred writings of these religions. The preference in this article is for the term 'political religions' instead of 'conservative religions' in order to highlight the current role of such religions in dictating African sexual politics.³³ As Pereira reminds us:³⁴

While some dimensions of sexuality may always remain private, it is clear that sexuality is not, in its entirety, a private affair. Sexual politics are played out as much in the exercise of political authority as they are in intimate relations. Indeed, the intertwining of sex, violence and masculinity in the exercise of power by public office-holders is evident even (perhaps especially) among those who feel free to use religion for political ends.

Several historical-anthropological scholars have long erased the mythical line that tries to separate religion from the secular in Africa. They have demonstrated that religion, politics and the market have occupied the same sphere since the colonial period.³⁵ Religion greatly influences the development of social justice and ethical norms in our societies. Indeed, there is hardly any African state that strictly applies secularism; the tendency is to adopt an institutionalised and organic union between religion and the state.

When we speak about African sexualities, we are relying on discourses of law, culture and religion and the way that these structure their realities. Disciplinary power, in the Foucauldian sense,³⁶ fashions African people to conform to the mainstream notions of sexuality, thus 'voluntarily' colluding with patriarchal-capitalist sexual moral standards. One of the most radical examples of such self-surveillance can be seen in the acts of young women voluntarily submitting themselves for virginity testing in search of public approval. In South Africa and Zimbabwe, for example, many young women 'voluntarily' submit themselves for such tests in a bid to gain public approval, respond to demands for communal belonging and

33 H Ahmed-Ghosh 'Introduction: Lesbians, sexuality and Islam' (2012) 16 *Journal of Lesbian Studies* 377-380.

34 C Pereira 'Zina and transgressive heterosexuality in Northern Nigeria' (2005) 5 *Feminist Africa* 75.

35 K Fields *Revival and rebellion in colonial Central Africa* (1985); JDY Peel 'The pastor and the Babalawo: The interaction of religions in nineteenth century Yorubaland' (1990) 60 *Africa* 338-369; JDY Peel *Religious encounter and the making of the Yoruba* (2003); J Comaroff & J Comaroff *Of revelation and revolution: Christianity, colonialism, and consciousness in South Africa* (1991); J Comaroff & J Comaroff *Revelation and revolution: The dialectics of modernity on a South African frontier* (1997); N Etherington 'Recent trends in the historiography of Christianity in Southern Africa' (1996) 22 *Journal of Southern African Studies* 201-219; Meyer (n 17 above).

36 M Foucault 'Truth and power,' in C Gordon (ed) *Power/knowledge: Selected interviews and other writings, 1972-1977* (1980); M Foucault *The history of sexuality, volume I: An introduction* trans R Hurley (1978); M Foucault *Discipline and punish: The birth of the prison* trans A Sheridan (1977).

on account of the dignity and pride associated with it.³⁷ It is all part of the contradictions between bodily integrity, self-surveillance and religiosity.

It is thereby invaluable in facilitating our critical rethinking of how African people become subjects when we assume the gendered/sexualised identities that are constructed for us within the three power structures under scrutiny. Historically, all over Africa, the 'truth regimes' about sexuality are largely penned by the nib of legislation, custom and religion. The 'master frames' (or scripts) of sexuality that law, culture and religion construct for African people push many who do not conform to the very margins of society – sex workers, rape survivors, the youth, homosexuals, widows, single mothers, people living with HIV, and so forth. Their bodies become sites for political inscription even as they are constituted as the sexual 'other'. For example, the use of the term 'corrective rape' or 'curative rape' to describe sexual violence against African lesbians (to force them into heterosexuality) suggests that: (a) one's sexual orientation needs correcting; and (b) there are circumstances when rape can be warranted. In this respect, Hames discusses the need to change the discourse and speak of 'homophobic rape', refocusing on the punitive and hateful elements of the crime.³⁸

In this era of the HIV pandemic, political Christianity and Islam, especially, have constructed a discourse that suggests that sexuality is the key moral issue on the continent today, diverting attention from the real critical moral issues for the majority of Africans, such as financial security or the plunder, misuse, disuse and misappropriation of public funds. The wanton and fraudulent diversion of public funds by the powerful that prevent the masses from accessing basic human needs such as health care, clean water, education, nutrition, shelter, jobs, clothing, information and security is the number one moral issue preoccupying the minds of the average African. Employing religion, culture and the law to flag sexuality as *the* biggest moral issue of our times and dislocating the *real* issue is a political act and must be recognised as such.

To further understand the fundamentalist views that people hold in religion and culture, it is useful to employ the public and social policy analytical framework of the three I's, namely, ideas, interests and institutions:³⁹ *Ideas* (based on a patriarchal-capitalist ideology);

37 D Lewis 'Gendered spectacle: New terrains of struggle in South Africa' in A Schlyter (ed) *Body politics and women citizens: African experiences* (2009).

38 M Hames 'Violence against black lesbians: Minding our language' (2011) 25 *Agenda* 87-90.

39 B Palier & Y Surel 'Les 'trois I' et l'analyse de l'Etat en action' (2005) 55 *Revue Française de Science Politique* 7-32; H Hecllo 'Ideas, interests and institutions,' in L Dodd & C Jillson (eds) *The dynamics of American politics approaches and interpretations* (1994); PA Hall 'The role of interests, institutions and ideas in the comparative political economy of the industrialised nations' in M Lichbach & A Zuckerman (eds) *Comparative politics: Rationality, culture and structure* (1997).

interests (of those with the power to influence policy); and *institutions* (including formal and informal laws, norms, customs and religions plus their enforcement mechanisms) all help to structure the politics of African sexualities and effectuate paradigm shifts therein. In this light, religions can be recognised as 'major sources of social identity and political allegiances, as well as of personal and communal morality for millions of people as well as also for many bodies politic'.⁴⁰ Indeed, in Africa where religion is largely a 'way of living', an integral part of culture and identity, this analytical framework assumes critical importance.

The ideological premises from which African religions and sexualities operate dictate a separation of the public and private realms. They emphasise domesticated female bodies designed primarily for reproduction and social production, on the one hand, and public male bodies, on the other. At the same time, because religion in most African states is practically in the public square, it forms part of the mechanism that regulates women's domesticated bodies and sexuality. During the last four decades, three major developments have operated to (re)shape sexualities in Africa: (a) the growth of the human rights and feminist movement; (b) the HIV epidemic; and (c) the cultural/religious fundamentalisms which grew out of a backlash against the rights of women and sexual minorities. The various forces and interests involved lead to gendered contradictions and double standards regarding acceptable sexual behaviour. The past four decades have also seen the growth of 'new social movements' based on gender and sexuality that have raised serious critiques and trenchant resistance to dominant sexuality ideologies.⁴¹ We now move to a discussion of how these developments have played out in law and society.

3 The sexual citizen: Between desire and the law

It is against this backdrop that we can now analyse how African people experience and express themselves as sexual beings. Note that gender relations and sexuality (for the two are inseparable) play a crucial role in creating and sustaining patriarchy and capitalism.⁴² Male dominance and female subordination, from the level of the family unit to the community and state levels, have to be maintained for the survival and supremacy of the two systems. How does an African subject – particularly one who does not conform to the dominant model of sexuality – articulate their sexuality in the public sphere? How can they strike a balance between claims for rights and freedoms in the public realm and demands for the protection of

40 P Martin 'Human rights and religion: New thinking' (2012) 34 *Human Rights Quarterly* 900.

41 J Bennett 'Subversion and resistance: Activist initiatives' in Tamale (n 1 above).

42 Tamale (n 1 above).

separate 'private' sexual spaces? How do the law, culture and religion 'unsettle' sexual citizenship?

The need to control and regulate women's sexuality and reproductive capacity is crucial in patriarchal-capitalist societies at two levels. First, as one of the central tenets of the institutionalisation of women's exploitation, such control consolidates male domination through their control of resources and their relative greater economic power over women. The patriarchal family engenders these economic relations whereby the man, as head of the household, exercises control over the lives of women and children who are virtually treated as his property.⁴³ In this way, heteronormativity forms one of the essential power bases for men in the domestic arena. Capitalism required a new form of patriarchy than that which existed in pre-colonial Africa – one that embraced a particular (monogamous, nuclearised, heterosexual) family form.⁴⁴ It is essential that the man's acquired property and wealth is passed on to his male offspring in order to sustain the system of patriarchy. Hence, it becomes important to control women's sexuality in order to guarantee the paternity and legitimacy of children when bequeathing property. To this end, the monogamy of women is required, without necessarily disturbing men's polygynous sexuality. Such double standards are clearly reflected in legislation across Africa: for example, the crime of adultery applying to women and not to men. In fact, the double standards seen here reflect the culture in the Bible where it was acceptable for a Hebrew husband to have sex with any single woman and not commit adultery.⁴⁵ The inconsistency in sexual morality is also seen in the offence of prostitution around the continent that penalises only the sellers (the majority being women) and not the buyers (read men) of sex.

At another level, capitalist patriarchal societies are characterised by a separation of the 'public' sphere from the 'private' realm. The two spheres are highly gendered with the former representing men and the locus of socially-valued activities such as politics and waged labour, while the latter is representative of the mainly unremunerated and undervalued domestic activities performed by women. This necessitated the domestication of women's bodies and their relegation to the 'private' sphere, where they provide the necessities of productive and reproductive social life *gratuitously* (thus subsidising capital)⁴⁶ and are economically dependent on their male partners.⁴⁷

43 F Engels *The origin of the family, private property and the state* (1972); M Barrett *Women's oppression today: The Marxist/feminist encounter* (1988).

44 E Zaretsky *Capitalism, the family and personal life* (1976).

45 See Deuteronomy 22:22 & Leviticus 20:10.

46 Also by keeping women in a subordinate position, capitalism can justify and profit from paying women who work outside the home lower wages and employing them under worse conditions than men.

47 Zaretsky (n 45 above); L Nicholson *Gender and history: The limits of social theory in the age of the family* (1986).

In Africa, the process of separating the public-private spheres preceded colonisation but was precipitated, consolidated and reinforced by colonial policies and practices. Where there had been a blurred distinction between public and private life, colonial structures (law, religion) and policies (for example, educational) focused on delineating a clear distinction guided by an ideology that perceived men as public actors and women as private performers. Where domestic work had co-existed with commercial work in pre-colonial satellite households, a new form of domesticity, existing outside production, took over. Where land had been communally owned in pre-colonial societies, a tenure system that allowed for absolute and individual ownership in land took over. At the same time, politics and power were formalised and institutionalised with male public actors. The Western capitalist, political ideology (that is, liberal democratic theory) that was imposed on the African people focused on the individual, submerging the African tradition that valued the collective.

Statutory and religious jurisprudence in Africa, as well as its reinterpreted customary laws, are largely built on a heteronormative-reproductive ideal⁴⁸ with a presumed masculine juridical subject. I refer to 'reinterpreted' customs because, during the process of colonisation, many of the entrenched African cultural norms were distorted by the colonialists and their patriarch African collaborators to suit the new form of patriarchy required for the capitalist mode of production.⁴⁹ All three current legal regimes construct and reconstruct the African sexual terrain with particular emphasis on 'public morality'.⁵⁰ They dictate rules that govern marriage, divorce, adultery, transactional sex, incestuous sex, dress codes, and so forth.

There are several scriptural examples from the Messianic religions to illustrate this point. Most of them find practical expression based on the patriarchal-capitalist interpretations of the Bible and the Qur'an. Messianic religions are well known for their restraining influence on sexuality; relative to ATR, Christian and Islamic doctrines and sermons (as opportunistically and patriarchally interpreted) encourage sexual purity and virtue (especially for women). Whereas ATR generally tolerated practices such as masturbation, fornication, infidelity, adultery, non-penetrative sex, prostitution and homoerotics, the Messianic religions condemned them as sinful.⁵¹ Religious leaders from all denominations are extremely vocal and influential within the sexual surveillance system around the continent. Additionally, the

48 O Oyewumi *The invention of women: Making an African sense of Western gender discourse* (1997); I Amadiume *Reinventing Africa: Matriarchy, religion and culture* (1997).

49 Zaretsky (n 45 above).

50 Imam (n 32 above).

51 See, eg, in the Bible, 1 Corinthians 6:9-10; Matthew 19:9; 1 Thessalonians 4:3; Genesis 38:9-10; Exodus 20:14; Leviticus 19:29; Leviticus 20:13; and Deuteronomy 22:22; and in the Qur'an, Sūrah 24:2-3, 30-33; Sūrah 4:15-16; and Sūrah 7:81-84. In addition, there are several Islamic examples found in *hadith* books, eg Sahih Buhari Vol 3 Book 48 No 817.

religious and political leadership regulate and police African sexualities by highlighting their negative aspects. By keeping sexual pleasure in the background and foregrounding the risks and dangers associated with sexuality, practices of self-surveillance, particularly for women, are intensified. The concepts of sin (religious), taboo (cultural) and criminalisation (legislation) play a crucial role in constructing sexuality and the manner in which African people experience it, ultimately exercising a regulatory and controlling role. Hence we see the implementation of the 'three I's' framework (ideas, interests and institutions) being accelerated into a surveillance mechanism.

A good example of how religion conjoins with politics and law in constructing African women's sexuality is seen in the 2008 Nigerian Bill 'for an Act to prohibit and punish public nudity, sexual intimidation and other related offences in Nigeria'. The Bill was presented by the Chairperson of the Senate Committee on Women and Youth Affairs, Senator Eme Ufot Ekaette, in a bid to regulate women's dress code. It was introduced in the wake of several arrests of women wearing trousers and skimpy clothes in Lagos. Pastor Enoch Adeboye, the general overseer of the Redeemed Christian Church of God, the largest Pentecostal church in the country, had also addressed the issue of moral laxity and social corruption among his congregation, condemning women's clothing and banning his female congregation from wearing trousers and revealing clothes.⁵² But it was clause 16 of the Bill that was most revealing:

The roles of religious bodies in moral rejuvenation of our country is by this Act hereby guaranteed:

- (a) The Ministries of Information, Cultures and National Orientation shall develop policies and programmes for the integration of religious bodies in the reformation of the society for moral uprightness;
- (b) Religious bodies shall be encouraged in teaching moral uprightness to its adherents.

Analysing the Bill, Bakare-Yusuf writes:⁵³

[T]he senator collapses various distinct issues into a confused and spuriously unified account. First, she assumes that there is a causal relationship between nudity and sexuality. Second, women's sartorial agency is assumed to always be directed at men and is held to be an invitation to an erotic encounter that might often lead to unwanted consequences. Women must therefore be disciplined and protected from any potential masculine sexual terror that acts under provocation. Finally, the senator assumes that the judicial system must be based on a religiously grounded morality, which can be universalised regardless of differences ... The unclothed body, which in many Nigerian cultures was previously read in a non-sexual way, is now overburdened with sexual meaning and anxiety that acts as a prelude to sexual intercourse.

52 See 'Breaking news: No more trousers for redeemed ladies, Adeboye Orders' <http://www.nairaland.com/71063/breaking-news-no-more-trousers> (accessed 5 January 2013).

53 Bakare-Yusuf (n 19 above) 117 122.

The Nigerian Bill illustrates the elaborate system that legal regimes deploy to reward those who conform to the rules and punishes those who transgress them. The text and implementation of the laws largely exercise double standards and discriminate against women.⁵⁴ At the same time, it is notable that they also invoke the notions of religious piety and sexual morality in order to justify what is clearly an effort at the reinforcement of patriarchal dominance.

Recalling that Messianic religions stress the impurity and inherent sin associated with women's bodies, Ruether informs us:⁵⁵

Most human religions, from tribal to world religions, have treated woman's body, in its gender-specific sexual functions, as impure or polluted and thus to be distanced from sacred spaces and rites dominated by men.

It is not by coincidence that penal codes around the continent reduce religious sexual transgressions into punishable criminal offences, thereby laying down the laws of sexuality, ensuring that all citizens (believers and non-believers alike) adopt the hegemonic sexual discourse. Through the intersection of religion, the law and reinterpreted customs, the complexity of African sexualities (particularly women's) is instrumentalised, controlled and regulated by the patriarchal state.

Generally classified under the label 'offences against morality', sex laws are enumerated in African penal codes, prohibiting and/or regulating various sexual relations. Not only do these laws universalise sexuality, but they squarely place issues of 'sexual morality' between consenting adults within the realm of the state and the public. Such offences are often prejudicial to women and seek to maintain their subordinate status in society. Most of these laws found their way into African penal codes as direct imports from the legal regimes of former colonial powers. Ironically, while most victimless sex offences have been decriminalised in former colonial metropolises such as Britain, France, Portugal and Belgium, African jurisdictions maintain the moral surveillance regimes with enthusiasm. For example, while the offences of criminal adultery, pornography, prostitution, abortion, sodomy and elopement were all struck out of the penal codes of these Western countries, they remain intact in most of Africa. The legal protection of rape in marriage was also lifted in all these countries.

Equally antiquated are sexist defences available to sex offenders, such as 'mistaken belief'⁵⁶ and 'general immoral character'⁵⁷ as mitigating factors in rape cases, or the cautionary rule in cases of

54 Pereira (n 34 above).

55 R Radford Ruether *Sexism and God-talk: Towards a feminist theology* (1983) 7.

56 Mistaken belief is a defence available to individuals accused of sexual offences. If they can establish that they had an honest and reasonable mistaken belief of a fact (eg the age of the victim), they will be let off the hook.

57 Evidentiary rules allow a man accused of rape to put up the defence of 'general immoral character' on the part of the female victim in order to impeach her credibility.

sexual assault that requires corroboration of the evidence provided by the complainant.⁵⁸ Under Shari'a, the rules of evidence dictate that the testimony of a female is only worth half of the value of a man's testimony. The injustice built into the evidentiary requirement of 'corroborating evidence' in rape trials (based on the assumption that women and girls fabricate rape) and admissibility of the complainant's sexual history were highlighted in the highly-publicised Jacob Zuma rape trial in South Africa in 2006.⁵⁹ Such rules turn the constitutional presumption of innocence until proven guilty in criminal cases on its head. Adultery as a crime or even as a ground for divorce has long been repealed in the countries that exported this law to Africa. However, most of these outmoded sex laws continue to enjoy currency in many African jurisdictions. In its most violent manifestation, stoning-to-death for adultery, for example, is still a legal form of punishment in Northern Nigeria's (mis)interpretation of Shari'a. This issue was thrown into sharp relief by the infamous case of Amina Lawal.⁶⁰

The offence of prostitution criminalises sex work in all but one African nation. Senegal, which legalised prostitution in 1969, keeps a tight regulatory leash on those engaged in the trade. Historically, the reason for such a status in this former French West African colony was not a result of a liberal government, but rather an attempt to protect French colonial administrators from contracting sexually-transmitted diseases (STDs) from native women.⁶¹ The continued total prohibition of sex work in African states is justified on two main grounds: (a) that prostitution promotes social immorality; and (b) that prostitution poses a public health hazard to society, particularly STDs such as HIV. The morality argument buckles in the face of the apparent double sexual moral standards that most African penal codes set for men and women; the law targets and penalises only the sellers of sex (mostly women), letting the clients (mostly men) off the legal hook.

58 This evidentiary rule requires the evidence of a complainant in cases of sexual assault to be independently corroborated. Hence, the court must always warn itself of the danger of convicting an accused rapist on the uncorroborated evidence of the complainant.

59 In the case of *The State v Jacob Gedleyihlekisa Zuma*, the South African High Court allowed Zuma's lawyers to cross-examine the complainant about her sexual history, thereby violating her rights to dignity, privacy and equality. See J Moloi 'The case of *S v Zuma*: Implications of allowing evidence of sexual history in rape trials' (2006) 18 *South African Crime Quarterly* 25. Also see E Skeen 'The rape of a trial: Jacob Zuma, AIDS, conspiracy and tribalism in neo-liberal post-apartheid South Africa' BA thesis, Princeton University, 2007, <http://www.friendsofjz.co.za/documents/The%20Rape%20of%20a%20Trial.pdf> (accessed 26 December 2012).

60 Pereira (n 34 above).

61 K Ngalamulume 'Le péril vénérien: L'État colonial français et la sexualité à Saint-Louis-du-Sénégal, 1850-1920' ['The venereal peril: The French colonial state and sexuality in Saint-Louis, Senegal, 1850-1920'] in J-P Bado (ed) *Conquêtes médicales: Histoire de la médecine moderne et des maladies en Afrique* [Medical conquests: The history of modern medicine and diseases in Africa] (2006).

Professional public health literature indicates that the continued enforcement of prostitution laws only exacerbates the problem of public health. Indeed, this is borne out by the statistics of HIV adult prevalence rates; 0,7 per cent in Senegal compared to Uganda (6,5 per cent), South Africa (17,8 per cent), Botswana (24,8 per cent), Lesotho (23,6 per cent) and Swaziland (25,9 per cent).⁶² The contradiction in the socio-cultural legal regimes is clearly seen in the fact that most African countries now include sex workers among the 'most at risk' populations in their multi-sectoral AIDS strategies, yet they maintain the prohibitive legal regime.⁶³ Studies on adult sex work on the poorest continent in the world shows that those engaged in the trade do so primarily for economic reasons and to meet the appeal of financial autonomy.⁶⁴

A good example to illustrate how the Messianic faiths supplanted African cultural values pertaining to sexuality is seen in the labelling of same-sex erotic relationships as deviant. Indeed, the strength and influence of the hegemonic sexual discourse is clearly demonstrated in the area of homoeroticism. In Africa, not only does the discourse construct same-sex relations boldly as 'unnatural', but also as distinctly 'un-African' – an import from decadent Western societies. Political religions and reinterpreted culture are the chief inscribers of same-sex sexuality as 'un-African' and deploy it within the discourse of 'sin'. Hence, Africans engaged in same-sex sexual practices are viewed as undeserving aping sinners. In collaboration with state political leaders, the deviant-defining rule is reinforced and firmly entrenched into the public sphere. President Mugabe of Zimbabwe described homosexuals as 'worse than dogs and pigs' and is one of several African politicians who link homosexuality to Western imperialism. Others include Presidents Arap Moi of Kenya, Sam Nujoma of Namibia, Bingu wa Mutharika of Malawi, Olusegun Obasanjo of Nigeria and Abdoulaye Wade of Senegal – all of whom are on record for espousing homophobic bigotry and policies. Legislation provides the final authoritative and normalising framework for punishing and silencing 'deviant' individuals.

A respectable body of scholarship exists that suggests that, prior to the proselytising influence of the Messianic religions, there was a

62 UNAIDS *Report on the Global AIDS Epidemic*, http://www.unaids.org/globalreport/Global_report.htm (accessed 18 December 2012).

63 S Tamale 'Paradoxes of sex work and sexuality in modern-day Uganda' (2009) 15 *East African Journal of Peace and Human Rights* 69-109.

64 African Sex Worker Alliance 'I expect to be abused and I have fear': Sex workers' experiences of human rights violations and barriers to accessing healthcare in four African countries' Research Report <http://africansexworkeralliance.org/sites/default/files/ASWA%20Report%20HR%20Violations%20and%20Healthcare%20Barriers%2014%20April%202011.pdf> (accessed 12 December 2012); Tamale (n 64 above).

general tolerance, even acceptance, of homosexuality in Africa.⁶⁵ The enigmatic history of same-sex relations not only indicates that they were invested with ritualised significance (for instance, for healing, spiritual and magical powers), but they were also accepted as age-structured and erotic sexual pleasure in many African cultures. By re-writing the history of African sexualities, the power elite seek to obliterate same-sex relations in order to bolster their control over the political and social context; to maintain the hegemonic heteronormative hold on women. Such a revision facilitates the control of the nation's very identity. How is it even possible to talk about an African sexual morality on a continent as pluralistic and layered as Africa?

It is against such a background that it is important to appreciate that the current homophobic upsurge and the legal winds of re-criminalisation of same-sex relations that are sweeping across the African continent, from Dakar to Djibouti and from Cairo to Cape Town, are not coincidental, nor are they mere happenstance. Recent history has connected the religious and politically-inspired homophobia in African states to renewal evangelical movements (aligned with the neoconservative right) in the United States. Zambian Reverend Kaoma argues that Africa has become a critical locale for these groups due to the demographic shift of the centre of global Christianity to the global south.⁶⁶ He claims that the US Christian Right is using African churches, through the divisive issue of homosexuality, as proxies for US culture war battles. They work hand-in-glove with African religious and political leaders to oppose progress in the rights of lesbian, gay, bisexual and transgendered (LGBT) persons.

Far from being used by the American evangelical movements, as suggested by Kaoma, there is mutual benefit for both groups in spreading homophobic propaganda. The benefits are economic, populist and personality driven, tinged with hypocritical self-righteousness. Homophobia has become simply a political tool used by conservatives to achieve their selfish agendas. The more important point to note is that anti-homosexuality rhetoric legitimises the standing of its proponents in mainstream thought and maintains their social relevance – whether in the West or in Africa. They have whipped up stigma, discrimination and violence against people

65 M Epprecht *Heterosexual Africa? The history of an idea from the age of exploration to the age of AIDS* (2008); M Epprecht *Unspoken facts: A history of homosexuality in Africa* (2008); S Murray & W Roscoe (eds) *Boy-wives and female husbands: Studies of African homosexualities* (1998); G Herdt 'Representations of homosexuality: An essay in cultural ontology and historical comparison, Parts I and II' (1991) 1 *Journal of the History of Sexuality* 481-505 603-632; B de Rachewiltz *Black eros: Sexual customs of Africa from prehistory to the present day* trans P Whigham (1964). Note that the concept 'homosexuality', which originated and evolved from the West, does not necessarily hold the same historical and contemporary meanings in the African context of same-sex relations and typologies.

66 Kaoma (n 32 above).

engaged (or those perceived to be engaged) in same-sex relations. It is this hysteria which explains why the incidents of so-called 'corrective rapes' of lesbians to turn them into heterosexuals and other homophobic violence are on the rise around the continent.⁶⁷

It is also worth noting that these homophobic gusts blow amidst rising inflation, high unemployment, corruption, repression and increased hopelessness among the African populace. Whether it is the draconian Anti-Homosexuality Bill in Uganda or the Nigerian Same Gender Marriage (Prohibition) Act, all homophobic legislation around the continent enjoys populist support thanks to the hegemonic power structures. It was not accidental that the Ugandan Bill was tabled in parliament against the backdrop of a conference to expose the 'dark and hidden' agenda of homosexuality organised by a fundamentalist religious non-governmental organisation (NGO) called the Family Life Network and funded by right-wing American evangelicals.

All the new Bills around the continent targeting homoerotic relations ride on the back of existing legislative codes that criminalise 'unnatural' sexual relations in 38 of Africa's 54 states.⁶⁸ Even in South Africa – the only country on the continent that outlaws discrimination on grounds of sexual orientation – the legislative gains for sexual citizenship are constantly threatened by those who wish to reinstate the hegemonic discourse. In 2002, the then Deputy President Jacob Zuma launched the high-profile 'Moral Regeneration Movement' (MRM) which, as its name suggests, was meant to renew the spirituality and morality of the people of South Africa. The campaign, which was carried into Zuma's current presidential term, is implemented by government in partnership with faith-based organisations. One of its programmes is to build stronger (heterosexual) family structures.⁶⁹ Indeed, President Zuma himself is on record as saying that same-sex marriages were 'a disgrace to the nation and to God', a taboo that could not be tolerated in 'any normal society'.⁷⁰

Zuma's remarks go to the core of the negative links between state actors who are intent on constricting the space for civil action and the dominant religious movements, which likewise seek to propagate a particular version of piety and morality. Among African dictatorships, non-conforming sexualities have become a metaphor for immorality and form an effective instrument in the politics of distraction. Instead of blaming political mismanagement and corruption for high unemployment, the high cost of living and poor health facilities, the red herrings will crystallise, *inter alia*, in the form of 'the vice of

67 Hames (n 38 above).

68 J Horn 'Re-righting the sexual body' (2006) 6 *Feminist Africa* 7-32.

69 L Vincent 'Moral panic and the politics of populism' (2009) 45 *Representation* 213-221.

70 L Seale 'Zuma's anti-gay comments lead to backlash' *The Star* 27 September 2006.

homosexuality' or 'the evil of prostitution'. And the red herrings are usually fished out of the sea of morality when political accountability is looming.

The irony seems to be lost on those who condemn same-sex relations as alien, while simultaneously bolstering their arguments with 'foreign' religions such as Christianity and Islam. Is it not the mother of all ironies for a Bible-wielding African politician named 'David' and dressed in a three-piece suit, caressing an iPhone and speaking a colonial language, to condemn anything for its un-Africanness? Another irony lies in the fact that, in African countries, ideological and political groupings, civic associations, cultural, linguistic and religious organisations that are staunchly opposed in their world views quickly rally together in their opposition to non-conforming sexualities. Hence, 'progressive' social groups (for instance, children's rights activists) have become strange bedfellows with the most oppressive regimes in Africa in condemning and attacking such sexualities.

The capacity of African women to control their sexual and reproductive lives and to break free from the chains of domesticity is continually curtailed by law, culture and religion.⁷¹ Despite the staggering abortion-related mortality rates⁷² on the continent, unrestricted abortions are only legal in Tunisia (1973), Cape Verde (1983) and South Africa (1996).⁷³ In 2007, Nigeria's efforts to domesticate the United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) were thwarted by the patriarch elite who dismissed the CEDAW Bill as neo-imperialist. The words of Sonnie Ekwowusi echo those of many other African leaders:⁷⁴

My humble submission is that Nigeria must not domesticate CEDAW ... the *raison d'être* of CEDAW, the main thrust of the 30-article CEDAW Convention, the whole live wire of CEDAW is centred in articles 10(h), 12, 14(b) and 16, which are aimed at legalising abortion, sterilisation of women to control population, prostitution, under the soft language of family planning ... I trust that neither the Speaker nor the President of the Senate nor any member of the National Assembly would be deceived to yield to the mounting pressures to domesticate CEDAW and legalise abortion in Nigeria, which run counter to the aspirations of the Nigerian people and the fundamental objectives and directive principles of state

71 S Shaikh 'Morality, justice and gender: Reading Muslim tradition on reproductive choices' in Tamale (n 1 above); S Tamale 'Gender trauma in Africa: Enhancing women's links to resources' (2004) 48 *Journal of African Law* 50-61.

72 The World Health Organisation (WHO) reported that in 2008, the unsafe abortion mortality ratio in Africa was 80 per 100 000 live births, four times higher than the Asian region and eight times as high as in the Latin American and Caribbean regions (see 'Unsafe abortion incidence and mortality: Global and regional levels and trends during 1990-2008' http://apps.who.int/iris/bitstream/10665/75173/1/WHO_RHR_12.01_eng.pdf (accessed 15 December 2012)).

73 In the three countries, abortions are legally unrestricted during the first trimester of pregnancy and thereafter they can be procured under certain conditions.

74 'Why Nigeria must not domesticate CEDAW' *The Guardian* (Nigeria) 18 July 2007.

policy enshrined in our Constitution. We are obliged to make it known to our countrymen and women that CEDAW is a lying snake which must be killed before it crawls into the house ... Africa is for Africans. We must reject the use of African soil as a dumping ground for all sorts of evil by our neo-imperialists.

Even when African states ratify the hard-won women-friendly Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), many of them do so with a specific reservation to article 14 relating to the 'right to health and control of reproduction'. Article 14 describes abortion as a human rights issue and calls for member states to authorise medical abortions 'in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the foetus'. A faith-based website is dedicated to 'fight against [article 14 of] the Maputo Protocol'.⁷⁵ As I argue elsewhere, laws which restrict the abortion of unplanned pregnancies and force motherhood on women, mesh perfectly with the gender roles that the patriarchal-capitalist state has constructed for women, that is, childcare and homecare. It reinforces the basic notions of reproductivity and leaves little time and room for women to pursue goals outside the confines of domesticity. Thus, the *status quo* of 'private/domestic' women and the 'public/political' men is safely entrenched in African societies.⁷⁶

Women are sometimes the unwitting reinforcers of the man-made negative discourse regarding our sexualities and the sexualities of 'failed' masculinities such as homosexuality. In analysing representations of African sexualities, Lewis suggests that the resilience of the reactionary constructions of our sexuality is because⁷⁷

[African] individuals often rely on conservative fictions of self to gain acceptance within communities, societies or nations. Both men and women may collude in perpetuating customary laws and practices. This happens not because women and men gain equal measures of power from these, but because many women are able to derive a seemingly enduring and meaningful sense of self and belonging through them. The survival of fictions of sexuality in the myths by which many live and structure their lives is probably the most obvious indicator of our need to interrogate representations of sexuality today.

Given the taboos, silences and mysteries that surround issues of sexuality, the hegemonic discourse remained the master narrative (or meta-narrative) of African sexualities for decades in post-independence Africa. Even mainstream women's rights activists generally shied away from the topic beyond the classics of sexual violence, disease and population control. The hegemony was broken in 2003 when the African Gender Institute at the University of Cape

75 See <http://www.maputoprotocol.com/the-fight-against-the-maputo-protocol> (accessed 8 January 2013).

76 S Tamale 'Law, sexuality and politics in Uganda: Challenges for women's human rights NGOs' in M Mutua (ed) *Human rights NGOs in East Africa* (2009).

77 D Lewis 'Representing African sexualities' in Tamale (n 1 above) 213.

Town, in collaboration with the Institute of African Studies at the University of Ghana, organised a pan-African conference on mapping African sexualities.⁷⁸ In the next section of the article, I turn to some of the ways that African activists have interrogated and challenged (mis)representations of their sexuality in a bid to shift the normative sexual landscape that has been influenced by the dominant religious, cultural and legal discourses.

4 Out of the margins: Challenging structures of sexual oppression

Needless to say, not all Africans passively conform to the hegemonic or dominant sexual discourses constructed by the establishment. Indeed, the turn of the century witnessed the growth of social movements which put up a courageous challenge and provided different inflections to the various 'truths' regarding the sexualities of Africans. African communities which have been pushed to the margins of sexual citizenship, particularly women, have made real attempts to construct a counter-hegemonic sexual discourse through subversion, activism, advocacy and research.⁷⁹ Their navigation around hegemonic discourses always throws up critical issues of intersectionality whereby the interactive influences of culture, religion, gender, class, race, ethnicity, age, disability, geographical location, and so forth, on one's sexuality are taken into account. Inevitably, such complexities lead to counter-hegemonic intersectional discourses of sexuality that highlight, for example, the sexual rights of disabled young women or those of poor refugee homosexuals.

Sexual minorities seek to explode the sexual myths based in essentialist attitudes towards African sexuality (as represented in the singular) and demand for inclusion, justice and dignity. The pursuit of social change has coalesced at the national (for example, INCREASE in Nigeria, Sister Namibia in Namibia and Sexual Minorities in Uganda), sub-regional (for example, Justice Associates (JASS) Southern Africa and The Mediterranean Women's Fund in the Maghreb sub-region) and regional (for example, Feminist Africa, African Sex Workers Alliance-ASWA and Pan-African Positive Women's Coalition) levels and happens within the range of formal NGOs, community-based organisations and unregistered grassroots and volunteer groups. Within their diversity, the activist work of sexual minorities across Africa has made serious attempts to build horizontal alliances with mainstream human rights organisations and to vertically link up with international actors (for instance, the African Union (AU), the European Union and the UN).

78 Tamale 'Researching and theorising sexualities in Africa' (n 1 above); A Mama 'Is it ethical to study Africa? Preliminary thoughts on scholarship and freedom' (2007) 50 *African Studies Review* 1-26.

79 Bennett (n 42 above).

It must be remembered that African political struggles for sexual rights take place against the very powerful institutions of law, culture and religion, and their terms of engagement remain contested. This means that activists have to devise creative ways of advancing their cause. For example, fitting their agenda within the frameworks of public health or development is found to be more strategic for some groups than espousing the language of 'sexual empowerment'.⁸⁰ The rights framework is similarly attractive to some sexual minorities on the continent for its holistic approach. This section demonstrates how activists have responded to counter-essentialist 'truths' and hegemonic discourses about African sexualities. Today, sexuality is indeed on the cutting edge of human rights activism and research on the African continent.

In these struggles, the law is a double-edged sword. Even as it is deployed by states to construct the hegemonic discourse and to control and regulate the sexualities of African people, it can also be used by activists to challenge and overturn unjust practices and to effect fundamental change to the *status quo*.⁸¹ Thanks to the activism of legal feminists, several African states have reformed their sex laws to sanction marital rape, the provision of which having been incorporated into the criminal justice systems of South Africa, Namibia, Zimbabwe, Seychelles and Lesotho. Not only do legal feminists and sexual activists around the continent lobby for law reform, but they also engage in strategic action litigation to engender social change in the area of sexuality. For example, laws against special corroboration in rape trials have been abolished by courts in Kenya, Tanzania and Uganda and are facing serious challenges elsewhere.⁸²

Strategic litigation has indeed proved to be a powerful, if rather slow, vehicle for challenging 'dangerous' sexuality regulatory laws. In Uganda, feminists successfully challenged a sexist law which criminalised extramarital sexual relations for wives but not for husbands (unless they had sexual relations with another man's wife). Hence, the regulatory agenda behind sex laws and the glaring double standards of sexual morality set out in the law have been clearly exposed. In South Africa, although sex work has not yet been decriminalised, the NGO Sex Workers Education and Advocacy Task Force (SWEAT) won a significant victory when they got the High Court in the Western Cape to declare that the police was in violation of the rights and dignity of sex workers when they arrest them

80 As above.

81 S Tamale *et al* 'Legal voice: Challenges and prospects in the documentation of African legal feminism' (2011) 15 *Feminist Africa* 1-15.

82 S Bott *et al* 'Preventing and responding to gender-based violence in middle and low-income countries: A global review and analysis' World Bank Policy Research Working Paper 3618 (2005); EK Quansah 'Corroborating the evidence of a rape victim in Botswana: Time for a fresh look' (1996) 28 *Botswana Notes and Records* 231-238.

'knowing with a high degree of probability that no prosecution will follow'.⁸³ Justice Burton Fourie elaborated:⁸⁴

They [sex workers] are rounded up, arrested, detained and, virtually without fail, thereafter discharged without being prosecuted for any offence. I agree with the contention of applicant, that what the police are therefore targeting is not the illegality of sex work *per se*, but rather the public manifestations of it. The arrests of the sex workers therefore amounts to a form of social control.

In the oft-quoted case of *Sara Longwe v Intercontinental Hotels*,⁸⁵ a feminist in Zambia successfully challenged a hotel policy that prevented 'unaccompanied women' to access their hotel. This discriminatory policy was based on the assumption that women that patronised the hotel bar without male company were prostitutes; it was part of the oppressive patriarchal surveillance machinery.

The rights of homosexuals to human dignity and protection from inhuman treatment have been successfully tested in the Ugandan courts.⁸⁶ Through a constitutional law test case, the Ugandan penal code provision on adultery was also declared unconstitutional.⁸⁷ At the international level, the United Nations Working Group on Discrimination against Women recently urged governments around the world to repeal laws that criminalise adultery.⁸⁸ The emphatic statement said in part:

Almost two decades ago, international human rights jurisprudence established that criminalisation of sexual relations between consenting adults is a violation of their right to privacy and infringement of article 17 of the International Covenant on Civil and Political Rights ... Given continued discrimination and inequalities faced by women, including inferior roles attributed to them by patriarchal and traditional attitudes, and power imbalances in their relations with men, the mere fact of maintaining adultery as a criminal offence, even when it applies to both women and men, means in practice that women mainly will continue to face extreme vulnerabilities, and violation of their human rights to dignity, privacy and equality.

The production of shadow reports critiquing the progress of African governments in implementing UN human rights treaties is another

83 Justice Burton Fourie in *SWEAT v The Minister of Safety and Security* 2009 (6) SA 513 57.

84 As above.

85 1992/HP/765. Also see S Hlupekile Longwe 'Case study: Legal action to stop hotels discriminating against women in Zambia' (2011) 15 *Feminist Africa* 83-104.

86 See the cases of *Victor Mukasa & Yvonne Ayo v AG* [Hct Misc Cause 247 of 2006] and *Kasha Jacqueline, David Kato & Onziema Patience v Rolling Stone Ltd & Giles Muhame* [Hct Misc Cause 163 of 2010].

87 See the case of *Law and Advocacy for Women in Uganda v Attorney-General* (unreported Const Pet 13 of 2005). Also see J Mujuzi 'The Constitutional Court of Uganda and women's right to equality: The "Adultery Judgment"' (2010) 16 *East African Journal of Peace and Human Rights* 474-492.

88 Dated 12 October 2012. See full statement at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E> (accessed 12 December 2012).

strategy that activists have adopted. For example, in 2008 a Nigerian NGO shadow report to the Committee on the Elimination of All Discrimination Against Women (CEDAW Committee) elaborated areas in which maternal health objectives could not be met due to failings in policy, legal and administrative areas.⁸⁹ Although such reports hardly cause a ripple in national law reform processes, they certainly draw the attention of the international community. They usually work to supplement other strategies mentioned above.

During the past three decades, reproductive justice has also been realised in some African countries (for instance, Algeria, Botswana, Burkina Faso, Ghana and Ethiopia), where abortion laws have been liberalised in some form.⁹⁰ The 1985 Abortion Amendment Law in Ghana, for example, expanded the conditions under which legal abortions could be procured, including pregnancies that result from rape, incest or defilement of a mentally-handicapped woman.⁹¹ Similar conditions were incorporated into the highly-restrictive Ethiopian Criminal Code in 2004.⁹² In both cases, advocates that lobbied for law reform worked within the frameworks of public health and human rights.

Creative and unique methods of resistance and contestation of hegemonic sexual discourses have been adopted across the continent, including silence. There is a legitimate silence surrounding the sexualities of African people whose citizenship has been rendered fragile - a silence that is ambiguous and not able to be engaged. But construction of counter-hegemonic discourses of African sexualities is also evident in poetry, novels, art works, theatre, cinema and photography.⁹³ For example, a documentary film entitled *Not yet rain* was produced in Ethiopia to highlight the evils of unsafe abortions. In that documentary, the mother who lost her daughter to a back alley abortion narrates how the abortionist used a catheter wrapped around an umbrella to perform the procedure on her daughter. In lusophone Africa, feminists have also engaged directly in the political reconstruction of hegemonic discourses on sexuality through critical and historical analyses of works of fiction. In their article 'Cape Verdean and Mozambican women's literature: Liberating the national and seizing the intimate',⁹⁴ Fêo Rodrigues and Sheldon analyse novels

89 See <http://www.fidh.org/IMG/pdf/BAOBABNigeria41.pdf> (accessed 26 December 2012). Also see A Godwin 'Women protest against delay in passing Bill on eliminating discrimination' *The Guardian* 16 November 2011.

90 M Berer 'Making abortions safe: A matter of good public health policy and practice' (2000) 78 *Bulletin of the World Health Organisation* 580-592.

91 See Ghanaian Criminal Code (Amendment) 1985 (amending Criminal Code 29 of 1960), secs 58 & 59.

92 See art 551 of the Federal Republic of Ethiopia Criminal Code as amended in 2004.

93 See eg Tamale (n 1 above).

94 I Fêo Rodrigues & K Sheldon 'Cape Verdean and Mozambican women's literature: Liberating the national and seizing the intimate' (2010) 53 *African Studies Review* 77-99.

to demonstrate the link between the political and the intimate arena of sexuality and motherhood.

More radical methods of resistance enlisted by sexual rights activists include the embodied acts of stripping naked - the traditional and powerful 'weapon' that African women have employed for centuries to articulate their anger towards injustice. Historically, women have used their gendered and sexualised bodies to protest extremities, including sexual oppression and their reclamation of their 'undisciplined' bodies. The shocking primordial exposure of women's nudity (or near nudity) in public acts of irreverence and parody has proved quite effective. Lewis argues that subversion of power through spectacle (such as women enlisting their bodies in resistance) signals a form of 'politics' beyond formal politics that undermines the foundations of the hegemony of repressive regimes.⁹⁵ Recently in Uganda, a group of women activists stripped to their bras in front of the central police station in the capital city to protest against the sexual assault of a female opposition leader by the police force.⁹⁶

In 2008, hundreds of South African women marched to a commuter taxi stand dressed in miniskirts to protest against harassment for wearing miniskirts.⁹⁷ The protest had been sparked off by the treatment of a 25 year-old woman wearing a miniskirt who had been stripped, paraded naked and sexually assaulted by some drivers in Johannesburg.⁹⁸ Similar acts have been reported in Malawi, Nigeria, Democratic Republic of the Congo, Sierra Leone, Kenya and a host of other African countries. These 'disciplinary' actions by men are part of the patriarchal surveillance apparatus to preserve the *status quo* and the spectacle performance by activists is a direct rejection of the dominant gender sexual paradigms. The gay pride parades staged in South Africa (and more recently in Uganda) also demonstrate the subversive power against heterosexist-patriarchal oppression.⁹⁹ The power in all the embodied subversive examples given above is derived from the reversal of positions where the social superior is subjected to the position of spectator of the 'erotic' spectacle put on by the social inferior. It cannot be denied that those spaces of protest have a counter-hegemonic effect on society.

Finally, one important way that African sexual activists have directly responded to dominant religious discourses is by adopting analytical methodologies that engage in re-interpreting the sacred scripts in the

⁹⁵ Lewis (n 37 above).

⁹⁶ The police officers violently squeezed the breast of Ingrid Turinawe in the process of arresting her. See J Njoroge 'Police arrest women activists' *Daily Monitor* 23 April 2012 <http://www.monitor.co.ug/News/National/-/688334/1392006/-/avjh6iz/-/index.html> (accessed 27 December 2012).

⁹⁷ C Lowe-Morna 'Long and short of the miniskirt debate' *The Argus* 3 March 2008.

⁹⁸ See 'Hundreds of women in miniskirt protest' *Mail & Guardian* 4 March 2008 <http://mg.co.za/article/2008-03-04-hundreds-of-women-in-miniskirt-protest> (accessed 27 December 2012).

⁹⁹ Lewis (n 37 above).

holy books, particularly the Bible. This epistemological approach addresses the important question: *How do we know?* Generally referred to as 'African feminist hermeneutics', these feminist biblical scholars use the African context to analyse the Bible from a critical and scientific point of view, in the bid to expose its sexism.¹⁰⁰ Feminist interpretations of the Bible seek to uncover the structures of exploitation and oppression embedded therein, to bring to central focus the role of women in history, theology and ethics, to critique the images of women as portrayed by the writers of the biblical text and as explored by its interpreters. African feminist hermeneutics seek alternative theories and methods by which the 'meaning' of the biblical text is generated, and therefrom discuss the relative merits not only of the Bible's interpretation and application, but of the Bible itself. This scholarship is critical in equipping the movement with the liberation language and in offering an alternative discourse from a theological perspective.

5 Conclusion: African religion and sexualities – Toward a socio-legal reconstruction

Since the turn of the century, African intellectuals have drawn serious attention to analysing issues of sexuality on the continent. However, the scholarship is still very much a 'work in progress' with a clear paucity of theoretical and empirical investigations that draw links between law, culture, religion and sexuality. It is important to comprehend the central role that the control and regulation of African sexualities plays in maintaining patriarchal-capitalist inequalities in order to strategise for effective social change. The article has attempted to illuminate the essentialist roles that law, culture and religion play in organising the moral, social and economic aspects of African sexualities. The pluralist nature of African legal systems both complicates and refines our understanding of sexualities simultaneously as an oppressive and potentially liberating force.

The article has further drawn attention to the growing presence of fundamentalist or political religions led by clergy with complex, often opaque, connections to key players from outside Africa and within, as well as to national politicians and, critically, the general population. As one of the most important forces that influence the belief systems that

¹⁰⁰ See eg S Nadar 'Power, ideology and interpretation/s: Womanist and literary perspectives on the book of Esther as resources for gender-social transformation' presentation at the School of Theology, University of Natal, Pietermaritzburg, 2003; M Dube (ed) *Other ways of reading: African women and the Bible* (2001); M Dube *Post-colonial feminist interpretation of the Bible* (2000); DR Mbuwayesango 'Childlessness and women-to-women relationships in Genesis and in African patriarchal society: Sarah and Hagar from a Zimbabwean woman's perspective (Gen 16:116; 21:821)' (1997) 78 *Semeia* 2736; T Okure 'Feminist interpretation in Africa' in E Schüssler Fiorenza (ed) *Searching the Scriptures: A feminist introduction* (1993).

African people have, shaping and defining the deepest values that they hold, religion heavily impacts on issues of sexual morality. The sexual morality espoused by most religions and the law perpetuates gender hierarchies, thereby depriving certain groups of their full citizenship.

When religious fundamentalism worms its way into law, policies, regulations and institutions, it becomes political fundamentalism and targets powerless minorities. Predictably, most of the campaigning and policy efforts of these fundamentalist actors constitute a focused attack against African women's bodily autonomy, integrity and dignity and the criminalisation and persecution of sexual minorities. The power and authority vested in religions and their leaders are often used negatively by people to justify oppressing, excluding, stifling, manipulating and controlling others. And yet, paradoxically, religion has also provided a fulcrum on which arguments for equality, freedom and liberty have been founded. We need only think of the struggles against colonialism, slavery or apartheid, racial discrimination or civil rights to recognise the role that religion-based movements have played in liberation.

Statutory law provides an indispensable tool in the hands of the powerful to maintain the hierarchical *status quo*. However, activists around the continent have demonstrated that the same law can be used to engender social justice and transformation. However, shifting the broader forms of law found in culture and religion requires strategies that are better able to support people's appreciation of their day-to-day lives. Transformation of existing oppressive sexual scripts propped up by religion and culture would require a nuanced approach that seeks to integrate people's local understandings within the human rights discourse.

Some African scholars, such as An-Na'im, have devoted considerable time examining how religion and culture can be legitimately transformed to accommodate issues of human rights and constitutionalism. Given how much African people are entrenched in their traditional and religious beliefs, An-Na'im is convinced that any attempts to pursue reform must be adapted to local conditions.¹⁰¹ In other words, it is only through people's conviction and agency that social change can happen.¹⁰² Through what he terms 'internal cultural transformation' married to progressive religious interpretations, An-Na'im argues that it is possible to integrate human rights and constitutionalism into culture and religion. We must respect the fact that religion is a place where most Africans anchor their beliefs and values. As such, we should aim at reconstructing religion in

101 AA An-Na'im *Human rights in cross-cultural perspectives: A quest for consensus* (1992); AA An-Na'im *Islam and the secular state: Negotiating the future of Shari'a* (2008).

102 This reasoning is in line with the perspectives of Western theorists Max Weber and Anthony Giddens.

a manner that makes it relevant to the needs of African people (particularly women) and work to un-learn the dominant hegemonic religious culture and re-learn a new liberating one. Mobilising religion as a source of rights will resonate with many African people.¹⁰³ The challenge is for activists and scholars to develop effective praxis-oriented methods of engendering legal and social change in the quest for sexual citizenship in Africa.

103 G ter Haar *How God became African: African spirituality and Western secular thought* (2009).

Theologising the mundane, politicising the divine: The cross- currents of law, religion and politics in Nigeria

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Summary

From the embers of several ethnic groups colonially conjoined and subsequently amalgamated for sheer administrative convenience, modern Nigeria has emerged with internal contradictions. Unlike what happens in other climes, where many years of living together promote social harmony and mutual co-existence, Nigeria appears to be perpetually a tinderbox. Nationhood is threatened and politics defined along religious lines and religion itself highly politicised. This article highlights the critical factors responsible for the complexity of the Nigerian situation. These include socio-economics, religion, law, politics and education, among others, the interplay of which defines contemporary Nigeria, where insecurity is a national menace. In addition to offering a holistic analysis of general Nigerian and Nigerian Islamic perspectives on a number of issues that account for the near absence of positive and negative peace in the country, the article emphasises the imperative of a peaceful world, based on principles of justice and fair play in the distribution of resources, the promulgation of law, religious practice, media reporting and social commentary.

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1 Introduction: Nigeria, a diverse and religious country

On his seventieth visit to Nigeria on 22 November 2012,¹ the then Archbishop-designate of Canterbury, Justin Welby, remarked that, no matter how conversant with or knowledgeable about the socio-religious situation in Nigeria one is, one cannot gain an accurate impression of the country without a *caveat*: The issues are not as straight-forward or simple as they appear. Welby's informed impression or submission is predicated on the fact that there are other underlying factors. This observation aptly underscores the complexity of the Nigerian situation.

This article is intended to highlight a number of silent and salient factors behind the socio-economic problems in Nigeria, particularly as they relate to law, religion and politics, the cross-currents of which define her contemporary socio-political experience. Any analysis of inter-religious conflicts, political instability and apparent constant and unnecessary conflict of law in Nigeria is superficial unless the underlying factors are objectively studied and addressed. These factors include:

- (a) the socio-ethnic and religious configuration of Nigeria;
- (b) the nature of the federal in Nigeria;
- (c) the effect of the religio-legal political compromise of 1960 and its abrogation on Northern Nigeria;
- (d) the religious influence on public policy in Nigeria;
- (e) whether Nigeria considers itself a secular or multi-religious nation;
- (f) the abuse of education and educational institutions for the promotion of religious oppression, bigotry and hate in Nigeria;
- (g) the socio-economic status of religion and religious leaders, especially independent clerics, in Nigeria;
- (h) the relationship between religious politics and violence in Nigeria; and
- (i) the entanglement of law and religion in Nigeria.

Nigeria, the most populous African country, is composed of a diverse ethnic and cultural mix of approximately 160 million people with some 250 ethnic groups and about 500 languages. The ethnic configuration of the country includes Yoruba (21 per cent); Hausa (21 per cent); Igbo (18 per cent); Fulani (11 per cent); Ibibio (5,6 per

¹ The incumbent Archbishop of Canterbury at Abuja in the company of Tony Blair on the occasion of the launching of the Tony Blair Faith Foundation. The author was present at the event. See 'Tony Blair, Bishop Justin Welby, Archbishop of Canterbury, and HRH Prince Ghazi of Jordan announce action for reconciliation in Nigeria' Tony Blair Faith Foundation Blog, 22 November 2012, <http://www.tonyblairfaithfoundation.org> (accessed 31 January 2014).

cent); Kanuri (4 per cent); Edo (3 per cent); Tiv (2 per cent); Bura (2 per cent); Nupe (1 per cent); and others (9 per cent). The major languages are Hausa, Yoruba and Igbo with English, the colonial heritage, serving as the official language, and *lingua franca*. Adegbija, in his 'tentative' register of some 499 languages spoken in Nigeria, identifies the 'major' languages as including Annang, Badakare, Baruba, Bekawara, Berom, Bokyi, Bolewa, Buduna, Chamba, Ebira, Fulfude, Gwari, Ibibio, Idoma, Igala, Ijo, Ikwere, Itsekiri, Jarawa, Jukun, Kaje, Kalabari, Kana, Kanuri, Kilba, Kutep, Margi, Mumuye, Nupe, Shuowa Arabic, Tangale, Tere, Tiv and Urhobo.²

Nigeria is also regarded as a highly-religious country. A BBC report some years ago find Nigerians to be the most religious people in the world.³ An October 2009 report of the Pew Forum on Religion and Public Life confirmed earlier surveys that Muslims make up about 50 per cent of the population in Nigeria, with Christians making up another 40 per cent, and African traditional religionists constituting 10 per cent.⁴ The American cable television network CNN, in a published report, found that Nigeria is the sixth largest Muslim country in the world.⁵ This religious canopy embraces many social and ethnic groups.

2 Socio-ethnic and religious configuration of Nigeria

In the past, Nigeria was believed to be made up of the Hausas in the north, the Igbos in the east and the Yorubas in the west, although further studies have rendered the classification a fallacy and an oversimplification. The north and east have paid dearly for this popular but incorrect assumption. The large number of minority ethnic groups in the north have relentlessly challenged their domination by the Hausas, while diverse ethnic groups in the east and part of the west ensured the creation of the mid-west region shortly after the dawn of independence. It can also, arguably, be said that one of the underlying motivations for the birth of the defunct Republic of Biafra was the control of the minority groups in what was then known as Eastern Nigeria.

Before the advent of the British, there were hundreds of distinct ethnic and linguistic groups in the vast area now known as Nigeria. Each group, particularly in the south, had its own unique culture and

2 EA Adegbija *Multilingualism: A Nigerian case study* (2004).

3 'BBC votes Nigerians world most religious people' *Daily Independent* (Lagos) 27 February 2004 A16.

4 Pew Forum on Religion and Public Life *Tolerance and tension: Islam and Christianity in sub-Saharan Africa* (2010).

5 RA Greene 'Nearly 1 in 4 people worldwide is Muslim, report says' *CNN* 12 October 2009. See also Pew Forum on Religion and Public Life *Mapping the global Muslim population* (2009). For even more recent statistics, see also Pew Forum on Religion and Public Life *The future of the global Muslim population* (2011).

system of governance. The Northern part of what is now referred to as Nigeria was more politically and administratively centralised than the independent kingdoms and autonomous communities in the south. The definition of either north or south is also contentious since some northerners, such as the Yorubas of the north, only grudgingly accept being tagged northerners.

The north, though made up of many ethnic groups, has Hausa as its *lingua franca*, since almost all the groups (with the exception of the Yorubas) have adopted it as the official medium of communication. The north was also unified and administered by an Islamic movement led by Usmanu Dan Fodiyo in 1804. The official religion in the north was indisputably Islam, though other religions were allowed and tolerated. Arabic was said to be the official language, but this was also a fallacy. The official language was Hausa, though the leadership of the movement was Fulani, a Fulfude-speaking ethnic group. Arabic script was used to transcribe the Hausa language. For example, up until the early part of this century, any Nigerian currency had a Hausa transcription of its value, but was written in Arabic script. The deletion of this feature from the currency during the civilian regime of President Olusegun Obasanjo (1999-2007), based on the incorrect premise that it was Arabic or Islamic, is an instance of *theologising the mundane*.

In its political structure, the north was essentially feudalistic. The east was essentially republican with autonomous communities, while the west was also feudalistic but with some modern refinement due to the influence of Western civilisation. The British colonialists adopted direct rule in Lagos and the southern protectorate, while the Northern protectorate had indirect rule through the established kings (*emirs*) who wielded both religious and political power, in what was essential Islamic rule. The rulers in South Western Nigeria also held both political and religious power. The religious power of the southern kings, however, concerned traditional religious rites which did not in the main cover either Islam or Christianity. With political authorities exerting control on religions, the *politicisation of the divine* became a natural corollary. Christians and adherents of African traditional religion in the north were essentially regarded as second-class citizens, much as Muslims were regarded in the south. The British encouraged the Christianisation of the south while being cautious in the dissemination of Christianity in the north. The protests of the Muslims in the south were largely ignored.⁶

The Nigerian law, it is worth noting, has three major sources. They are Euro-Christian British law, referred to as common law, Islamic law and customary law.⁷ The law traditionally applicable in Nigeria was customary law. In the north, before the advent of British rule, the

6 *Lagos Weekly Record* 28 July 1894; *Political Memorandum*, London, 1970 265; JND Anderson *Islamic law in Africa* [1954] (2008) 222-223.

7 AG Karibi-Whyte *History and sources of Nigerian criminal law* (1993) 58.

applicable law in most of Northern Nigeria was Islamic law, which was regarded as customary law.⁸ The British introduced common law, with some modifications, to accommodate prevalent Islamic law in the north. In the south, the British common law, with a large dose of Christian ethics and practice, was made to co-exist with or even subvert customary law. With the amalgamation of the Northern and Southern protectorates of Nigeria in 1914, the British classified Islamic law as the customary law of Northern Nigeria. The implication of that was not immediately obvious to the peoples of Northern Nigeria. The subsequent invocation of the repugnancy doctrine to nullify some Islamic court judgments attracted some protests from the north.⁹

Muslims in the south, especially in the south west where they are in the majority, looked to Northern Muslims for religious relief, which was not as forthcoming as expected. This explains, to a large extent, the uneasy relationship between the two Muslim groups in Nigeria up to the present day.

3 Nature of the federal system in Nigeria

In many federal systems around the world, the constituent units are blocks which come together to submit their overall sovereignty to a central authority, while retaining control over certain specific features of government. In the case of Nigeria, the constituent units are not only the creation of the central authority, but each is also as internally heterogeneous as the overall federation. The composition of many of the constituent units is not based on any historical, cultural or linguistic affinity. They are merely a proclamation of the central authorities. Consequently, the agitation for more states is still as intense as ever.

The north, generally speaking, had been under a central Islamic government in the early part of the nineteenth century. The British created what is known as Southern Nigeria from a large number of diverse ethnic groups. The British then split the southern areas into the western and eastern regions, based only on geographical proximity. Consequently, at independence, Nigeria had three constituent units – North, West and East. In 1964, the mid-west was carved out of the west and some parts of the east. In 1967, the federal military government decreed 12 states out of these regions. The number rose to 19 in 1976; 21 in 1987; 30 in 1997; and 36 in 1999. The military therefore balkanised Nigeria into 36 states, at the whims and caprices of the ruling junta who, at times, sponsored civilian agitators to demand what was originally intended. The 36 states are today regarded as the constituents of the 'federation', which is more unitary

8 JM Abun-Nasr 'The recognition of Islamic law in Nigeria as customary law' in JM Abun-Nasr *et al* (eds) *Law, society and national identity in Africa* (1990).

9 IO Oloyede *Repugnancy doctrine and the practice of Islamic law in Nigeria* (1993).

than federal. The military later informally introduced a supra-state structure called 'the Six Geo-Political Zones', which again have neither the mandate of the citizens, nor internal coherence or cultural identity. Table 1 shows some of the demographic features of the six zones.

Table 1: Geo-political zones and their populations¹⁰

S/No.	Geo-Pol Zones	No of states	Population	Dominant religion	Percentage of the total population
1	North west	7	35,915,467	Predominantly Muslim	25.58
2	North east	6	18,984,299	Predominantly Muslim but with two Christian-dominated states	13.52
3	North central	6	18,963,717	Muslim majority but with substantial Christian community	13.50
4	South west	6	27,722,432	Mixed in almost equal proportion of Muslim and Christian communities	19.74
5	South east	5	16,395,555	Predominantly Christian	11.68
6	South	6	21,044,081	Predominantly Christian but with pockets of Islamic communities	14.98
	FCT	1	1,406,239		1.00

This informal geopolitical structure, which seems to enjoy some acceptance, has raised other challenges of fact and perception. For instance, any zone with five states requires an additional state in the zone to preserve the equality of zones. The result has been intra-regional politics based on historical past of 'North', 'West' and 'East'.

The geographical analysis is just a superficial externality; the real blocks or constituent unites can be said to be five: (a) the Hausa/Fulani majority in the north who are almost totally Muslim; (b) other minority ethnic groups of the north who are non-Muslim; (c) the

¹⁰ National Population Commission of Nigeria, <http://www.population.gov.ng/index.php/119-about-us/about-nigeria> (accessed 30 April 2014).

Igbos (Christian); (d) minority ethnic groups in South-Eastern and Mid-Western Nigeria (predominantly Christian); and (e) the west (mixed in religion). The religious and political voices of these five shape the nature of the law and socio-economic status of the country. The situation is complex and dynamic, because it more often than not involves a shift of identities depending on circumstances and convenience. Religious, ethnic or regional identities are being manipulated for political and personal ends.

4 Religio-legal political compromise of 1960 and its aftermath in Northern Nigeria

Immediately before independence, one of the three major contentious issues between the north and the south was the issue of applicable criminal law. Islamic law, both civil and criminal, was the applicable law in most parts of Northern Nigeria prior to independence in 1960. Up until 1956 it was called 'native law and custom'. Anderson rightly observed that Islamic law 'was still up to 1960 more widely, and in some respects more rigidly, applied in Northern Nigeria than anywhere else outside Arabia'.¹¹ In the southern parts of Nigeria, the Nigerian criminal code was the applicable law in criminal matters, while Christian marriages and family law were incorporated into the statutory marriage law which operated in Southern Nigeria along with customary law.

As independence approached, there was a need for a uniform criminal law and the Nigerian criminal code applicable in Southern Nigeria was to be fully adopted for the north and the south. The Islamic scholars and jurists (*ulama*), as well as the greater part of Muslims in Northern Nigeria, objected to the abrogation of Islamic criminal law in Northern Nigeria. This prompted the Northern government to set up a panel of six members to recommend an appropriate legal system for Northern Nigeria in 1958. The panelists included (i) the Chairperson of the Pakistan Law Commission; (ii) the Chief Justice of Sudan; (iii) Professor JND Anderson, a scholar of comparative law and religion at the School of Oriental and African Studies (SOAS), London; (iv) two Islamic scholars; and (v) Chief Peter Achimugu, Christian northerner and minister in the Northern regional government.¹²

The Committee submitted a report which was the basis of the famous '1960 Compromise', whereby penal and criminal procedure codes were enacted for Northern Nigeria. The penal code was a replica of the Sudan Penal Code which incorporated diluted versions

¹¹ Anderson (n 6 above) 219.

¹² P Ostien (ed) *Shari'a implementation in Northern Nigeria 1999-2006: A source book* (2007) vol I, ch 2 14.

of Islamic criminal law.¹³ At that time, Islamic law, or Shari'a, was confined to the law of personal status, which incorporated family and civil cases in which all parties were Muslims. Corporate and commercial litigation was to be dealt with under statutory law, customary law or the law under which the parties concluded their contract. The Shari'a Court of Appeal was established for Islamic law civil cases, while the Native Courts Appellate Division was created in the State High Court for customary law cases. A panel of High Court judges and a judge (*kadi*) of the Shari'a Court of Appeal sat to resolve cases involving a conflict of law between customary and Islamic law cases.¹⁴ A Yoruba northerner who was from the opposition party in the north, Chief Josiah Sunday Olawoyin, unsuccessfully opposed the arrangement in the regional parliament on the premise that it was to 'Islamise the whole of the Northern Region'.

The northerners were persuaded to accept the code on the basis that it was necessary for independence and foreign international trade and commerce.¹⁵ The compromise was reviewed in 1962 by a panel of three Christians and three Muslims, who approved its implementation. Williams applauded the arrangement in which 'the [penal] code which in spite of, or perhaps even because of its not being an exact copy of English criminal procedure, is looked upon as their own by Northern Nigerians and which on the whole is administered with some pride and with increasing impartiality and efficiency'.¹⁶ The criminal code of Southern Nigeria governs criminal matters in Southern Nigeria.

Thus, right from independence, it was clear that religion, law and politics, alongside ethnicity, were the bedrock of the federation. It is surprising, therefore, that the Shari'a *imbroglio* at the inception of civilian rule in 1978 was largely treated as a strange development. The main bone of contention was that, since each of the states in Northern Nigeria had a Shari'a Court of Appeal, Muslims called for a Federal Shari'a Appeal Court to adjudicate on all Shari'a cases where the parties were Muslim. This was rejected by the majority of the delegates in the Constituent Assembly. Apart from the religious sensitivity which the voting pattern aroused in the electorate, the ensuing debate created very hard feelings on both sides which would take a long time to erase. The debate and its fallout have been well-documented.¹⁷

13 S Kumo 'Shari'a under colonialism-Northern Nigeria' in N Alkali *et al* (eds) *Islam in Africa* (1993) 8.

14 Ostien (n 12 above) vol I, ch 4, 51 & 54 (statement by the government of the Northern region of Nigeria on the re-organisation of the legal and judicial systems of the Northern region).

15 Ostien (n 12 above) vol I, ch 1, 5 & 6 (debates of the House of Assembly (Second Legislature) third session, 12 to 19 August 1959, Column 501).

16 Ostien (n 12 above) vol I, ch 1, 7 (quoting TH Williams 'The Criminal Procedure Code of Northern Nigeria: The first five years' (1966) 29 *Modern Law Review* 272).

17 IO Oloyede *Shari'a versus secularism in Nigeria* (1987).

The compromise was that the composition of the (Federal) Court of Appeal and the Supreme Court would include some experts in Shari'a to decide all Islamic law family matters on appeal. It is also significant that one of the pillars of compromise of 1960 and 1979, which was that a *kadi* of the Shari'a Court would sit on a panel of the judges of the High Court when issues of conflict of Shari'a and customary laws were being decided, was later judicially nullified by the common law justices at the Court of Appeal and Supreme Court on the basis that such *kadis* were not qualified common law lawyers.¹⁸ The greater part of Muslims in Nigeria perceive the judicial nullification of the political agreement as a product of professional rivalry between Muslim justices (who are qualified common law barristers) and the *kadis* (who were experts in Islamic law but were not called to the Nigerian Bar as advocates). This is another dimension of the crisis that caused a large number of Muslims to develop hard feelings against the common law system. The 1979 Constitution operated for four years (1979 to 1983) before the military intervention, which lasted 16 years. On the eve of the third civilian dispensation in 1999, the controversy was not allowed to degenerate as it did during the Second Republic. The 1979 compromise was incorporated into the 1999 Constitution.

Immediately after the inception of civilian rule, agitation for the nullification of the compromise of 1960 began in the north. The bases of the agitation were said to be the following:

- (a) The compromise of abandoning the Islamic penal system at the eve of independence was not a necessary prerequisite for independence as they were made to believe.
- (b) The venom poured on Muslims during the 1979 Shari'a debate and the Christian opposition to Nigerian membership of the Organisation of the Islamic Conference (now the Organisation of Islamic Co-operation) (OIC), to which many countries with a Muslim minority belong.
- (c) The judicial nullification of an aspect of the 1960 compromise whereby a *kadi* would be a member of the panel of a state High Court on issues involving Islamic law in Northern Nigeria.¹⁹
- (d) The application of Islamic law and its penal system in other independent nations of the world and the influence of global Islamic revivalism.

18 *Mallam Ado & Hajiya Rabi v Hajiye, Dije* CFCA/K/69/82 on the basis of secs 242(i) and 2(a)-(e) of the 1979 Constitution. See also *Umar v Bukar Sarki* FCA(k) 1985.

19 See P Ostien 'An opportunity missed by Nigeria's Christians: The 1976-78 Shari'a debate revisited' in BF Soares (ed) *Muslim-Christian encounters In Africa* (2006) 238-243 (quoted in Ostien (n 12 above) vol I, ch 1, pp 7-8: 'Nigeria's Muslims ... in the resulting 1979 Constitution, lost every one of the perquisites that had made the settlement of 1960 palatable to them in the first place' and '[T]he new penal and criminal procedure codes, with other elements of the settlement of 1960, came to be seen as ill-motivated and unjustified in positions forced on an unwilling or deluded Sardauna (Premier of Northern Nigeria) by the undue influence of the British.'

- (e) Restriction of Islamic family law to Northern Nigeria where Christian/statutory family marriages are also provided for through the state High Courts, but without making Islamic family courts available to Muslims in the southern part of Nigeria.²⁰
- (f) The mischievous application of the repugnancy doctrine which the Islamic law scholar SK Rashid has blamed for the crises in Nigeria, observing that '[i]n Nigeria, the abrogation of Islamic criminal law and mischief of repugnancy clause have played havoc with the law and other situations'.²¹

5 Abrogation of the 1960 compromise in 12 states in Northern Nigeria

The aforementioned circumstances in 1999 prompted the Zamfara state parliament to enact a law,²² which restored the pre-1960 penal system in that state. The turnout of Muslims at the 27 October 1999 launching of the restoration of Islamic penal law for Muslims was summed up in a news report as follows:²³

[It was] what could better be described as 'mother of all launchings'. Gusau, the capital of Zamfara state, in the history of its existence witnessed for the first time a crowd that cannot easily be compared to any recent gathering in Nigeria ... Three days to the D-day, people started coming into Gusau. In fact, about two million Muslim faithfuls from all parts of the country converged in the state capital to herald the commencement of Shari'a in the state. Every available space within the capital city was converted by traders for their wares ... The Gusau-Sokoto, Gusau-Zaria [and] Gusau-Kano roads had the busiest traffic ever as people came from these directions in thousands. Those who could not afford transport trekked from appreciably far distances to witness the occasion ... Movement in the town was brought to a standstill as the crowd covered a radius of four kilometers.

The event was slated for 8:00 am at the Ali Akilu Square but, interestingly enough, the square came to full capacity on the eve of the launching. Around 10:30 am the governor, Ahmad Sani, made a triumphant entry into the square amidst a thunderous ovation of welcome. At the appearance of the governor, the shouts of Allahu Akbar (God is great!) filled the air while the governor managed to squeeze his way to the high table where other dignitaries ... were seated.

20 Oloyede (n 17 above) 12. Eg, a Christian in any part of Nigeria can be legally wedded in a church and the marriage is considered done under the official statutory Marriage Act, with attendant privileges which include a judicial resolution through state High Courts, whereas any Muslim marriage outside Northern Nigeria is regarded as a mere customary marriage which (unlike its Christian counterpart) a High Court will not entertain. He or she would either be contended with the Customary Court (with no consideration for Islamic law on which he or she married) or to go for a private settlement with no force of law.

21 SK Rashid 'On the teaching of Islamic law in Nigeria' in SK Rashid *Islamic law in Nigeria: Application and teaching* (1986) 90.

22 Zamfara State of Nigeria, Law 5 of 1999 enacted in October 1999, published in *Zamfara State of Nigeria Gazette* of 15 June 2000 A1-30.

23 'The birth of Shari'a' *The Guardian* (Lagos) 30 October 1999, reproduced in Ostien (n 12 above) vol I, Preface to Volumes I-5, ix.

The programme ... showed that the events would only take three to four hours but many items on the agenda were skipped when it became apparent that the occasion may start recording casualties ... Scores of the people fainted because of exhaustion and suffocation. The good, however, was that the members of the Islamic Aid Groups were ... at hand to carry shoulder high any casualty, not without difficulty anyway, as they pass the victims across the wall of the square for those outside to receive them and take to the hospital ...

[Among the speakers] was the Aare Musulimi of Yorubaland, Alhaji Abdulazeez Arisekola Alao, [who] said he was the happiest man on earth having been alive to witness the historic occasion. [He] thanked the governor and the members of the state House of Assembly who, according to him, unanimously passed the Bill on Shari'a into law, thereby making it possible 'for Allah's law to be operative in Zamfara State instead of man-made law forced on us by our colonial masters'.

This popularity must have enticed 11 other governors in the northern states, where Muslims are in the majority, to follow suit. The motivation was more political relevance and advantage than religious commitment on the part of most of the governors. By the end of 2000, 12 states had enacted one form or the other of the Shari'a codes (penal system). Those states are presented in Table 2.

Table 2: The distribution of the Shari'a states

Geo-political zones	States
North west zone	Jigawa, Kaduna, Kano, Katsina, Kebbi, Sokoto and Zamfara (the originator)
North east zone	Bauchi, Borno, Gombe, Yobe (4 of 6)
North central zone	Niger (1 of 6)

The popular but erroneous interpretation of the Shari'a revival was that it was a northern reaction to the emergence of a Christian president. The two major contenders for the presidency were Christians. The majority of the votes from the south-west zone, where the two leading contenders came from, were not votes for President Obasanjo, who won by attracting massive votes from the Northern and Muslim-dominated states. In addition, the principal sponsors and supporters of his candidacy were Northern Muslims. The table below contains the results of the presidential elections in Nigeria since 1979. The results of the topmost contenders (with not less than 10 per cent of votes) are shown with their religious affiliation and zones of origin.

Table 3: Results of the Nigerian presidential elections (1979-2011)²⁴

Date	Name of candidate	Religion	Zone of origin	Percentage of total Votes Obtained	Party
1979	Shehu Shagari	Islam	NW	33.77	NPN
	Obafemi Awolowo	Christianity	SW	29.18	UPN
	Nnamdi Azikiwe	Christianity	SE	16.75	NPP
	Aminu Kano	Islam	NW	10.28	PRP
	Waziri Ibrahim	Islam	NE	10.02	GNPP
1983	Shehu Shagari	Islam	NW	47.51	NPN
	Obafemi Awolowo	Christianity	SW	31.09	UPN
	Nnamdi Azikiwe	Christianity	SE	13.99	NPP
1993	Which was annulled by a Muslim Military President from North Central Zone				
	Moshood Abiola	Islam	SW	58.36	SDP
	Bashir O. Tofa	Islam	NW	41.64	NRC
1999	Olusegun Obasanjo	Christianity	SW	62.78	PDP
	Olu Falae	Christianity	SW	37.22	Alliance of (AD – APP)
2003	Olusegun Obasanjo	Christianity	SW	61.94	PDP
	Muhammadu Buhari	Islam	NW	32.19	ANPP
2007	Umar Musa Yar'adua	Islam	NW	69.60	PDP
	Muhammadu Buhari	Islam	NW	18.66	ANPP

24 Independent National Electoral Commission Nigeria 'INEC: Report on the 2011 General Election', <http://www.inecnigeria.org/wpcontent/uploads/2013/07/report-on-the-2011-General-elections> (accessed 30 April 2014).

2011	Goodluck Jonathan	Christianity	SS	58.89	PDP
	Muhammadu Buhari	Islam	NW	31.98	CPC

The table shows clearly that Muslims could not have been opposed to the emergence of President Obasanjo in 1999. The two contenders were Christians from the south west. It was rather a move to appease the south west, which was the home of the winner of the 1993 annulled election. It is also instructive that the former military president who annulled the election results was a major promoter of President Obasanjo's candidacy – probably as a strategy to pave the way for his own anticipated later return as a democratically-elected President. It is similarly revealing that, while the two contenders in 1999 were Christians of south west origin, the two leading contenders in 2007 were Muslims of North-West origin. The two contenders in 1993 were Muslims. It is clear that the shift of identities and affiliations has been a ploy by the elite to utilise whichever religion, ethnicity or other primordial factors to maximise political advantage. It is also difficult to absolutely implicate one factor for the result.

The names of political parties before and immediately after independence also buttress the ethnic and geopolitical inclinations of the political parties. Parties such as Igala Union, Igbira Tribal Union, Mabolaje Grand Alliance, Kano Peoples Party, Zamfara Commoners Party, and so forth, did not hide ethnic identities while regional identities were displayed by the names of parties such as United Middle Belt Congress, Northern Peoples' Congress, Niger Delta Congress, Northern Elements Progressive Union, and so forth. The policy of not reflecting ethnicity in the names of registered political parties succeeded only in consigning it to the underground, but did not reduce the potency of ethnic factors in national politics. It is thus clear that the constituent units of Nigeria are only figuratively its regions, zones and states – the real *de facto* operational constituents, which are not formally acknowledged, are the political parties organised along ethnic lines.

6 Religious influence on public policy in Nigeria

Some light has been shed thus far on how religion plays an underlying role in public policy in Nigeria. The influence of the inherited British system, with its emphasis on the separation of state from religion, had a negative impact on the public administration of the country. The United Kingdom cannot be said to be a secular country, due to the Christian origin of many of its customs and practices. Its law can be said to be 'common law' in Britain, but not for a nation as diverse as Nigeria.

For example, the statutory Marriage Act bequeathed to Nigeria is based on the Christian principle of monogamy. Many privileges

granted to couples under the law are denied to those who marry under Islamic or customary law. Area courts (customary and Islamic) in Northern Nigeria are excluded from cases 'arising from or connected with a Christian marriage',²⁵ so also are customary courts in Southern Nigeria barred from hearing cases 'related to Christian marriages'.²⁶ Christian marriages are statutory marriages for which the High Court is the court of first instance. The legal scholar LB Curzon has correctly observed:²⁷

The influence of the canon law was important, in that some of the fundamental common law principles were derived from ecclesiastical doctrine. Our laws of marriage grew from the body of the canon law.

In *Harrey v Farine*, Justice Robert Lush concluded:²⁸

Our (UK) laws do not recognise a marriage solemnised in that (Islamic) country, a union, falsely called marriage, as a marriage to be recognised in our *Christian* country.

Further, in *Bownman v Secular Society Ltd*²⁹ it was decided that³⁰

[t]he UK is and has been a Christian state. The English family is built on Christian ideas; and if the national religion is not Christian, there is none, as English law may well be called a Christian law.

The Christian Association of Nigeria recently publicised its involvement in the religious manipulation of foreign policy of some supposedly secular Euro-American countries through closed-door sessions with foreign embassies, at the end of which the Association described Christians who acknowledged that religious fanaticism in Nigeria cuts across religious divides as 'useful idiots'.³¹ On the other hand, an official land allocation paper from a state ministry contains a *caveat* that the land 'cannot be used for brothel or church'.³²

7 Nigeria: A secular or multi-religious nation?

A number of studies have addressed the secular and religious nature of Nigeria.³³ It is generally believed that the observance of the weekly Sabbath on Sunday is non-religious, whereas at least in origin it was

25 Federal Government White Paper on the Report on Area Courts, Federal Ministry of Information, 1977 No 5 5.

26 *Adegbola v Folaranmi James & Tiamiyu Lawanson* (1921) 3 NLR 89.

27 LB Curzon *English legal history* (1979) 57.

28 1880 6p.D 35 53, as cited by RH Graveson *Conflict of laws: Private international law* (1974) 244.

29 UK Appeal Case 406, cited in Oloyede (n 17 above) 32.

30 As above.

31 *The Nation* (Lagos) 26 December 2012 46.

32 See 'Nigerian Christians are treated as second class citizens – Oritsejafor' *Vanguard* 27 July 2013.

33 Oloyede (n 17 above) 29-38; IO Oloyede 'Secularism and religion; Conflict and compromise – An Islamic perspective' (1987) 18 *Islam and the Modern Age* 121-138.

based on biblical customs.³⁴ In *Dickson v Marcus Ubani*,³⁵ the Seventh Day Adventist Church sought to enforce the right of its members to a Saturday Sabbath. The Church pursued the right until Saturday was granted as public holiday during the reign of a Christian military ruler General Yakubu Gowon (1967-1975). In Southern Nigeria, spectators and litigants are obliged to take off their caps (as if they were in church), whereas this Christian church practice is not extended to the courts in the United Kingdom.

Until 1982, when Muslim judges refused to participate in church services in the south-west part of Nigeria, the annual opening of court sessions were held in churches alone with all judges in attendance, irrespective of religion. It was only in 1982 that Muslim judges decided to go to mosques while the Christians went to churches. In the north, such sessions are held in the courts.

The heavy expenditure of public funds on pilgrimages, such as the Hajj and the Christian pilgrimage to Jerusalem and annual Christmas carols, betrays the secularity theory. Muslims and Christians exhibit their faith in the public arena in such a manner that suggests that religious allegiance is paramount. The Constitution of the Federal Republic of Nigeria avoids the word 'secular' and instead states that 'the government of the Federation or of a state shall not adopt any religion as state religion'.³⁶ What the nation does is to support all religious groups and activities in varying degrees, depending on who is in the majority or in power. The reality is that Nigeria is a multi-religious and not a secular state.

8 Abuse of education and educational institutions in Nigeria for the promotion of religious oppression

Secularism is 'the belief that the state morals, education, etc should be independent of religion'.³⁷ It can be further explained as a 'system of beliefs which rejects all forms of religious faith and worship, the view that public education and other civil policy should be conducted without the introduction of a religious element'.³⁸ Western education in Nigeria has been a tool for the propagation of Christianity and the denigration of Muslims and Islam. In addition to the historical fact that the negative attitude of Nigerian Muslims (particularly in the north) was based on fear and the experience of being lured out of Islam, public educational institutions continue to be used to wage psychological and social wars against Muslims. Three examples will suffice.

34 EL Cross (ed) *The Oxford dictionary of the Christian church* (1978) 132.

35 *Dickson v Maras Ubani* (1961) All NLR 277.

36 Sec 10 of the 1999 Constitution of Nigeria, incorporated in the 1999 Constitution.

37 *Chamber's 20th century dictionary* (1983).

38 *The Lexicon Webster dictionary* (1973) Vol II:863.

The first example concerns the University of Ibadan, a public university in Nigeria. In April 2000, a Christian lecturer in a course on land law asked his Christian and Muslim students to answer questions based on a fictional land law.³⁹ The parties in these hypothetical problems bore the names of 'Alhaji Looter' and 'Muhammed Kill-n-Go'. The first character defaulted on mortgage loans. The second was a fundamentalist proponent of Shari'a who attempted to convert his landlord's family to Islam before seducing the landlord's wife and arranging for hoodlums to pull down the family's ancestral shrines, in addition to refusing to pay rent (*ishakole*) to the landlord's family for three years. In both cases, the use of derogatory names for Muslim characters, who were further defined by their unscrupulous actions, could not have been well received by the Muslim students in the course.

In a second example, two students, Owo Eje⁴⁰ and Iyawo Alarede,⁴¹ were prescribed textbooks for secondary school public examinations in Nigeria. The books contained obscene caricatures of Muslims and Islam. In light of the recent protests at the time from Muslims of the south west, the textbooks had to be reviewed to delete their extremely offensive anti-Islamic expressions and fictions.

A third example was contained in the pages of a textbook on English prescribed for pupils of public primary schools in Nigeria and procured and distributed free by the Federal Government of Nigeria.⁴² The book was published by the reputable Macmillan Publishers of Ibadan but printed in Malaysia. The text describes a legendary war chief Gandoki of Northern Nigeria who recounts stories to young boys of fighting in the Muslim army of Shehu Dan Fodio in the battles to convert the Fulani 'unbelievers'. Gandoki recounts his warning to the Fulani: 'If you follow Islam, I'll let you go free; if you don't follow Islam, I'll cut off your heads.' Gandoki describes further adventures in the land of the *jinn* in which he builds a school for children. As he recounts:

Every morning and every evening, I taught them the words of the Prophet. The chief of the *jinn* took me from place to place and as I travelled I taught the people about Islam. I killed those who would not pray to God.

These examples and many others have compromised the capacity of education to reverse the unfortunate trend of religious bigotry. Instead, educational institutions, including public ones, continue to serve as veritable breeding grounds for hate and religious intolerance. Where then lies the salvation?

39 University of Ibadan, Question Paper for LPB 402 held on 15 April 2000.

40 K Akinlade *Owo Eje* (1976).

41 S Eso-Oluborode *Iyawo Alarede* (1993).

42 O Taiwo *et al Macmillan primary English course*, Pupils Book 5 (1996).

9 Socio-economic status of religion and religious leaders in Nigeria

Most Nigerians subscribe to either Christianity or Islam.⁴³ For various cultural and psychological reasons, Nigerians regard religion as a shield or shelter against perceived enemies.⁴⁴ Consequently, religious leaders wield a considerably high influence over their flock. Many Nigerians would not embark on any venture without spiritual sanction from their religious leaders, who take maximum selfish advantage of such consultations. They are also considered to possess supernatural powers to make miracles and wonders occur.⁴⁵ More often than not, such miracles are contrived. Ceremonies and festivities are common in society and none takes place without the involvement, in one way or the other, of the religious leaders who make many of them very wealthy. Spiritual healing powers are also claimed by or ascribed to many religious leaders.⁴⁶

The situation provides a fertile ground for independent clerics who look for excuses to establish personalised religious movements to which followers faithfully contribute a prescribed portion of their income. A tithe of one tenth of the gross income of a Christian and one fortieth of the net income of a Muslim, after meeting all expenses, is a sacred prescription. A large proportion, if not all in some cases, ends up in the personal purse of the religious leaders. Religious leadership has become hereditary rather than being based on merit. In these circumstances, all commercial tricks are employed for maximum benefit under the cloak of religion. False and exaggerated alarms of religious persecution are at times raised to attract sympathy and financial support of undiscerning foreign sympathisers. A number of religious leaders have been found to be illegally receiving regular subventions from the funds of the public and public-quoted companies.⁴⁷ It would, therefore, be understandable why religious leaders may strive to, through fair and foul means, install their own disciples in strategic public and corporate positions.

43 Pew Forum (n 4 above) 64.

44 Pew Forum (n 4 above) 34 (on the persistence among Africa's Muslims and Christians of African traditional religion practices of *juju* amulets to ward off the 'evil eye' of perceived enemies).

45 Pew Forum (n 4 above) 176 (on African belief in miracles).

46 Pew Forum (n 4 above) 211 (on African reports of witnessing divine healing of an illness or injury).

47 'EFCC: Former PHB boss Atuche used stolen funds to pay N45m church tithes' *Sahara Reporters* 26 September 2012, <http://saharareporters.com/news-page/efcc-former-phb-boss-atuche-used-stolen-funds-pay-n45m-church-tithes> (accessed 30 April 2014).

10 Religious politics and violence in Nigeria

The current Boko Haram scourge in the north of Nigeria, as well as the kidnapping and massive theft of crude oil in the south, is traceable to soured political maneuvers and socio-economic environment. It is generally believed that groups established for the promotion of political ends fell out with their political principals, who were then accused of abandoning their human tools after attaining their desired political goals. Powerful politicians responded to the challenges with brutal force which further aggravated the crises. With access to arms and ammunition initially procured by political thuggery, the deprived members of society turned to ethnic and religious camouflage as a platform for raising arms against society. If Boko Haram is a purely Islamic movement against non-Muslims, why are the majority of the victims Muslims? It seems more likely the case that interreligious acrimony was created to attract the maximum effect of creating anarchy and turmoil in the country. Rather than creating synergy to identify and uproot criminality and terrorism, energy is being dissipated on interreligious controversies.

It must nevertheless be acknowledged that indoctrination and outright ignorance have misled some individuals into religious extremism and violence. Such individuals are found in virtually all major religions. The Boko Haram phenomenon originated in the extremist perceptions of a few individuals in Nigeria. It is similar to the use of Christianity by Joseph Kony over the past two decades to wage a devastating war on the people of Northern Uganda. Such perversion of religion may have led groups to use Islam as an alibi for violence, but other factors may be at play.

For instance, another dimension of the spate of bombings and other violence generally believed to be perpetuated by the faceless Muslim group is that a number of culprits apprehended were non-Muslims who were hiding under the chaotic situation to settle intra-religious scores within the Christian community. Furthermore, Henry Orkah, who was recently convicted and sentenced in South Africa for masterminding the 1 October 2010 bombing in Abuja, Nigeria, is a Christian. His brother, who recently complained in detention that he was being tortured to implicate some Muslim leaders in the bombing episode, is a Christian. There are a number of media reports of Christians found to be behind the bombing of their own churches.⁴⁸

A renowned American professor of African history, Jean Herskovitz, recently gave a succinct statement of the origin of Boko Haram in the *New York Times*, arguing:⁴⁹

48 *The Vanguard* (Lagos) 30 August 2011; *The Leadership* (Abuja) January 2012; *The Nation* (Lagos) 28 March 2012 57; *Daily Post* (Lagos) 22 June 2012.

49 J Herskovits 'In Nigeria, Boko Haram is not the problem' *The New York Times* 2 January 2012.

Boko Haram began in 2002 as a peaceful splinter group. But it was not until 2009 that Boko Haram turned to violence, especially after its leader, a young Muslim cleric named Mohammed Yusuf, was killed while in police custody. Video footage of Mr Yusuf's interrogation soon went viral, but no one was tried and punished for the crime. Seeking revenge, Boko Haram targeted the police, the military and local politicians – all of them (the politicians) Muslims.

The dreaded group turned its inexcusable venom on innocents – Christians in particular – which is very un-Islamic. The state security agency recently confirmed that different criminal groups currently falsely claim to be Boko Haram. On this point, Herskovits further observes:⁵⁰

Governments and newspapers around the world attributed the horrific Christmas Day bombings of churches in Nigeria to Boko Haram ... [which] has been blamed for virtually every outbreak of violence in Nigeria. But the news media and American policy makers are chasing an elusive and ill-defined threat; there is no proof that a well-organised, ideologically coherent terrorist group called Boko Haram exists today. Evidence suggests instead that, while the original core of the group remains active, criminal gangs have adopted the name Boko Haram to claim responsibility for attacks when it suits them ... It was clear in 2009, as it is now, that the root cause of violence and anger in both the north and south of Nigeria is endemic poverty and hopelessness.

Meanwhile, Boko Haram has evolved into a franchise that includes criminal groups claiming its identity. Revealingly, Nigeria state security services issued a statement on November 30, 2011 identifying members of four 'criminal syndicates' that send threatening text messages in the name of Boko Haram. Southern Nigerians – not northern Muslims – ran three of these four syndicates ... And last week, the security agents caught a Christian southerner wearing northern Muslim garb as he set fire to a church in the Niger Delta. In Nigeria religious terrorism is not always what it seems. None of these excuses Boko Haram's killing of innocents. But it does raise questions about a rush to judgment that obscure Nigeria's complex reality.

The Nigerian Catholic Bishop of Sokoto Diocese and outstanding scholar, Mathew H Kukah, recently spoke candidly in an 'Appeal to Nigerians' in which he observed of Boko Haram saga:⁵¹

On Christmas day, a bomb exploded at St Theresa's Catholic Church, Madalla, in Niger State, killing over 30 people and wounding a significant number of other innocent citizens who had come to worship their God as the first part of their Christmas celebrations. Barely two days later, we heard of the tragic and mindless killings within a community in Ebonyi State in which over 60 people lost their lives with properties worth millions of naira destroyed and hundreds of families displaced ... The tragedy in Madalla was seen as a direct attack on Christians. When Boko Haram claimed responsibility, this line of argument seemed persuasive to those who believed that these merchants of death could be linked to the religion of Islam. Happily, prominent Muslims rose in unison to condemn this evil act and denounced both the perpetrators and their acts as being un-

⁵⁰ As above.

⁵¹ MH Kukah 'An appeal to Nigerians' (delivered at NTA and Radio Nigeria on 10 December 2011) *The Guardian* (Lagos) 17 January 2012.

Islamic. All of this should cause us to pause and ponder about the nature of the force of evil that is in our midst and to appreciate the fact that contrary to popular thinking, we are not faced with a crisis or conflict between Christians and Muslims. Rather, like the friends of Job, we need to humbly appreciate the limits of our human understanding.

In the last few years, with the deepening crises in parts of Bauchi, Borno, Kaduna and Plateau states, thanks to the international and national media, it has become fanciful to argue that we have crises between Christians and Muslims. Sadly, the kneejerk reaction of some very uninformed religious leaders has lent credence to this false belief. To complicate matters, some of these religious leaders have continued to rally their members to defend themselves in a religious war. This has fed the propaganda of the notorious Boko Haram and hides the fact that this evil has crossed religious barriers. Let us take a few examples which, though still under investigation across the country, should call for restraint on our part.

Sometime last year, a Christian woman went to her own parish church in Bauchi and tried to set it ablaze. Again, recently, a man alleged to be a Christian, dressed as a Muslim, went to burn down a church in Bayelsa. In Plateau State, a man purported to be a Christian was arrested while trying to bomb a church. Armed men gunned down a group of Christians meeting in a church and now it turned out that those who have been arrested and are under interrogation are in fact not Muslims and that the story is more of an internal crisis. In Zamfara State, 19 Muslims were killed. After investigation it was discovered that those who killed them were not Christians. Other similar incidents have occurred across the country.

Indeed, there have been two reports of cases in which those who attempted to or successfully bombed churches were confirmed members of the church.⁵² This prompted the zonal Chairperson of CAN, quoting Matthew 24 on the 'destruction of the temple and signs before the end of time', to refer to the church bombings as 'this strange development as signs of the end of time'.

There were reports that a Muslim candidate for the 2011 presidential election openly asked Muslims to vote for him on the basis of religion, and the Christian Association of Nigeria, the umbrella body of Christians in Nigeria, publicly declared support for the Christian among the three topmost candidates. In 2000, the President of CAN, while reacting to the Shari'a revival in the north, publicly announced that 'whether they like it or not, we will not allow any Muslim to be President of Nigeria. I am declaring this as President of CAN'.⁵³

This development was a very dangerous and destructive trend for the nation. That notwithstanding, the results of the election, when compared with previous presidential elections and against existing ethnic and political groupings, gave no room for the categorical isolation of religion as the main factor in the election. It is difficult to distinguish religion, ethnicity or politics as major factors in the results

52 'Police arrest prostitute over alleged attempt to burn down church' *Vanguard* (Lagos) 30 August 2011.

53 M Haruna 'Still playing dangerous politics with Boko Haram' *The Nation* (Lagos) 64; *This Day* (Abuja) 31 July 2000.

because the different configurations at times coalesce. In such cases, coincidence may be at play, as can be deduced from the table that follows:

Table 4: Results of the 2011 presidential election⁵⁴

S/No	State	Registered voters	Voters turnout	PDP (A Christian from SS zone)	CPC (A Muslim from NW zone)	ACN (A Muslim from NE zone)
A	North-west zone					
	Jigawa	2,013,974	56.64 per cent	36.75 per cent	58.21 per cent	1.52 per cent
	Kaduna	3,905,387	65.81 per cent	46.31 per cent	51.92 per cent	0.44 per cent
	Kano	5,027,297	53.17 per cent	16.48 per cent	60.77 per cent	1.58 per cent
	Katsina	3,126,898	52.43 per cent	26.13 per cent	70.99 per cent	0.67 per cent
	Kebbi	1,638,308	56.41 per cent	39.95 per cent	54.26 per cent	2.83 per cent
	Sokoto	2,267,509	40.12 per cent	33.97 per cent	59.44 per cent	2.21 per cent
	Zamfara	1,824,316	51.67 per cent	25.35 per cent	66.25 per cent	1.91 per cent
	Total	19,803,689	53.26 per cent X	31.37 per cent	60.61 per cent X	1.61 per cent
B	North-East Zone					
	Adamawa	1,816,094	49.98 per cent	56.00 per cent	37.96 per cent	3.61 per cent
	Bauchi	2,523,614	63.80 per cent	16.05 per cent	81.69 per cent	1.04 per cent
	Borno	2,380,957	49.46 per cent	17.58 per cent	77.25 per cent	0.64 per cent
	Gombe	1,318,377	58.41 per cent	37.71 per cent	59.73 per cent	0.44 per cent
	Taraba	1,336,221	55.31 per cent	61.07 per cent	34.91 per cent	2.41 per cent

⁵⁴ n 24 above.

	Yobe	1,373,796	45.28 per cent	18.83 per cent	54.26 per cent	0.98 per cent
	Total	10,749,059	53.71 per cent X	34.54 per cent	57.63 per cent X	1.52 per cent
C	North-central zone					
	Benue	2,390,884	43.82 per cent	66.31 per cent	10.47 per cent	21.29 per cent
	Kogi	1,316,849	42.66 per cent	71.17 per cent	23.53 per cent	1.16 per cent
	Kwara	1,152,361	35.99 per cent	64.68 per cent	20.16 per cent	12.64 per cent
	Nasarawa	1,389,308	49.99 per cent	58.89 per cent	40.08 per cent	0.17 per cent
	Plateau	2,259,194	62.46 per cent	72.98 per cent	25.27 per cent	0.72 per cent
	Niger	2,175,421	46.85 per cent	31.54 per cent	64.03 per cent	1.31 per cent
	Total	10,684,017	46.96 per cent X	60.92 per cent	30.59 per cent X	6.22 per cent
D	South-west					
	Ekiti	764,726	34.24 per cent	51.56 per cent	1.03 per cent	44.67 per cent
	Lagos	6,108,069	31.84 per cent	65.90 per cent	9.77 per cent	21.96 per cent
	Ogun	1,941,170	28.01 per cent	56.86 per cent	3.25 per cent	36.70 per cent
	Ondo	1,616,091	30.12 per cent	79.57 per cent	2.44 per cent	15.25 per cent
	Osun	1,293,967	39.62 per cent	36.75 per cent	1.36 per cent	58.46 per cent
	Oyo	2,572,140	33.57 per cent	56.14 per cent	10.70 per cent	29.21 per cent
	Total	14,296,163	32.9 per cent X	57.80 per cent	4.76 per cent X	34.38 per cent
E	South-east					
	Abia	1,524,484	77.95 per cent	98.96 per cent	0.31 per cent	0.37 per cent
	Anambra	2,011,746	57.52 per cent	98.96 per cent	0.36 per cent	0.30 per cent

	Ebonyi	1,050,534	47.87 per cent	95.57 per cent	0.20 per cent	0.22 per cent
	Enugu	1,303,155	62.46 per cent	98.54 per cent	0.46 per cent	0.22 per cent
	Imo	1,687,293	83.56 per cent	97.98 per cent	0.54 per cent	1.05 per cent
	Total	7,577,212	56.87 per cent X	98.02 per cent	0.39 per cent X	1.25 per cent
F	South-south					
	Akwa Ibom	1,616,873	76.22 per cent	94.58 per cent	0.43 per cent	4.39 per cent
	Bayelsa	591,870	85.61 per cent	99.63 per cent	0.14 per cent	0.07 per cent
	Cross River	1,148,486	63.24 per cent	97.67 per cent	0.55 per cent	0.81 per cent
	Delta	2,032,191	68.82 per cent	98.59 per cent	0.64 per cent	0.09 per cent
	Edo	1,655,776	37.52 per cent	87.28 per cent	2.86 per cent	8.73 per cent
	Rivers	2,429,231	76.33 per cent	98.04 per cent	0.71 per cent	0.88 per cent
	Total	9,474,427	67.96 per cent X	95.97 per cent	0.89 per cent X	2.50 per cent
G	Federal Capital Territory (FCT)	943,473	42.19 per cent	63.66 per cent	33.05 per cent	0.58 per cent

For instance, at one point in 2011 there were equal numbers of Muslim and Christian governors in Nigeria, despite the fact that each state independently elected its governors. While four of the 19 governors in the Northern zones were until recently Christians, four of the 17 governors in the southern zones are Muslims. This again is another coincidence. Two of the Christian governors in the north were involved in separate air mishaps. These accidents have also thrown into relief the tragicomic nature of religious politics in Nigeria. As a result of these accidents, the Muslim deputies of the two governors had to take over, one temporarily and the other permanently. One of the remaining two Christian governors in the north recently informed a church congregation that the accidents, which reduced the number of Christian governors in the north, were the result of a spiritual onslaught against Christians.⁵⁵ He worried that he might also be a victim, but he was reminded that his deputy and

the third in command in his state are also Christians. He chose to gloss over the fact that a Muslim governor in the north was also in hospital as a result of a fatal road accident and two governors in the south were currently not in office as a result of ill-health. The deputies of the three ailing governors are Christians which belies the claim of an Islam-inspired spiritual war theory.

This is an example of how extraneous interpretations can be given to virtually any incident in the country. It matters a little to the 'smart' governor that the wives of three of the four Muslim governors in South-Western Nigeria are top Christian leaders, and that the wife of the northern Christian governor who is recuperating as a result of the plane crash is a Muslim and an Alhaja.

11 Conclusion: Religion, politics, and other causal factors

At the global level, Islam faces a number of challenges, some of which are unnecessary. The international media constantly stigmatises Islam. For example, the Norwegian Anders Behring Breivik, who killed 77 souls in a shooting spree, was protesting, among other grudges, the 'Islamification of Europe'. He was not called a Christian terrorist whereas, if he had been a Muslim, the international media would have labelled him an Islamic terrorist or fundamentalist. There are many such selective demonisations in the media. The Israel-Palestine conflict, which is perceived in Nigeria as a Christian-Muslim conflict, is far from that – there are Christians, Jews and Muslims across the divide. It was originally a conflict over land, but it has become a matter of religion.

Any person genuinely interested in world peace should be concerned about the increasing polarisation of the world in the quest for power and influence. It is paramount that the necessary steps be taken to avert hypocritical lip service to humanity when the reality is an unbridled urge for exclusion and a threat to world peace. The infamous claim of the presence of weapons of mass destruction that led to the invasion of Iraq was found to be a ruse, but it is one which has consumed a large number of human beings. It is therefore necessary to note that, while Nigeria is just a case study, a number of lessons can be learned from the Nigerian experience.

The situation in Nigeria has called attention to the impossibility of compartmentalisation of public administration into religious, political or social categories. It is also obvious that law, politics and religion have been intractably integrated in a manner that questions the classification of Nigerian conflicts and disputes along religious,

55 The Governor of Benue State as widely reported in the national newspapers in December 2012.

political or legal lines. It is necessary to find ways to address those salient factors that obscure a causative and precise diagnosis.

The Nigerian police force and the enforcement of religious criminal law

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Summary

The argument of this article is that the Nigerian police force is responsible by the tenor of the provisions of the 1999 Constitution of the Federal Republic of Nigeria for the enforcement of criminal law in Nigeria, whether they are religiously inspired or not. Accordingly, the Nigerian police force has a constitutional responsibility to enforce the Islamic penal codes introduced in 12 Northern Nigerian states in the wake of Nigeria's fourth republic from 1999.

1 Introduction: The Constitution, the *hisbah* and the Nigerian police force

I shall argue in this article that the Nigerian police force (NPF) is responsible by the tenor of the provisions of the 1999 Constitution of the Federal Republic of Nigeria (Nigerian Constitution) for the enforcement of criminal law in Nigeria, whether they are religiously inspired or not. Accordingly, the NPF has a constitutional responsibility to enforce the Islamic penal codes¹ introduced in 12

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1 The states are Zamfara, Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, and Yobe. The following are examples of the manner of introduction of Shari'a penal codes in Zamfara, Kano, Niger and Katsina States: In Zamfara State, the Shari'a Courts (Administration of Justice and Certain Consequential Changes) Law 1999 (Zamfara Law) came into effect on 27 January 2000, established Shari'a courts and endowed them with jurisdiction to determine civil and criminal proceedings. The applicable law in civil criminal proceedings of the Shari'a courts is declared to be the whole corpus of Islamic law, which is defined by sec 7(1)(a) of the Zamfara Law to include the Holy Qur'an, the Hadith and Sunnah of Prophet Muhammed, and other recognised components of Islamic law. Kano State enacted a comprehensive Shari'a Penal Code Law 2000. In Niger State, and a slight amendment was made to the

Northern Nigerian states² in the wake of Nigeria's fourth republic from 1999. It will also be contended that it is the erroneous belief by the NPF that the Islamic penal codes are unconstitutional without the benefit of a judicial pronouncement that is at the heart of the organisation's refusal.

One of the significant consequences of the NPF's position is the establishment and operations of *hisbah* organisations³ by many northern states and the recent clamour for the amendment of the 1999 Constitution of the Federal Republic of Nigeria to either introduce a state police or to empower state governors to give final and lawful instructions to state police commissioners.⁴ It will be demonstrated that the reasonable accommodation and co-operation between the NPF and *hisbah* organisations in many Northern Nigerian states are indicative of the capacity of the NPF to enforce the Islamic penal codes alone or in co-operation with civil society organisations. Furthermore, it will emerge that the stance of the NPF and its co-operation with *hisbah* organisations is part of a systemic 'avoidance' of the legality of the introduction of Shari'a in Nigeria by civil society as well the political and judicial branches of the Nigerian government.

Writ large in the background is the incapacity of Nigeria's constitutional system to confront and resolve issues of significance such as the introduction of Shari'a by sweeping these issues under the carpet and hoping that they go away. This state of 'false reality' has resulted in considerable human rights abuses, which are also explored in the article. The second part of the article, following the introduction, reviews the assertion that the NPF is constitutionally responsible for the implementation of Islamic penal codes in 12 northern states of the Federation. The third part examines ongoing implementation of Islamic penal codes by *hisbah* organisations and

existing Penal Code through the Niger State Penal Code Amendment Law 2000. In Katsina State, Shari'a was introduced through the Katsina State Islamic Penal System (Adoption) Law 2000. For a fuller discussion of the introduction of the Islamic penal codes, see generally P Ostien (ed) *Shari'a implementation in Northern Nigeria 1999-2006: A source book* (2007) <http://www.Sharia-in-africa-.net/pages/publications/sharia-implementation-in-Northern-Nigeria.php> (accessed 14 March 2014).

2 The term 'Islamic penal code' is used to distinguish these codes from penal codes in existence that were based on the 1960 Penal Code.

3 *Hisbah*: enjoining what is good and forbidding what is wrong according to Shari'a; by extension, those who enjoin and forbid.

4 See Communiqué of Northern Governors Forum reproduced in J Bulus 'State police: The unending debate' *Vanguard* 25 August 2012. ('The Forum is not in support of the creation of state police. It, however, resolved to prevail on the FG to embark on police reforms that will assist the states in the control and management of police affairs on a sound philosophy of modern policing by amending the provision of section 215 of the Constitution to read as follows: "Subject to the provision of this section, the governor or such commissioner of the government of the state as he may authorise in that behalf may give to the commissioner of police of that state such lawful directions with respect to the maintenance and securing of public safety and public order within the state as he may consider necessary, and the commissioner of police shall comply with those directives or cause them to be complied with."')

their relationship with the NPF. In the fourth part, Nigeria's judicial review of constitutional compliance is examined with a view to understanding the obstacles to constitutional litigation that would have examined the legality of the introduction of Islamic criminal law, including the Islamic penal codes, which have greatly assisted the NPF in discharging its constitutional responsibility of enforcing the Islamic penal codes. Concluding remarks follow.

2 The Nigerian police force and the enforcement of Islamic penal codes

This section of the article examines the assertion that the NPF is under an obligation to enforce Islamic penal codes, just as it enforced the provisions of the Criminal Code⁵ and the penal codes⁶ which predate the Islamic penal codes. To provide a context for this assertion, it is important to draw attention to the fact that public order and public security are concurrent matters between the federal and state governments under the 1999 Constitution by virtue of the provisions of sections 11(1)⁷ and (2)⁸ thereof. The Criminal Code and the Penal Code, which are expressions of a legislative intent to secure public order and security through the creation of offences, is a federal and state enactment depending on how the offence relates to matters in the Exclusive,⁹ Concurrent¹⁰ or Residual list.¹¹ Thus, as rightly observed by Nwabueze, '[t]he Criminal Code operates both as a federal or state law under the provisions of the Constitution relating to existing law'.¹² The same remark applies to the Penal Code

5 Many Nigerian states have enacted an identical version of the Criminal Code Chapter 77 Laws of the Federation of Nigeria 1990. Eg, Rivers State has a Criminal Code Cap 37 Laws of Rivers State 1999.

6 Just like the Criminal Code, the northern states of Nigeria have reenacted the Penal Code 1960 as state laws. See eg Niger State Penal Code Law Cap 94 Laws of Niger State.

7 'The National Assembly may make laws for the Federation or any part therefore with respect to the maintenance and securing of public safety and public order and providing, maintaining and securing of such supplies and service as may be designed by the National Assembly as essential supplies and services.'

8 'Nothing in this section shall preclude a House of Assembly from making laws with respect to the matter referred to in this section, including the provision for maintenance and securing of such supplies and services as may be designated by the National Assembly as essential supplies and services.'

9 See part 1 of sch 2 to the 1999 Constitution which lists 66 items over which the federal government has exclusive competence.

10 See part 2 to sch 2 of the 1999 Constitution over which the federal and state governments have concurrent competence in the manner set out in the Constitution.

11 The residual list is a default list containing those matters which are neither in the Exclusive Legislative List nor in the Concurrent Legislative List.

12 See BO Nwabueze *The Presidential Constitution of Nigeria* (1982) 58.

promulgated in 1960, whose religious origin¹³ is far more acknowledged than the Criminal Code.¹⁴ Thus, the Penal Code contains many offences that reflect Islamic norms.¹⁵ Criminal law and prosecution in Northern Nigeria, even after the introduction of the Islamic penal codes for the 12 northern states, is partly constituted by the Penal Code and Criminal Procedure Code 1960, as enacted by each of these states. The NPF is constitutionally bound to enforce the Penal and Criminal Codes because they are existing laws under the 1999 Constitution. It is difficult to imagine why the introduction of Islamic penal codes in the 12 northern states should be any different. Until they are struck down by Nigeria's courts, the Islamic penal codes and other Islamic criminal legislation remain valid and enforceable by the NPF. As Ostien observes with respect to the pre-Islamic penal codes:¹⁶

Alongside the old Penal Codes we now have, also, in all the Shari'a states except for Niger, new Shari'a Penal Codes running in parallel. The Shari'a Penal Codes bring Islamic criminal law back into more or less full force within the Shari'a States as to persons tried for crimes in the new Shari'a Courts. They do so in the form of lengthy codes, in compliance with the constitutional requirement that all criminal law be enacted as written law in which all criminal offences are defined and the penalties therefor prescribed. At the same time, all the old Penal Codes, clones of the Penal Code of 1960, remain on the books – to be applied to persons tried in the Magistrate or High Courts. In short, as in colonial days, which penal law is applied to a person depends on which court he or she is tried in. The choice of court seems to a large extent to be the accused's. There is a presumption that non-Muslims will be charged and tried in the Magistrate and High Courts (and therefore be subject to the old Penal Codes); but they may *opt into* the Shari'a courts (and therefore be subject to the Shari'a Penal Codes) if they give their consent in writing.

The fact that the Islamic penal codes are more *Islamic* in no way diminishes the responsibility of the Nigerian police force to enforce them. At this stage, it is important to wonder whether the NPF is right to refuse to enforce Islamic penal codes. It is argued that the NPF is a secular organisation that is consistent with Nigeria's secular status, which is affirmed in section 10 of the 1999 Constitution and, accordingly, it would not enforce laws which are tantamount to the adoption of a state religion.

Closely related to the obligation of the NPF to enforce the Islamic penal codes is the operational design of the NPF in the 1999 Constitution, which endows the President of the Federal Republic of

13 See P Ostien & A Dekker 'Shari'a and national law in Nigeria' in JM Otto (ed) *Shari'a incorporated: A comparative overview of the legal systems of twelve Muslim countries: Past and present* (2007) 5 ('the contents of the Penal Code were negotiated at length with northern politicians and legal scholars of various schools, particularly the north's leading *Ulama*').

14 See CO Okonkwo & ME Naish *Okonkwo and Naish on criminal law in Nigeria* (1980) 4-6.

15 See eg sec 389 of the Penal Code (Seduction and Enticement); sec 400 (Insulting the Modesty of any Woman); and sec 401-402 (Drunkenness).

16 Ostien (n 1 above) vol IV ch 4 6-7.

Nigeria with operational control over the NPF Force in terms of section 215(3) of the Nigerian Constitution.¹⁷ This position is reinforced by the provisions of section 215(4), providing that

[t]he governor of a state may give to the Commissioner of Police such lawful directions with respect to the maintenance and securing of public safety and public order within the state as he may consider necessary and the Commissioner of Police shall comply with those directions or cause them to be complied with: Provided that before carrying out any such directions under the foregoing provisions of this subsection, the Commissioner of Police may request that the matter be referred to the President or such Minister of the government of the Federation as may be authorised in that behalf by the President for his directions.

The proviso of a recourse to the President for his confirmation of instructions from a state governor has engendered considerable political problems, especially when the incumbent President is at political religious and personal loggerheads with state governors. Even though state governors have been judicially confirmed¹⁸ as the chief security officers of their states, the confirmatory powers of the President are still being exercised. Thus, a President would appear to be within his powers to lawfully instruct a police commissioner in any of the 12 northern states to ignore the request of a governor of one of these states to enforce provisions of an Islamic penal code.

It is therefore not surprising that an amendment of section 215(4) of the 1999 Constitution to empower state governors to give lawful and final commands to state police commissioners has become an attractive alternative. There is therefore merit in the contention that, were governors of a state to be recognised as capable of issuing lawful and final commands to state police commissioners, the enforcement of Islamic criminal law could be enhanced.

3 Nigerian police force and the enforcement of Islamic penal codes by *hisbah* organisations

This section reviews the operation of *hisbah* organisations to enforce the provisions of the Islamic criminal codes and other criminal legislations that promote Shari'a in the wake of the refusal of the NPF and the Federal Government of Nigeria to implement the Islamic penal codes. The establishment and operations of *hisbah* organisations has resulted in widespread allegations that they are a police force and unconstitutional in view of the emphatic cast of section 214 of the 1999 Constitution, that there shall be only one police force in

17 'The President or such other Minister of the Government of the Federation as he may authorise in that behalf may give to the Inspector-General of Police such lawful directions with respect to the maintenance and securing of public safety and public order as he may consider necessary, and the Inspector-General of Police shall comply with those direction or cause them to be complied with.'

18 See *Fawehinmi v Inspector-General of Police* (2002) 7 NWLR (Pt 767) 606.

Nigeria.¹⁹ Any other police force, it is argued, can only exist pursuant to a constitutional amendment. This perspective, however, ignores the constitutional challenges that arise from the powers granted to state governments by sections 4(6) and (7) of the Nigerian Constitution enabling state Houses of Assembly to make laws for the peace, order and good government of a state.²⁰ Supposing in accordance with their constitutional entitlements, a state government enacts criminal legislation, who would enforce such legislation? Faced with this challenge, the Kano State government took out an action against the Federal Government in *Attorney-General of Kano State v Attorney-General of the Federation*²¹ (*Hisbah* case), claiming that the Kano State *Hisbah* Board Law 4 of 2003 and the Kano State *Hisbah* Board (Amendment) Law 6 of 2005 were regularly made by the Kano State House of Assembly and duly assented to by the governor of Kano State in accordance with powers vested by sections 4(6) and (7) of the 1999 Constitution.²² It is clear that the Supreme Court sidestepped the merits of the case by holding that, by the facts of the case, the threshold of its original jurisdiction²³ had not been crossed since there was no dispute between the Federal and Kano State governments. Rather, the Court held that a dispute was evident between officials of Kano State and officials of the Federal Government that could have been brought before lower courts of record, such as the Federal High Court.²⁴ It is interesting to note that Kalgo JSC recognised the fact that, under section 7 of the *Hisbah*

19 In addition, para 45 of the Exclusive Legislative List found in the First Schedule to the Nigerian Constitution lists 'police and other government security services established by law', making the police a matter for the federal government.

20 See *Ojisua v Aiyebilehin* 2001 11 NWLR (Pt 723) 44.

21 2007 6 NWLR (Pt 1029) 164 (*Hisbah* case).

22 The trigger to this case appears to be a demonstration against the Kano State *Hisbah* Board in 2005 in the course of their attempts to enforce a ban on the carrying of female passengers by commercial motorcycle owners. In early 2006, the Inspector-General declared the Kano State *Hisbah* Board as unconstitutional, banned it and arrested its leaders. For an account of these events, see M Last 'The search for security in Moslem Northern Nigeria' (2008) 78 *Africa* 41 52; R Olaniyi 'Hisbah and Shari'a law enforcement in metropolitan Kano' (2009) 57 *Africa Today* 71 87.

23 The original jurisdiction of the Supreme Court of Nigeria is stated in sec 213(1) of the 1999 Constitution: 'The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the federation and a state or between states if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends. (2) In addition to the jurisdiction conferred upon it by subsection (1) of this section, the Supreme Court shall have such original jurisdiction as may be conferred upon it by any Act of the National Assembly: Provided that no additional jurisdiction shall be conferred upon the Supreme Court with respect to any criminal matter.'

24 The jurisdiction of the Federal High Court as regards the case is found in secs 251(1)(p), (q) and (r): 'Notwithstanding anything to the contrary contained in this Constitution, and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters – (p) the administration or the management and control of the Federal Government or any of its agencies; (q) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it

Board Law of 2003, some of the duties and responsibilities of the *Hisbah* Board are similar in many respects to those of the NPF. Furthermore, it appeared from the papers filed by the plaintiffs in the *Hisbah* case that the then Inspector-General of Police was of the opinion that the *hisbah* corps in Kano State completely usurped the powers and duties of the NPF under the Police Act and the 1999 Constitution. The outcome of the *Hisbah* case was a successful civil suit for illegal detention instituted by the arrested officials of the Kano State *Hisbah* Board, and an acquittal of the criminal charges against them by the NPF could understandably be regarded by the Kano State government and the other 11 Northern Nigerian states as a victory and an affirmation of the constitutionality of the Kano *hisbah* operations.

While the Kano State *Hisbah* Board appears to be the most prominent, available evidence indicates that there are *hisbah* operations in seven of the 12 northern states which have introduced Islamic penal codes. With respect to law enforcement activities generally, it would appear that the unsettled status of the *hisbah* resulted in the designation of the *hisbah* as acting in an advisory and complementary role to law enforcement agencies, especially the NPF. For example, in Bauchi State, *hisbah* activities are carried out pursuant to section 8(g) of the Bauchi State Shari'a Commission Law 2001, which empowers the Commission to recruit and control members of the *hisbah*. The Bauchi State Guidelines on the Formation Functions and Operations of the *Hisbah* Committees in Bauchi State outline *hisbah* activities as including:²⁵

- 2.1.1 preaching, guidance and promotion of Islamic education;
- 2.1.2 resolution of conflicts and making peace between individuals, groups and communities without having to resort to courts;
- 2.1.3 uniting people of a particular community to solve their common problems related to moral issues, social welfare, youths unemployment, etc, so as to complement government activity;
- 2.1.4 assisting law enforcement agencies in preventing and combating crime and ensuring compliance with the Shari'a.

In Jigawa State, the *Hisbah* Advisory Committee (Establishment) Law 2004²⁶ established a Jigawa State *Hisbah* Advisory Committee. Section 5(d) of this Law provides that one of the functions of the Committee is 'assisting the law enforcement agents in the prevention and detection of crimes through locating and exposing criminals and places where criminal activities take place'. Available evidence

affects the Federal Government or any of its agencies; (r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies.'

25 Text of Guidelines is found in Ostien (n 1 above) vol VI ch 10 5.

26 Law 2 of 2004. The text of the law is reproduced in Ostien (n 1 above) vol VI ch 10 22.

indicates that the Bauchi State *Hisbah* Corps has been involved in arresting prostitutes, homosexuals and a female singer, amongst other arrests.²⁷ In Kano State, the *Hisbah* Board Law of 2003 established the Kano State *Hisbah* Board. The functions of the Board are set out in section 7(4) and include 'rendering necessary assistance to the police and other security agencies, especially in the areas of prevention, detection and reporting of offences'. When it is seen that this function is one of the many endowed on the Kano State *Hisbah* Board,²⁸ it is tempting to conclude that the Kano State *Hisbah* Board, like other *hisbah* organisations, is not a police force mandated to enforce Islamic criminal law. Available evidence indicates otherwise, and there are many instances in which the Kano State *Hisbah* Board, like other *hisbah* organisations, has operated like a police force. In Kano State, the *Hisbah* Board has been involved in preventing women from riding commercial motorcycles pursuant to a 2005 amendment to the Kano State Road Traffic Ordinance, which inserted a section 45 that provides that any motorcyclist that carries any female as a paying passenger shall be guilty of an offence and on conviction shall be liable to a fine or suspension from riding a motorcycle. Other documented activities²⁹ of the *Hisbah* Board include the destruction of alcohol; the arrest of prostitutes; and the closure of brothels, rendering necessary assistance to the police and other security agencies, especially in the areas of prevention, detection and reporting of offences.

It is instructive that the activities of the *hisbah* in the northern states of the Federation have been conducted with the knowledge and in the presence of the NPF. Commenting on the relationship between the *hisbah* and the NPF in Bauchi State, an official of the Bauchi State Shari'a Commission stated:³⁰

Relations between the *hisbah* and the police vary from place to place, even within Bauchi State. In some places the police will balk at enforcing the Shari'a Penal Code: They feel they are a Federal force and not obligated to assist with Shari'a implementation. Sometimes there is a Christian DPO who doesn't want to enforce it. Sometimes the police seem to fear that the

27 Ostien (n 1 above) vol VI ch 10 11-13.

28 Sec 7 of the *Hisbah* Board Law 2003 lists other functions as follows: '... encourage Muslims to unite in their quest for justice, equality and enjoin one another to do good and to avoid evil; encourage kindness to one another; advise against acquiring of interest, usury, hoarding and speculations; encourage charitable deeds particularly the payment of *zakat*; advise on moral counselling in the society which is in conformity with Islamic injunctions; encourage orderliness at religious gathering eg in mosques during *salat* (prayer), *iftar*, breaking the fast during Ramadan, pilgrims during *hajj* operations and in any public functions; encourage general cleanliness and environmental sanitation; may handle non-firearms for self-defence like batons, and other non-lethal civil defence instruments; reconciliation of civil disputes between persons and or organisations where parties are willing; assisting in traffic control; emergency relief operations; and assisting in any other situation that will require the involvement of *Hisbah*, be it preventive or detective'.

29 See Ostien (n 1 above) vol VI ch 10 55-56.

30 Ostien (n 1 above) vol VI ch 10 10.

hisbah will usurp their function. Sometimes they refuse to treat a case when the *hisbah* bring a suspect; or sometimes they will deliberately bring the wrong charge so that the suspect gets off. However, the situation is beginning to change as the DPOs have been ordered to co-operate. Some Christian DPOs have given their full co-operation; one was given a letter of commendation in this regard and this has served as a morale booster to others that were hesitant.

Summarising the relationship between the *hisbah* and the police in Kano State, Ostien concludes that 'the *hisbah* and the police have sometimes co-operated. But often they have not, the *hisbah* acting in defiance of the police and even of court orders.'³¹ In Zamfara State, there also appears to be evidence of co-operation between the *hisbah*³² and the police. Co-operation and conflict would appear to represent the state of *hisbah*-police relations. It is therefore appropriate to conclude that there is a level of reasonable accommodation between the police and the *hisbah*. This could suggest that the two security agencies can exist side by side, but with the NPF as the enforcer of the Islamic penal codes and other criminal legislation. The *hisbah* organisations would bring valuable support in this regard. In this way, the excesses of the *hisbah* would be contained.

4 Human rights, constitutional litigation and the avoidance of the Shari'a question

This section of the article examines the contention that the judicial avoidance of the Shari'a question in Nigerian constitutional litigation has significant human rights implications for Nigerians of all faiths. It is important to reiterate that the Islamic penal codes are subject to constitutional scrutiny. It must be stated that the Shari'a penal codes declare that they are subject to the Constitution of the Federal Republic of Nigeria.³³ The Constitution is superior and this is a point that is the conventional understanding in the Nigerian legal system. Academic opinion is in support of this contention.³⁴

31 Ostien (n 1 above) vol IV ch 10 57.

32 The *hisbah* is established by the Zamfara State *Hisbah* Commission (Establishment) Law 2003. The text of the Law is reproduced in Ostien (n 1 above) vol IV ch 10 91.

33 These codes were introduced in the 12 northern states of Nigeria. In differing degrees, they codify principles of Islamic criminal law. See AH Yadudu 'Evaluating the implementation of Shari'a in Nigeria: Time for reflections on some challenges and limiting factors' Paper presented to the 2006 Annual General Conference and Delegates' Conference of the Nigerian Bar Association held in Port Harcourt (Yadudu 2006) (on file with author).

34 See BY Ibrahim 'Application of the Shari'a penal law and the justice system in Northern Nigeria: Constitutional issues and implications' in J Ezeilo *et al* (eds) *Shari'a implementation in Nigeria: Issues and challenges in women's rights and access to justice* (2003) <http://www.boellnigeria.org/documents/Shari'a%20implementation%20in%20Nigeria.pdf> (accessed 31 January 2014) 128 132: 'Being a

The fact that the Nigerian Supreme Court missed a great opportunity to examine the constitutionality of the *Hisbah* Board of Kano State and, by implication, the legality of the introduction of Islamic penal codes in the 12 northern states of Nigeria would have resolved many lingering human rights issues. These issues stem in the main from the compatibility of the Islamic penal codes with Nigeria's Bill of Rights contained in chapter four of the Nigerian Constitution. The culture of judicial avoidance leaves a grey area in the enforcement of the Islamic penal codes by either the NPF or the *hisbah*. Any constitutional scrutiny of the legality of *hisbah* would significantly affect the rights of Nigerian Muslims to practise their religion as guaranteed by section 38 of the 1999 Constitution. If the *hisbah* were found to be without constitutional backing, the question of the enforcement of the Islamic penal codes would be left to the NPF which has indicated a resolve not to enforce these codes. Consequently, the Islamic penal codes would be left unenforced and the 12 northern states would revert to the penal codes which the NPF is content to enforce. As stated above, Muslims in these states would find their right to practise their religion severely constrained.

There is also the question of the challenge of a faith-based enforcement of Islamic criminal law. We noted that the structure of Islamic criminal law in states with the Islamic penal code is such that, while the Islamic penal codes will apply to Muslims, the penal codes will apply to non-Muslims who are exempted from the application of the Islamic penal codes. An appropriate question would be the constitutionality of such faith-based criminal jurisdiction. Many have argued that such faith-based jurisdiction is discriminatory on the grounds of religion which is recognised in section 42 of the Nigerian Constitution as a ground of discrimination. To provide a context that addresses such claims, it is important to examine the structure of the enforcement of fundamental human rights in the Nigerian Constitution, which recognises rights and the permissible grounds of their derogation. In this regard, section 45 of the 1999 Constitution is important and provides:

- (1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society –

supreme law, a constitution is endowed with a higher status in some degree over and above other legal rules in the system of government. It is in this light that the 1999 Constitution can be described as the supreme law in Nigeria ... This being so, the Shari'a legislated and practised in some northern states of Nigeria must comply with the provisions of the 1999 Constitution.' See also JM Nasir 'Women's human rights in a secular and religious legal system' 1 28, part of the two-day strategic conference on the Islamic legal system and women's rights in Northern Nigeria, organised by WARDC Lagos and WACOL Enugu (27-30 October 2002), <http://www.boellnigeria/documents/Shari'a%20%20women%27s%20human%20Rights%20in%20Nigeria%20%20strategies%20for%20Action> (accessed 31 January 2014).

- (a) in the interest of defence, public safety, public order, public morality or public health; or
- (b) for the purpose of protecting the rights and freedom or other persons ...

The derogation clause envisages that the right to privacy (section 37), the right to freedom of thought, conscience and religion (section 38), the right to freedom of expression (section 39), the right to freedom of association (section 40) and the right to freedom of movement (section 41) are not absolute. There is, however, some uncertainty as to what 'defence, public safety, public order, public morality or public health' means. While defence, public safety and public health are more specific, the same cannot be said of the other factors. Over two decades of human rights jurisprudence has not yielded definitive answers. For example, in *Osawe v Registrar of Trade Unions*,³⁵ the Supreme Court upheld the Trade Union Act as a law reasonably justifiable in Nigeria on the grounds of public order for giving the Registrar of Trade Unions the discretion to determine the number of trade unions to be registered in Nigeria. What seems evident in this regard is that an ordinary statute can override a fundamental human right in appropriate circumstances. It seems plausible that the Islamic penal codes qualify under the rubric of 'public order' or 'public morality' and justify such faith-based criminal enforcement and therefore trump the claims of discrimination. In this regard, the Court of Appeal in *Anzaku v Governor Nasarawa State*³⁶ adopted the views of Nwabueze on this point:³⁷

Fairness and justice demand that people who are similarly circumstanced should be treated equally by the state. Yet there is no discrimination where special restrictions imposed upon a class, or special advantages accorded to it are reasonable designed to reflect real and substantial differences between it and other classes and groups ... Protection is not unequal merely because real and substantial differences between classes or groups are recognised by law for purposes of special protection or treatment reasonably related to such differences. Provided therefore that such special protection or treatment is reasonable, and not arbitrary, oppressive or capricious, there is no denial of equal protection. A class, for eg a religious or political group, may be isolated for special treatment if it constitutes a danger to public order, public security, public health or public morality, or if it is so vulnerable by reason of its peculiar circumstances as to require special protection.

Such faith-based criminal enforcement is also implicated in the assertion by non-Muslims that Islamic penal codes³⁸ and other Islamic

35 (1985) 1 NWLR 755.

36 [2006] ALL FWLR (Pt 303) 308.

37 Nwabueze (n 12 above) 453-454.

38 See sec 401 of the Kano State Penal Code: 'The manufacture, distillation, distribution, disposal, haulage, consumption and possession of all brands of intoxicating liquors, trade spirits and any other intoxicating substance is hereby prohibited throughout the state.' In this regard, see the following reports in Ostien (n 1 above) vol VI ch 10 55 n 70 (citing 'Shekaru destroys 36 410 bottles of

criminal legislation³⁹ which criminalises alcohol sales and consumption and prostitution, infringe their rights, implying that their faith allows them to consume alcohol and engage in prostitution. It would appear that complaints of this nature arose because of the involvement of the *hisbah* and the summary action taken by them in the destruction of the alcohol rather than to commence the prosecution of the alleged offenders. In addition, it is well within the rights of the 12 northern states to criminalise prostitution as well as the sale and consumption of alcohol, since these states are within their constitutional remit to make criminal laws in accordance with their conception of the good of society, albeit religiously inspired. Whether these laws breach any provision of the Bill of Rights is one of the issues which constitutional litigation would clarify.

Constitutional litigation would also assist in the resolution of allegations that some provisions of the Islamic penal codes breach many provisions of the Bill of Rights. Even though these allegations directly affect individuals, they indirectly affect perceptions about the Islamic penal codes and ultimately the effectiveness of enforcement measures and the resolve of the NPF. It may well be that the reluctance to enforce the Islamic penal codes is attributable to the belief that the Islamic penal codes are unconstitutional, barbaric and uncivilised.⁴⁰ In this regard, punishments in the Islamic penal codes include hudud punishments, such as stoning to death for the offences of sodomy, rape and incest when committed by married persons; amputation for theft; cross-amputation for multiple thefts and robbery; and crucifixion for robberies in which murder has been committed and property seized; as well as retaliatory punishments. These punishments are alleged to be in contravention of the right to dignity of a person and the right to life. Whether the punishments contained in the Islamic penal codes are in contravention within the Bill of Rights is still unclear, almost a decade and half after the introduction of the Islamic penal codes. The situation is even more so since Nigerian human rights jurisprudence has no clear standards of what constitutes inhuman and degrading treatment. What seems to

beer' *Daily Trust* (Abuja) 26 October 2008; 'Shari'a Committee destroys N50 million drinks' *This Day* (Abuja) 13 January 2009.

39 See eg the Niger State Liquor Licensing Regulations 2000, reproduced in Ostien (n 1 above) vol III ch 3 pt IV 180; Borno State (Liquor Business (Prohibition) Law 2000 reproduced in Ostien (n 1 above) vol III ch 3 pt IV 187 and the Borno State Law on Prostitution Homosexuality Brothels and Other Sexual Immoralities reproduced in vol III ch 3 pt IV 199.

40 See ON Ogbu 'Punishments in Islamic criminal law as antithetical to human dignity: The Nigerian experience' (2005) 9 *International Journal of Human Rights* 165. See also Ostien & Dekker (n 13 above) 592: 'The Shari'a Penal and Criminal Procedure Codes have been in force for a number of years now. Many sentences shocking to modern sensibilities – of amputation of hands for theft, of other forms of mutilation as retaliation for injuries inflicted, of dire forms of execution, including stoning to death for *zina* and stabbing to death with the same knife the condemned man had used to kill his victims – have been imposed by the Shari'a courts.'

be an authoritative exposition of the standard of conduct deemed to be inhuman and degrading in *Uzoukwu v Ezeonu*⁴¹ and *Onwo v Oko*⁴² is as vague as the constitutional prescription. With respect to the right to life, it is difficult to appreciate the significant difference between the death penalty imposed by the Criminal Code and sanctioned by the Supreme Court of Nigeria in *Onuoha Kalu v State*,⁴³ and the manner of execution of the death penalty imposed by the Islamic penal codes, such as stoning to death.

A number of factors have contributed to the culture of avoidance. While the judgment of the Supreme Court in the *Hisbah* case appears to be deliberate and a good example of 'judicial avoidance', the absence of robust standing principles in Nigerian constitutional litigation has meant that only interested parties are likely to raise the question of the legality of Islamic penal codes. Even though there appears to be a watering down of the principles set forth in *Adesanya v President of the Federal Republic of Nigeria*⁴⁴ in a number of cases,⁴⁵ the point remains that the prospects of public interest litigation remains unlikely. One reason could be a type of 'religious avoidance' adopted by Muslims in seeking the constitutional review of the Shari'a legal system. Such review sought by a Muslim could be viewed as a betrayal of Islam and the Muslim an agent of 'Western countries' intent on destroying Shari'a.⁴⁶ Allied to this point is a strong belief that the Shari'a is a complete system of law, able to correct human errors in its implementation.⁴⁷ Yawuri, who was involved in the defence of the two *zina* (adultery) cases of *Safiyattu Hussaini*⁴⁸ and *Amina Lawal*,⁴⁹ said:⁵⁰

It is settled that the Shari'a had long ago evolved an appellate system to review cases with a view to rectifying these human errors, and the results of the appeals in these two cases show that the system is working in Nigeria.

If this represents the view of Muslims in Nigeria, it is not difficult to understand why there has not been a concerted constitutional challenge of the implementation of the Islamic penal codes. Is it any wonder then that there has been no such challenge by non-Muslims? Be that as it may, it is inevitable that such constitutional scrutiny will

41 [1991] 6 NWLR (Pt 200) 708.

42 [1996] 6 NWLR (Pt 456) 587.

43 [1998] 13 NWLR (Pt 583) 531.

44 (1981) 2 NCLR 358.

45 See *Owodunni v Registered Trustees of the Celestial Church* 2000 6 SC 60; *NNPC v Fawehinmi* (1998) 7 NWLR (Pt 559) 598; *Fawehinmi v Federal Republic of Nigeria* 2008 23 WRN 65.

46 See AM Yawuri 'On defending Safiyatu Hussaini and Amina Lawal' in Ostien (n 1 above) vol V ch 6, pt VII 139.

47 As above.

48 The English translation of the cases involving Safiyatu Hussaini are found in Ostien (n 1 above) vol V ch 6 pt II 17.

49 The English translation of the cases involving Amina Lawal are found in Ostien (n 1 above) vol V ch 6 pt III 52.

50 Yawuri (n 46 above) 139.

take place if the Shari'a legal system is agreed to be subject to the Nigerian Constitution. If the Shari'a legal system can correct human errors in its implementation, surely the Nigerian Constitution can also perform the same task. The successful constitutional scrutiny of the implementation of the Shari'a legal system – which is very likely – will be a huge boost for the legitimacy of the system across Nigeria's religious spectrum, just as the implementation of the Islamic penal codes by the NPF will contribute in no small measure to the legitimacy of the Shari'a legal system.

5 Conclusion: Shari'a and the Constitution

Our review of the relationship between the NPF and different *hisbah* organisations reveals that the former is sometimes engaged in the enforcement of Islamic penal codes and other criminal legislation of the Shari'a legal system of the 12 northern states of Nigeria. As stated above, this suggests that the NPF can successfully implement the Islamic penal codes, which this article has argued is the responsibility of the NPF. Significant issues will have to be addressed if the NPF were to take over the enforcement of Islamic penal codes, given the activities of the *hisbah* organisations. These issues are surmountable, it is submitted, because of the 'reasonable accommodation' between the two bodies identified in the article. The engagement of the NPF in enforcing the Islamic penal codes will strengthen the process of constitutional oversight of the Shari'a legal system in the 12 northern states that is inevitable if it is true – as it is – that the latter is built on the Nigerian Constitution. It is hoped that there will be constitutional scrutiny of many aspects of the Shari'a legal system, even when the NPF is involved in the implementation of its criminal aspects. The belief that the Shari'a legal system can run parallel to the Nigerian Constitution is not sustainable in the long run. So also is the belief that the present lukewarm implementation of the Islamic penal codes due to the international and local outcry over certain aspects of the Codes is acceptable. What is needed are measures, such as the enforcement of Islamic penal codes by the NPF, which will enhance the engagement of the Shari'a legal system in a long overdue dialogue with the Nigerian Constitution.

Insurgency in Nigeria: Addressing the causes as part of the solution

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Summary

Taking a cue from recent pronouncements by Chief Justice Dahiru Musdapher on the current precarious situation in Nigeria, this article examines the issues raised by the learned Chief Justice and concludes that none of those issues, working alone, is capable of making Nigeria a failed state. The one exception is the issue of insurgency, which is growing in strength and sophistication and becoming quite ominous for Nigeria. The article examines the growth of various insurgency movements in Nigeria, noting the strengths and impact of each and their potential to destabilise the country to the point of state failure and possible disintegration. The article then addresses the causative factors of insurgency in Nigeria, including the religious and ideological discontent which appears to be propelling the current conflict in Northern Nigeria. The article then considers some of the policy options for addressing these causes and conflict and recommends, among other measures, the establishment of a constitutional body – a supreme council for interreligious conflict – to function as a final arbiter in all interreligious conflicts that are potentially explosive conflicts that threaten a serious breach of the peace.

1 Introduction: Nigeria on the brink

Nigeria is at a dreadful precipice. Observers of the country and everyone with any interest in it must be very concerned about what the fallout would be should it be unable to surmount its current problems. The problems are a complex blend of social, political, ethnic, legal and constitutional problems which now bedevil the country in proportions never before experienced in the turbulent and checkered history of this potentially great nation. There is now a dangerous escalation of terrorist campaigns with all the hallmarks of

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insurgency. Religion may well add to the unending list of Nigeria's woes, as it appears to dominate the essential character of the current campaign of insurgency. Ironically, it could well portend a catastrophe, if not properly managed alongside other instruments of state policy. This article examines the problem areas articulated by the former Chief Justice Dahiru Musdapher concerning causative factors of insurgency and instability in Nigeria, and proposes a solution utilising an institutional framework that incorporates both religious and political actors.

Nigeria is at the moment at a crossroads. At the end of the day, given the dynamics of the turbulence in the polity, policy choices will certainly dictate whether Nigeria can survive as a state or fail and splinter into fledgling micro-mini states. The indicators are glaring, profuse and ominous. The immediate past Chief Justice of Nigeria, retired Justice Dahiru Musdapher, recently summarised the situation with the observation that¹

Boko Haram insurgency, political violence, corruption, nepotism, tribalism, indiscipline, abduction and kidnappings, armed robbery, murder and extortion, bombings of places of worship and innocent Nigerians are all the indicators of a failing state.

More generally, and more ominously, Chief Justice Musdapher maintained:²

Nigeria is clearly a nation at war with itself. The path we are treading is a threat to the continued peace, unity and prosperity of this land we call our home ... This is not the Nigeria we inherited from our predecessors, this is not the Nigeria we envisioned as young men. Favouritism, nepotism and tribal sentiments have made it impossible to run a merit driven system. Hard work, brilliance, honesty and integrity in our dealings are no longer rewarded. Rather we celebrate mediocrity soaked in the corruption we claim is our common enemy. I am scared and deeply worried. The situation is grave.

Ultimately, the former Chief Justice emphasised, '[t]hese social upheavals clearly threaten the survival of the Nigerian nation and we all have a duty to rise and stem the tide'.³

From the above portrayal, it may not be wrong to conclude with the Chief Justice that Nigeria is a 'failing' or, indeed, a failed state. The situation in Nigeria now has been characterised as being worse than Mohammed Farrah Aidid's Somalia or, indeed, Yugoslavia following the death of Marshal Tito. The problem is that, if the slide is not checked in good time, the fallout and trauma in the Nigerian case is likely to be worse than Yugoslavia and Somalia put together. To understand what exactly Chief Justice Musdapher meant, it is instructive to understand and appreciate each of the phenomena the respected judge mentioned. In the process, it will be necessary to

1 D Musdapher 'Media and democracy' *National Mirror* 21 December 2012 1-2.

2 As above.

3 As above.

answer the question whether, given a failure to abate or mitigate the dynamic interplay of the lethal factors prevailing in the state, Nigeria can survive or will break up as similarly situated countries have historically done. A further question is whether, if the probability of fragmentation is high, there are measures to prevent it from occurring.

2 *Indicia* of instability in Nigeria

It is necessary to assess each of the indicators to know which, if any, standing alone or in concert with others, has the potential to deal a mortal blow to the continued existence of Nigeria.

2.1 Political violence

Political violence is the use of lethal force or other debilitating means by a person or persons against others. In Africa, and particularly in Nigeria, political violence has often occurred in anticipation of, during or sometime after an election campaign. It has been a feature of Nigerian electoral history recorded as early as the pre-independence elections in the 1950s. It is usually intended to eliminate, intimidate, or otherwise subdue political opponents so as to obtain an advantage in the political process. It may have attained its zenith in the early 1960s in the old Western regional elections. The violence in response to the 2011 federal elections, particularly in the northern states, may well be an indication of a resurgence of violence related to the political process in Nigeria. Some Nigerians have described the recent Boko Haram insurgency as primarily politically motivated, though with a religious and ideological colour.

Political violence has never contributed to the stability of the state or government. In fact, it is said to have contributed substantially to the failure of Nigerian's First Republic and the emergence of military politics in the country in 1966. For obvious reasons, it abated significantly during military governance but re-emerged with the inception of partisan politics in 1978. It died down again between 1984 and 1998, although there were allegations of political violence during the latter part of military rule from 1994 to 1998. There has been a visible resurgence since 1999, when the country began its current attempt to move toward democracy. What Chief Justice Musdapher references regarding the current spate of political violence is the fact that, in all estimations, the intensity and frequency of the violence since 1999 – including murder, kidnapping, extortion and communal violence – has reached alarming proportions requiring urgent attention.

2.2 Corruption, nepotism and tribalism

The three closely-related phenomena of corruption, nepotism and tribalism are very deeply rooted in the Nigerian way of life. Corruption

is any conduct, including verbal and non-verbal communication, which tends to compromise the integrity or to blemish the innocence of the parties involved. This definition, no doubt, raises subjective elements of moral, ethical and cultural context.⁴ Both nepotism and tribalism are primordial instincts and are corruptive in that they debase or deprecate the high moral and ethical values which sustain competition in society. They debase the very foundations of any merit system and destroy the competitive spirit and, indeed, do not assist the lofty dictates and aspirations of the work ethic.⁵

Nepotism involves acts of favoritism, especially relating to patronage or benevolence by public officials and is directed to various categories of relatives. Such conduct confers advantages, often unmerited, and thereby defeats fair play and denies the competitive rights of similarly situated parties. The public officer's conduct may be said to be monopsonistic and thereby distorts competition, particularly when the beneficiary pays for the benefit. Morally and legally, it is a wrong, because it denies others the right to compete. Applied to employment opportunities, it distorts the labour market and thereby disturbs an otherwise even distribution of labour in the market and interferes with the employment of the right personnel for maximal efficiency and productivity.

A tribe is a cultural or ethnic group or sub-group with prominent, identifiable linguistic and other features, sometimes including prominent biophysical ones. Nigeria is reputed to have at least 250 tribes, with an even larger number of ethnic sub-divisions, and over 500 languages and dialects. Tribalism is conduct, particularly of a public official, in a manner that favours inordinately persons or issues which relate to his tribal affiliation. Tribalism is closely related to nepotism in that their economic, political and social outcomes are similar. Both are discriminatory and, therefore, legally unjustifiable as they debase the idea of equal opportunity.

Chief Justice Musdapher quite succinctly describes how the phenomena of corruption, nepotism and tribalism function side by side, each reinforcing the other with grave dysfunctional outcomes for the country. According to the learned Chief Justice:⁶

Corruption, tribalism and nepotism are essentially inter-twined in that they evoke dysfunctional social, political, economic and organisational outcomes. Our capacity to investigate, arrest, prosecute and convict those found guilty of contravening our laws is evidently weak and compromised; yet no one is held responsible ... If a person is accused of wrongdoing in Nigeria, his kinsmen are quick to relegate his clear transgressions to some kind of conspiracy against one of their own. Corruption and nepotism are

4 The term 'corruption' is defined loosely by the Corrupt Practices and Other Related Officers Act (2004) as conduct which 'includes bribery, and other related offences'.

5 See M Weber *The Protestant ethic and the spirit of capitalism* trans T Parsons (1930).

6 Musdapher (n 1 above).

supported and encouraged by its benefactors at the expense of all others. When a person occupies a position of authority, he is expected to help his own. The same people that complain about the impropriety of others become even more blatant when their so-called turn comes.

Corruption, nepotism and tribalism – an inseparable trio – have been with the Nigerian political system for a long time. Corruption has reached alarming proportions in recent times, but has earlier antecedents.⁷ The military cited corruption among the political elites as one of the primary reasons for the military *coup d'état* of 15 January 1966 that ended Nigeria's First Republic. The eradication of corruption was one of General Yakubu Gowon's stated preconditions for the handover of power to civilian politicians in assuming the position of military head of state.⁸ The public policy of trying to curb corruption in the Nigerian system has been sustained since General Gowon's regime. Several years later, Nigerians welcomed the creation of the Independent Corrupt Practices and Related Offences Commission in 2000, along with the subsequent establishment of its tribunal. Even so, Nigeria has recently been rated as one of the most highly corrupt nations in the world by Transparency International⁹ – an assessment shared by many Nigerians.

2.3 Ill-discipline and related crimes

Chief Justice Musdapher mentioned ill-discipline, abductions and kidnappings, armed robbery, murder and extortion as other grave problems facing Nigeria. All of these, except ill-discipline, are prohibited offences under the Nigerian Criminal Code, which has been in existence since 1943. They are also included in the Nigerian Penal Code (for the north) which came into force in 1958. Ill-discipline is often associated with, or a precondition to, lawlessness. Where it is pervasive, as is now the case in Nigeria, particularly as it concerns other criminal conduct, it is an indicator of a flagrant disregard for – or a failure of – the legal order, particularly the penal law. These can result in grave political and security consequences. But the question remains: Can any of these alone, or in concert, threaten the existence of Nigeria? My hunch is to doubt that these alone could. Let us look at some of the others.

2.4 Terrorism and insurgency

Since 2010, or thereabouts, terrorist attacks in the form of bombings of religious and other targets has been increasing at an alarming rate. Chief Justice Musdapher made the point strongly in maintaining:¹⁰

More than ever before in the history of Nigeria, the scourge of terrorism poses great challenges in the Nigerian state. Our slide into anarchy has

⁷ See Editorial 'Corruption and leadership in 2013' *The Guardian* 7 January 2013.

⁸ JM Ostheimer *Nigerian politics* (1982) 137.

⁹ Transparency International *Annual Report, 2012*.

¹⁰ Musdapher (n 1 above) 2.

assumed dangerous dimensions, perhaps beyond the capacity of our security agencies to deal with the menace effectively.

Although terrorism is not easily defined, it may be said to be the use of force, usually violent, as a means of coercing a target population to submit to the will of the terrorists. Terrorism is intended to elicit or maximise fear and publicity, making no distinction as to combatants and noncombatants in a conflict.

There is no legally agreed upon definition of the term 'terrorism', but a recent United Nations (UN) document describes it as any 'act which is intended to cause death or serious bodily harm to civilians or noncombatants with the purpose of intimidating a population or compelling a government or an international organisation to do or abstain from doing any act'.¹¹ The word 'terrorism' is both emotionally and politically laden, particularly as it imports issues of national liberation and self-determination.¹² Terrorism takes many forms, including political, philosophical, ideological, racial, ethnic, religious and ecological issues. The taxonomy of terrorism, including precipitating motivations and considerations, is now a subject of intense study.¹³ Whether the Nigerian experience can be reduced to a type may be an interesting subject, but for purposes of this article, the primary concern is the threat of insurgency.¹⁴ Insurgency is one objective of organised terrorism, just as terrorism is one of several strategies of insurgency. Both terrorism and insurgency may be used by states in their internal and foreign policy operations. Terrorism and terrorist tactics constitute part of the strategies and tactics of insurgency. The operational tactics are essentially those of guerilla warfare. The object is to intimidate, frustrate and raise the feeling of uncertainty, imminent danger and the loss of hope, so as to cripple or limit all aspects of human activity and normal livelihoods. Al Qaeda, Boko Haram, MEND and, lately, Jama'atu Ahlissunnah Lidda'anati Wal Jihad, are currently international and local Nigerian examples of terrorist networks. Until recently, Nigerian terrorist activity was thought to be motivated by ethnocentric considerations. Currently, there appears to be a pronounced religious content in the character of insurgency in Nigeria. A few of the earlier experiences merit examination here, as a guide in estimating the character, trend and

11 UN Secretary-General Ban Ki-Moon, Keynote Address, Closing Plenary of the International Summit on Democracy, Terrorism and Security, 'A Global Strategy for Fighting Terrorism' Madrid, Spain, 10 March 2005.

12 CFD Paniagua 'Negotiating terrorism: The negotiation dynamics of four UN counter-terrorism treaties, 1997-2005 PhD thesis, City University of New York, 2008.

13 See the Declaration on Measures to Eliminate International Terrorism annexed to UN General Assembly Resolution 49/60, Measure to Eliminate International Terrorism UN Doc A/Res/69/60, 9 December 1994. See also R Bailey 'Earth liberation front terrorist gets 22 years in prison for anti-biotech arson' *Reason Magazine* <http://reason.com/blog/2009/02/06/earth-liberation-front-terrori> (accessed 31 January 2014).

14 See PP Purpura *Terrorism and homeland security: An introduction* (2007).

intensity of the current campaign, as well as the dynamics and possible consequences.

3 History of insurgency in Nigeria

Previous insurgencies in Nigeria have varied in their scope, sophistication and intensity. There have been at least six instances. We need to briefly consider them in turn, based on a rough chronological order.

3.1 Declaration of Niger Delta Republic

The first known insurgency or terrorism attempt in Nigeria may be credited to the movement to liberate the Niger Delta people led by Major Isaac Jasper Adaka Boro. Major Boro belonged to the Ijaw ethnic extraction in the Niger Delta region and, at the time of his rebellion, was a student at the University of Nigeria, Nsukka. His complaint was against the exploitation of the oil and gas resources of the Niger Delta by both the federal and regional governments in total disregard of the citizens of the area. Boro formed the Niger Delta Volunteer Force (NDVF), an armed military group composed of 150 of his kinsmen. He firmly believed that the people of the Niger Delta deserved a more equitable share of the wealth which accrued from oil. To press the point, on 23 February 1966, the NDVF declared the Niger Delta Republic. The Republic lasted only 12 days before the federal military forces crushed the insurgency and arrested Boro. He and his followers were charged, tried and imprisoned for treason. However, on the eve of the Nigeria-Biafra war in July 1967, General Yakubu Gowon granted them amnesty. Boro enlisted in the federal forces in the war against the rebel Biafran forces of Odumegwu Ojukwu. He died a hero at Ogu, near Okrika in Rivers State, having participated in the successful liberation of the Niger Delta from the Biafran forces.¹⁵

From this episode of Nigerian history, we can identify a number of issues that continue to this day. First, the Niger Delta issue is not forgotten. It continues to be on the front burner in matters of security, insurgency and, indeed, the continued existence of Nigeria. Second, a resurgence of the threat of insurgency will likely re-emerge, either as a response to similar threats elsewhere in Nigeria or where there is a lapse in the policy thrust to remedy the imbalances which caused the insurgency in the first place. This is the background to the emergence of the Movement for the Emancipation of the Niger Delta (MEND) which we discuss later in this section. Third, it is noteworthy that the causative factors in this insurgency are still very much visible in the entire Niger Delta region, namely, extreme poverty in the midst of

¹⁵ 'Odumegwu Ojukwu' Wikipedia http://en.wikipedia.org/wiki/Odumegwu_Ojukwu (accessed 31 January 2014).

extreme affluence, degradation of the human living environment to levels requiring concerted humanitarian intervention, discriminatory public policies resulting in political alienation of the human population, unsustainable extractive economies and, finally, the absence of environmental remediation policies and activities. All these, and maybe more, are likely to fuel discontent and exacerbate future conflicts and insurgent tendencies.

3.2 Nigerian civil war

The Nigerian civil war (sometimes called the Nigeria-Biafra War) was fought from 6 July 1967 to 15 January 1970. The war followed a *coup d'état* of 15 January 1966, led by military men of the Ibo-speaking ethnic group, and a counter-*coup d'état* of 29 July 1966, led by military men mostly of the Hausa-Fulani-speaking Northern region. A great social upheaval followed these *coups*, including the destruction of lives and property of persons from the southern part of the country, particularly those from Eastern Nigeria. Their kinsmen had been identified as leaders of the first *coup*, which eliminated prominent leaders of the north, including Alhaji Tafawa Balewa, then Prime Minister of Nigeria, and Alhaji Ahmadu Bello, then Premier of Northern Nigeria. Colonel Odumegwu Ojukwu declared independence from the Nigerian Federation on 27 May 1967, naming the new state the Republic of Biafra. The civil war that ensued was probably the most devastating that the African continent has ever witnessed.¹⁶

Even though the Nigerian civil war ended more than 42 years ago, there are still some critical, lingering issues and lessons that might be learnt from the war. First, the ethnocentric *cum* religious issues that were part of the driving force towards belligerent insurgency have not only not abated, but there is a visible crescendo in their intensity and complexity. The fraternity which seemed to be the fundamental objective in General Gowon's pronouncement at the end of the war announcing a policy of 'No victor no vanquished' is still to be realised in many respects. Second, more than anything else, the religious gap between the Christians and Muslims in the country is not narrowing. Rather, there has been a rise in the levels of distrust, mutual suspicion and antagonism that might well be making inroads into the political class. It is there that the tragedy may lie. Third, notwithstanding their obvious successes in the professions, commerce, industry and government, the Ibos, who inhabit the major proportion of what was Biafra, do not feel fully integrated into the body politic of Nigeria, and this gives rise to a feeling of marginalisation and alienation. As the Ibo are a major tribe in the Nigerian demographic structure, such feelings could fan the desire to rekindle the Biafran flame with all the

¹⁶ For good accounts of the Nigerian civil war, see A Madiebo *The Nigerian revolution and the Biafran war* (1980); F Forsyth *The Biafra story* (1969); G Mwekikagile *Ethnic politics in Kenya and Nigeria* (2001).

attendant consequences for security and stability of the polity. Fourth, the primary cause of the Nigeria-Biafra War was ethno-religious hegemony and the problem of the consequential control of economic resources. This factor is still very prominent in Nigerian politics and ethno-religious struggles for supremacy.

A final and related issue we should note in the Biafra saga is the continued insistence of the Ibos that their boundaries remain coterminous with those of the former eastern region of Nigeria, including the present Cross River, Akwa Ibom, Rivers and Bayelsa States. This may have had a significant impact on the outcome of the civil war. While the minority tribes which constitute those four states – the Ijaws, Ibibios, Ogojas, Efiks and others – insist that they have nothing to do with Biafra, the Ibos insist that they do. This constitutes a serious conflict between the rights of the minorities, on the one hand, and the ambition of the Ibos, on the other. The truth is that, from the onset of the civil war, there has been and still continues to be a deep-seated distrust between the minority tribes and the Ibos, and none of the two sides seems to be making any effort to assuage the other. This situation is a ticking time bomb.

3.3 Movement for the actualisation of the sovereign state of Biafra

More than two decades after the end of the Nigerian civil war, there emerged the Movement for the Actualisation of the Sovereign State of Biafra (MASSOB). This movement is led by Mr Ralph Uwazurike, a lawyer by training. This movement has a firm root in the five South-East states of Nigeria that are home to the Ibo people. MASSOB has been reported to be well armed and there have been reported cases of confrontation with the Nigerian police and military forces. MASSOB adopts the Biafran national flag and this can be seen displayed in the South-East political zone of the country. The conspicuous display of the Biafran flag in a territory that would otherwise be Nigerian sovereign territory suggests that a state of Biafra still exists – at least in the minds of the Ibos.

MASSOB is obviously a logical follow-up to the failed activities of the Biafran belligerents. The agony of defeat, coupled with the unsettled issues that continue to bedevil the Nigerian polity, naturally extends the erstwhile belligerent posturing into this new strategy in anticipation of better opportunities to resuscitate full-scale belligerency. MASSOB has so far never claimed responsibility for any terrorist act, nor has anyone been attributed to its activities so far. However, MASSOB has introduced and circulated Biafran currency notes as legal tender. It has also issued passports for citizens of Biafra. MASSOB issued an 'official' statement in 2009, predicting the collapse and disintegration of the Nigerian state by 2013. The statement said that six republics are likely to emerge after the disintegration of Nigeria, namely, Biafra Republic (Ibo East), Arewa Republic (Hausa-

Fulani North) and Oodua Republic (Yoruba West), and three other unnamed republics.

3.4 Movement for the emancipation of the Niger Delta and related insurgencies

More than 30 years after the demise of Major Isaac Jasper Adaka Boro, there was a resurgence of the armed protest against the federal government and the multi-national companies engaged in the oil industry of the Niger Delta. Most of the armed groups were made up of raggedy, ill-equipped, restive youths, who are spread across the length and breadth of the Delta region. At its inception, this resurgence seemed to be decidedly unfocused as to who the target should be – whether it should focus on the oil companies, the government, or the chieftains and their middlemen as the primary culprits in the perceived scheme of denials of benefits from oil operations and from the associated injuries to the people and their environment.

Initially, therefore, there was great infighting among these armed youths. This came to a head in the late 1990s, as the main communities in Warri, Delta State, went into an all-out armed conflict, one tribe against the other. The war was centred on who should control the oil benefits coming to Warri, a centre of oil production, next in importance only to Port Harcourt, Rivers State, in the West African oil industry. The Ijaws, Itshekiri's and the Urhobos fought a destructive war for the soul of Warri for more than five years, but somehow the realisation that the common enemy was the federal government and its foreign company partners changed the campaign focus from an internecine fratricide to a major campaign against the government. By this time, the restiveness of the youths had spread across the entire Niger Delta and was growing in sophistication.¹⁷ There are allegations that corrupt politicians may have unwittingly aided the process of militarisation of the Niger Delta for personal reasons, unmindful of the consequences of their activities.

Earlier on there had been various movements and activists who opposed the perceived injustice the Niger Delta people were forced to bear by the government and its oil company partners. In most cases, including Umuechem and Ogoni in Rivers State, they were mostly non-violent.¹⁸ However, when Ken Saro-Wiwa, a non-violent environmental activist of the Movement for the Survival of the Ogoni People (MOSOP), was executed by the Nigerian government, this

17 The author was involved in brokering peace in the Warri conflict in Delta and the Okrika-Elleme conflict in Rivers State.

18 See AO Muzan 'Conflicts, disputes and strife in the Niger Delta oil industry: A causal analysis' (1999) 4 *Nigerian Journal of Jurisprudence and Contemporary Issues* 53.

fuelled an insurgency across the Niger Delta.¹⁹ At the height of the Niger Delta insurgency, some of the groups had a very sophisticated arsenal that would have been the boast of any group in the history of guerilla warfare. Among these groups were Ateke Tom's group and Alhaji Mujaheed Asari Dokubo's Niger Delta People's Volunteer Force, both of which spread throughout the entire Niger Delta region. This period also saw the emergence of the group known as the Movement for the Emancipation of the Niger Delta (MEND).²⁰

MEND considers itself to be an umbrella group, co-ordinating a large number of groups of various sizes and lethal capacity that spread the entire length and breadth of the Niger Delta region, from the creeks of Ondo State in the west, to the mouth of the Cross River in the extreme east of Nigeria's Atlantic coast and up north to the point of primary bifurcation of the river Niger, in that triangular fashion.²¹ The tactics used by MEND and its Niger Delta insurgent groups are largely those of guerilla warfare. Using speed boats and highly-sophisticated weapons, they often quickly out-maneuver and overrun elite security operatives hired to guard the oil operations in the creeks, swamps and offshore areas. The insurgents completely shut down operational systems, and they also kill, maim and take hostages, demanding large sums of money in foreign currency for their release. There have been reported incidents of bombings attributed to MEND, including the incident in Abuja for which the leader of MEND, Henry Okah, was convicted in South Africa. Based on reported activities beyond the confines of the Niger Delta, MEND seems to have expanded beyond the Niger Delta region to become a virtually nation-wide insurgency.

3.5 Oodua People's Congress

The Western states of Nigeria are home to the Yoruba and the the Oodua People's Congress (OPC), a nationalist Yoruba organisation formed in 1997. The founding head of the organisation is Dr Fredrick Fasheun, and its militant aspects are headed by Ganiyu Adams. The organisation came about as a natural outcome of the massive Yoruba protests which followed the death of Chief Mashood Abiola, who was widely regarded as the winner of the later annulled presidential elections of 12 June 1993. Clashes between the OPC and law enforcement agencies, primarily the police, intensified the activity of a dissident group within the OPC, which ultimately broke away to form the Oodua Liberation Movement, sometimes also known by the name Revolutionary Council of Nigeria (RCN). This splinter group became far more militant in its operations. This group opposes Nigeria's

19 The Movement for the Survival of the Ogoni People (MOSOP), which was headed by Ken Saro-Wiwa until his death, has continued to be a political, non-violent movement which seeks to address the ills of oil operations in the environment of Ogoni land in Rivers State.

20 MEND may have been a confederation of several groups.

21 See 'Nigeria: Risky toughness' *The Economist* 18 September 2008.

federal system of government and wants the Yoruba to secede from Nigeria and form a sovereign Oodua Republic.²²

3.6 Northern Arewa groups

We now turn to the northern part of the country known as Arewa. Until recently, the north had not seen any sustained terrorist attacks which could be characterised as approaching insurgency. There were, however, violent conflicts in the north in the late 1970s and 1980s. These were violent, intra-religious campaigns between different sects of Islam that resulted in the deaths of several thousand people. The Maitatsine sect led by Sheik Muhammadu Maruwa fought mainstream Muslims who refused to accept its path in Islam. Coincidentally, there were frequent violent and bloody intra-religious clashes between members of Izalatu bidi'at wa Ikamatul Sunna (Izala) and the Tijaniyya Tariqa Quadriyya Tariqah (Tariqah) sects. The Izala, headed by Shiekh Abubakar Muhammadu Gummi, regarded the Tariqah sect as un-Islamic and prevented them from leading Jumat prayers. This prohibition led to violence that erupted.²³

Aside from the Izala and the Tariqah upheavals, there were hardly any serious conflicts in the north of a major dimension before the current Jos crisis. The Jos crisis involves issues similar to those facing the Warri in Delta State, including control of territory, ethnic hegemony and political, economic, socio-cultural rights. Religion is more prominent in the Jos crisis than it was in the Warri crisis and is crucial to a lasting solution in Jos. The Jos crisis has had a long gestation period and has simmered for a long time. The sudden rupture and intensity of the conflict may not be entirely unconnected with recent changes in the Nigerian legal system, particularly constitutional issues relating to religion, local government and representation in the state and federal legislatures. Jos offers the best example in the north of Nigeria where pre-colonial and colonial history have produced a fusion of ethnicity, religion, politics, law and economics which now produce upheavals that may last for a long time to come. It has been noted that the British colonial administrators put several non-Hausa enclaves under Fulani rule under the emirs during their rule of the north while, at the same time, the *indigenes* of these areas were being converted to Christianity and not

22 See G Adams 'The Yoruba nation and self-determination' text of a press conference, Lagos, Nigeria, 20 October 1999. See http://en.wikipedia.org/wiki/Oodua_People's_Congress (accessed 23 March 2013). See also 'Oodua Peoples' Congress (OPC)' <http://www.globalsecurity.org/military/world/para/yoruba.htm> (accessed 31 January 2014).

23 OF Ibrahim 'Religion and politics: A view from the north' in L Diamond *et al* (eds) *Transition without end – Nigerian political and civil society under Babangida* (1996) 51-521.

Islam, the religion of the emirs.²⁴ According to historian Oscar Farouk Ibrahim:²⁵

The result was that most of them became Christians. Their journey to Christianity also ensured that they got Western education, and in the context of the modern Nigerian state, that translated to power through holding and state positions. These people now do not understand why some 'foreigners' should come and lord over them in their own land.

Historian Peter Ekeh makes that same point rather emphatically, as follows:²⁶

These non-Muslim areas have become the Christian north, one of the remarkable developments in Nigeria's history. But Christian Northern Nigeria carries with it scars of its past wounds inflicted by Fulani slave raids. Christianity in the north has become much more than a mere profession of faith. It is a political statement of freedom from Fulani control.

This 'political statement' is likely to be heard louder and louder as the Christian population grows in the north and the traditional Hausa-Fulani hegemony becomes increasingly challenged.

This realisation may have informed the establishment of the Arewa People's Congress. Even though the name 'Arewa' means 'north', a geographical description, the real focus may be northern elements of Hausa-Fulani extraction. The Arewa People's Congress is a group established in Northern Nigeria in December 1999 to protect the interests of the Hausa-Fulani in Nigeria. It was probably established to counter the growing influence in the Western parts of Nigeria of the Oodua People's Congress (OPC), which was reported to have been engaging in increasing confrontations with the Hausa-Fulani in the west.²⁷ Not much is known of the activities of the APC, and one can only speculate regarding the scope of interests of the Hausa-Fulani contemplated by the APC and how it goes about meeting that pronounced objective. However, this is regarded as closely allied with the wider Arewa Consultative Forum (ACF), an umbrella socio-cultural body in the north which also includes non-Hausa Fulani elements.²⁸

24 The *indigenes* are the Hausas and other aboriginal tribes (not the Fulani settlers). The Fulani are a primarily migrant or nomadic people who are regarded by the owners of the land as strangers or settlers. Historically, they have taken up permanent settlement only where they have sufficiently subjugated the aboriginals of the land that they settle.

25 As above.

26 P Ekeh 'Political minorities and historicity-dominant minorities in Nigerian history and politics' in O Oyediran (ed) *Governance and development in Nigeria: Essays in honour of Billy J Dudley* (1996) 52.

27 See SI Onimajesin 'The OPC militancy in Nigeria, 1999-2003: Its implication and management' University of Ilorin, <http://unilorin.edu.ng/publications/onimajesin.htm> (accessed 31 January 2014).

28 'Arewa People's Congress' Wikipedia http://en.wikipedia.org/wiki/Arewa_People's_Congress (accessed 31 January 2014).

3.7 Jama'atu Ahlil Sunna Lidawati wal Jihad (Boko Haram)

The latest upheaval in the north is Boko Haram which has, without a doubt, the character of an insurgency. The rise of the Boko Haram (meaning 'Western education is sinful') has brought about heightened tension, anxiety and a sense of insecurity hitherto unknown in any part of Nigeria except the Niger Delta region. The group has probably only existed for about three years. It is based in the northern states of Nigeria and has attacked both the police and military, churches and other places of worship, schools, international agencies, market squares and other highly-public targets. Newspaper estimates place the number of casualties in the wake of the Boko Haram campaign in the hundreds of thousands, with many others maimed or wounded. The group's weaponry includes bombs, arms and ammunitions of various degrees of lethal capacity. The government is probably doing its best to contain the insurgency, but it is very clear that the task of bringing back the peace and tranquillity that once characterised the northern states must be everybody's concern.

3.8 Jama'atu Ansarul Muslimina fi Biladis Sudan (Ansaru)

Jama'atu Ansarul Muslimina Biladis Sudan, known as Ansaru (meaning 'Vanguards for the protection of Muslims in black Africa'), is a self-proclaimed Islamist Jihadist militant group which is based in the north-eastern parts of Nigeria. It was founded in January 2012, when it broke away from Boko Haram. It is reputed to have a more international focus than Boko Haram. Ansaru's motto is 'Jihad fi Sabilillah', which means 'Struggle for the cause of Allah'. This group is still very new and secretive in its operation. It is alleged to have abducted a Briton and an Italian from Kebi State, a French national from Katsina State and, in February 2013, seven French citizens from Northern Cameroon.²⁹ These kidnappings are the best known of this group's activities in its barely two-year history. More time will be needed to make conclusions as to whether the group's activities are escalating or de-escalating.

4 Causative factors behind insurgency in Nigeria

4.1 Land use and proprietary rights

In discussing the rise of discontent and predicting the emergence of the Niger Delta insurgency, the author has asserted that opposing rights or claims to rights of any kind would invariably generate conflict. When parties assert their rights in a competing or boisterous way over a thing or situation, elements of conflict will arise, and if these do not abate in time, such conflicts are likely to mature into

²⁹ See H Idris 'Why we abducted French nationals' *Daily Trust* 19 March 2013 7. See also T Badawale 'The rise of ethnic militias, de-legitimisation of the state, and the threat to Nigerian federalism' (2001) 3 *West Africa Review* 1-11.

major confrontations.³⁰ Conflicting proprietary rights to land invariably degenerate into disputes. Nigeria practises a dual land tenure system, incorporating both customary and statutory land tenure. This implies that the proprietary rights of the various classes of owners, occupiers or tenants must relate to both systems. Customary tenancy is a traditional mode of holding land involving a grant by a landlord to another person, including a group, in consideration of the latter's acknowledgment of the former's title through payment of tributes. The grantor of the land is known as the overlord while the grantee is known as the customary tenant. This customary tenancy is said to be wider than fee simply because it also connotes and retains reversionary interests.³¹

Land tenure and proprietary interests in land are a critical factor in the conflicts raging in the north and elsewhere in Nigeria. The mix of customary rights and statutory rights has made a clear-cut definition of rights a thorny issue all over Nigeria. It is at the root of the Niger Delta insurgency. It is also the basis of such conflicts as those between the Fulani and the Tivs of Benue State, the Fulani and the tribes of Jos and the Plateau State, the Tiv and the Jukun of Taraba State, and many others. Proprietary rights claims were behind the Kano Katin Kwari Market killings of October 1982.³² In all of these incidents, the Nigerian Land Use Act of 1978 and other statutes now in force in Nigeria have not helped matters.³³ The entire problem of the 'indigene' and 'settler' dichotomy in Plateau State revolves around conflicting land and proprietary rights. The distinction between *indigenes* and settlers that is the basis for the dichotomy is not helped by the lack of judicial decisions and case law that would settle the legal definition and property claims.

Here the issue of customary title is always in dispute between the older customary title owners among the *indigenes* and the more recent 'settlers' whose settlement may have been longstanding, spanning several decades or more. This is the problem with which the *indigenes* have had to contend through the centuries, as have groups elsewhere in Africa.³⁴ Culturally speaking, and perhaps politically and legally speaking, the Fulani in West Africa claim, rightly or wrongly, a state in the strict Westphalian conception that is coterminous with the entire length and breadth of the sub-region extending from Nouakchott, Mauritania in the west, to Cameroon in the south, and

30 See Muzan (n 18 above) 54-55.

31 See *Oshoddi v Balogun*, 4 West African Court of Appeal (WACA) 7 (1936).

32 These were not sustained conflicts, but they arose from a mix of cultural and religious deferences existing between the indigenous Kano traders and non-*indigenes*, mostly Ibo, traders who had a common claim to market resources in Kano.

33 Eg, the Petroleum Act of 1969 and related oil and gas industry laws, some in force since 1958; see BM Russett 'Inequality and instability: The relations of land tenure to politics' (1964) 16 *World Politics* 442-454.

34 Eg the Maasai of East Africa.

thence toward North Africa, by way of Chad, Niger and Mali.³⁵ That expanse of an otherwise 'homogeneous' breadth of land defining the conceived or extant state was, they might argue, only disrupted and carved into the present nations of West Africa which, to them, can be regarded as mere provinces of one indivisible 'Fulani State' or homeland. So conceived, grazing rights, shelter rights and a place of abode, even if only temporary on their nomadic march, are regarded by them as a common heritage of all citizens of West Africa. It probably was so even before Count Otto Eduard Leopold von Bismark's conferences at Berlin in 1883 to 1885. It is a complex matter with which Nigerian political thought has had to contend for several decades.

To a considerable extent, this broad and liberal philosophy of statehood and land tenure influenced the colonial Native Land Tenure of Northern Nigeria, which has been regarded as a parent of the Land Use Act of 1978.³⁶ To the Fulani, the current states of West Africa can be viewed beneficially as provincial demarcations of one indivisible country with patches of foreign language influence. It has never been the tradition or practice of the Fulani to suppress a local language or impose the Fulani language wherever they may find themselves. Rather, as is most eminently demonstrated in the northern states of Nigeria, the Fulani would rather adopt, and masterfully so, the local language of the people they rule.

In the Niger Delta insurgency, the feeling of deprivation of land rights and other proprietary rights is further exacerbated by the impunity that is prevalent in the degradation of land, water and air resources of the people. This point has often been heard from the insurgents and other well-meaning local and international persons.³⁷

4.2 Growth of social class awareness and desire for equality

Social class awareness and consciousness have the potential for conflict generation. A society where the middle class is small with an equally small or smaller upper class and a robust lower class is prone to dangerous conflict. Such a society is usually characterised by great instability. This is because the lower class looks at the upper class with envy. This feeling is pervasive in many parts of Nigeria. Inequality results in bitterness, and bitterness generates envy and hate. This is true across the entire political spectrum in Nigeria, at the national, state and local levels.

35 In using the term 'sub-region', I mean to import the newer UN idea of regionalism rather than the older British or French conception of a political, economic, or geographically definable interest. For several decades, the reference to West Africa, *vel non*, simply meant British West Africa or French West Africa or the countries identified with these.

36 See *Abioye v Yakubu* (1991) 5 NWLR (Pt 190) 130 135, *per* Kawu JSC.

37 In 2012, the United Nations Environmental Program (UNEP) submitted a confidential report to the President of Nigeria confirming the need for remediation of Ogoni land.

This expression of bitterness is quite a universal phenomenon for, as Aristotle put it, 'it is the passion for equality which is thus at the root of sedition'.³⁸ Indeed, when people are satisfied, as is often the case with professionals, they need not be very rich like the upper class. These are the middle class – a population which in every society attains a certain point of social contentment and thus indifference. The critical estimation of the upper class by the lower class is often occasioned by hardship, suffering and the desire to be upwardly mobile.³⁹ Those who are worst afflicted with this type of feeling are those who have received some education and yet are bereft of a means of income.

The cure and prevention of the conflict that is occasioned by this feeling, Aristotle says, lies in 'the quality of goodness and justice, in the particular form that suits the nature of each constitution'.⁴⁰ The theoretical basis and the practical outcomes envisioned by Aristotle apply to all societies and all periods of human history. What Aristotle wrote two and a half millennia ago is applicable in today's world. Indeed, it is inevitable that there is bound to be an upheaval in any unequal social class structure. Indeed, American civilisation, as has been emphasised by President Barack Obama in his recent presidential campaign, is a prime example of how the middle class is the bulwark for the survival of any liberal democracy. Without a robust middle class, there is a breeding ground for revolts, anarchy and revolution.

There is no African nation, let alone Nigeria, which does not have an urn-shaped class structure, meaning a social class structure in which the lower class is bloated, the middle class a mere shoestring and the upper class one big, fat head, figuratively speaking. The middle class in any society is usually the natural medium of effective communication, contact and information transmission between the lower and upper classes. Where this wire of transmission is too thin, fragile or non-existent, a given society is inviting turbulent mass action, a revolution.⁴¹ The Niger Delta, the settler situations in Jos and, perhaps, the Boko Haram movement all evoke issues of inequality in Nigeria. The American political scientist and sociologist James Chowning Davies sums up the situation as follows:⁴²

When Jefferson premised the argument in 1776 for independence from British rule with the statement that 'all men are created equal', he was making an assertion about man's nature. Men who have been denied equality have been highly responsive to the demand by their leaders for equality and have made revolutions to get it. Whether the language was Lutheran, Wesleyan Calvinist, Jeffersonian, Rousseauian, or Marxian, the

38 Land and Native Rights Ordinance 1 of 1916, Cap 105 Law of Nigeria, superseded by the Land Use Act, Cap L5 LFN, 2004.

39 Muzan (n 18 above) 61.

40 See Aristotle *The politics of Aristotle* trans E Barker (1958), 203 204 n 36.

41 For some classical works, see H Arndt *On revolution* (1963); G Simmel *Conflict and the web of group affiliations* trans KH Wolff & R Bendix (1955).

42 JC Davies *When men revolt and why* (1971) 7.

frustrated expectation of equality has been a major factor in all major revolutionary upheavals since Luther posted his Ninety-five Theses on the Wittenberg church door. Indeed, since long before that.

4.3 Discrimination

Discrimination comes in a variety of forms. One example is economic discrimination, which is defined as the systematic exclusion, whether prescriptive or *de facto*, of a person or group from participating in positions or activities of higher economic value, such as employment, trade or profession. Another form is political discrimination, which is defined as a systematic or perceivable pattern of limitations in the form, process, normative or practical outcome of the opportunities of groups to take part in political activities or to attain or keep elite positions of trust.⁴³

There is also discrimination in the distribution of political and socio-economic goods to populations or segments of the population of a country. This type of discrimination often results in deprivation of basic infrastructural amenities and diminished opportunities for employment, particularly at the upper echelons of governance and economic activities. Ethnic minorities are often victims of this type of discrimination and it has often led to movements of terrorism and insurgency. This type of discrimination was the primary motive force behind the realignment of the erstwhile warring forces of the Ijaw, Itsekiri and Urhobo in Warri, Delta State against the federal government in the Niger Delta insurgency and, according to MEND, the insurgency's primary propellant. In the Niger Delta before the emergence of the insurgency, there was a widespread feeling of deprivation and discrimination, since the evidence showed that the rate of unemployment, the general standards of living and the rate of poverty in the region were clearly disproportionate to other parts of the country and clearly worse than the national average. This was reinforced by the fact that high positions of trust in the oil companies were filled by members of the majority tribes, some of whom were not necessarily more qualified than those who were unemployed.⁴⁴

4.4 Poverty

It has been noted elsewhere that 'among several other ills, poverty breeds anger, hatred, envy and conflict'.⁴⁵ Poverty is the cause of many of Nigeria's problems. The phenomenon of poverty has been recognised from ancient times. Euripides recognised it in early Greek times.⁴⁶ For Engels, the peasant war was the culmination of

43 Muzan (n 18 above) 71.

44 See P Collier *Oil and inequalities in rural Nigeria* (1981). See also PO Olayiwola *Petroleum and structural change in a developing country: The case of Nigeria* (1984).

45 Muzan (n 18 above) 66. See also L Randell *Political economy of Venezuelan oil* (1987).

46 See Euripides 'Suppliants' in *The tragedies of Euripides in English verse* trans AS Way (1894) 373.

revolutionary trends which shaped much German social history from the seventeenth century forward, such that⁴⁷

[a]lthough local insurrections of peasants can be found in mediaeval times in large numbers, not one general national peasant revolt, least of all Germany, can be observed before the peasant war ... [which came about] ... when the lowest stratum of the population, the one exploited by all the rest, arose, namely, the plebeians and the peasants.

The social conditions of sixteenth and seventeenth century Europe are applicable in present-day Nigeria. The same trend has manifested itself in regions as diverse as Asia,⁴⁸ Latin America⁴⁹ and elsewhere on the European and African⁵⁰ continents. But this states a complex phenomenon rather too simplistically. We need to know what we mean by poverty. We need to understand the characteristics of poverty so as to appreciate the causal dynamics between it and the types of conflicts that may result in volatile social eruptions like terrorism and insurgency.

Although poverty is not easily amenable to precise definition, we may assume that it means a lack of command over basic consumption needs, resulting in a situation where a person's basic needs far exceed the available means of meeting them.⁵¹ Basic needs include two components. First, they include the minimum requirements of an individual or family for the procurement of shelter, adequate food, clothing, furniture and other necessary household equipment such as cooking, eating and other utensils. Second, they include essential services provided by government for the community at large, such as sanitation, public transport, safe drinking water, health and educational facilities, employment and participation in the public decision-making processes of the community to which the individual belongs.⁵² According to the International Labour Organisation (ILO), just as there is relative poverty in comparison to the standard of living of others in the same society, there is also absolute poverty. Basic

47 F Engels *The peasant war in Germany (1850)* (1966) 49; H Arendt *On revolution* (1963).

48 See E Snow *Red star over China* (1968).

49 See DP Bwy 'Dimensions of social conflict in Latin America' in LH Masotti & DR Bowen *Riots and rebellion: Civil violence in the urban community* (1968). See also EW Gude 'Political violence in Venezuela, 1958-1964' *Proceedings of the American Political Science Association* (1967) 72.

50 See C Elliott *Patterns of poverty in the Third World: A study of social and economic stratification* (1973); see also P Collier 'Oil and inequalities in Nigeria' in L Leistritz & BL Ekstrom *Social impact assessment and management* (1986).

51 M Ravallion & B Bidani 'How robust is a poverty profile?' (1994) 8 *The World Bank Economic Review* 75-102. See B Seebom Rowntree *Poverty: A study of town life* (1901); see also V Thomas 'Spatial differences in poverty: The case of Peru' (1980) 7 *Journal of Development Economics* 85-98; AB Atkinson 'On the measurement of poverty' (1987) 55 *Econometrica* 749-764; J Dollard *et al Frustration and aggression* (1939) (1967). See also L Berkowitz (ed) *Roots of aggression: A re-examination of the frustration-aggression hypothesis* (1968); JC Davies 'Towards a theory of revolution' (1962) 27 *American Sociological Review* 5-19.

52 See CR McConnell *Economics principals, problems and politics* (1982).

needs can be relative as well as absolute.⁵³ The more basic needs are not met, the more severe will be the level of poverty. This relative severity of poverty has a close correlation with the psychological basis of individual and group relations and conduct. It is this psychological basis of individual and group conduct that dictates, to a large extent, the character of response that defines the nature and the scope of conflicts that result from the social condition of poverty. In other words, the social response to poverty, by an individual or a group, is motivated by psychological factors – and these have long been recognised.⁵⁴

Persistent poverty, particularly in the midst of economic growth and affluence of the upper class, will lead to feelings of frustration among the poor. It will also breed hatred, mistrust and anger. These psychological monsters lead to a loss of faith in the system, alienation and hopelessness.⁵⁵ At the stage of hopelessness, there is a progressive, psychological diminution of the value of life, which eventually leads to a point of indifference between life and death. At this point, hostility, antagonistic conduct and indiscriminate aggression manifest rather spontaneously and automatically.⁵⁶ Mailafia sums up the situation as follows:⁵⁷

The prevalence of poverty makes it easier for extremist groups to mobilise disenchanted mobs in pursuit of their own political goals. In Northern Nigeria, where over 70 per cent of the population lives under the internationally-defined poverty line, it is easy to see how any demagogue or religious extremist can mobilise the poor and destitute as instruments for his own political goals. There is the added factor of youth unemployment, especially within the growing stratum of university graduates. When people are pushed to the lowest levels of desperation and hopelessness, they can fall easy prey to religious demagogues who offer them a sense of belonging.

From this description and many similar analyses of the Nigerian situation, we can categorically assert that poverty breeds conflict and induces susceptibility to terrorist activity in Nigeria. Poverty is based on the lack of basic needs, and the more this lack persists, the greater the likelihood that a situation of frustration will arise which, if not checked in time, will lead to aggression and revolutionary conduct.

4.5 Unemployment

The national average of unemployment in Nigeria stands at 24 per cent, with an estimated 54 per cent of the youth population

⁵³ See *Employment, growth and basic needs: A one-world problem: Report of the Director-General of the International Labour Office* (1976).

⁵⁴ See TR Gurr 'Psychological factors in civil violence' (1968) 20 *World Politics* 254.

⁵⁵ TR Gurr *Why men rebel* (1970).

⁵⁶ For some classical treatments of the subject, see, eg, Dollard *et al* (n 51 above); Berkowitz (n 51 above); Davis (n 51 above).

⁵⁷ O Mailafia 'Conflict and insurgency in Nigeria' *PM News* 26 September 2012.

unemployed.⁵⁸ An unemployed person, like a poor person, is usually unhappy. The idleness created by unemployment can lead to antisocial conduct to occupy time. Even if the person is educated and skilled, it can lead to frustration, aggression and serious conflict. In itself, unemployment is, of course, a very potent cause of poverty. This is why employment is a necessary component of a basic needs strategy of development, both as a means and also as an end. The benefits of employment are hardly contestable. Employment yields an output and provides an income to the employed, and it gives the employed person the recognition of being engaged in some occupation worth his while and dignity. Mere employment does not, however, by itself satisfy all the requirements of the mind that would remove the psychological preconditions that lead to social unrest. There needs to be improvements in the quality of employment or conditions of work. Most persons would not consider themselves happily employed if the employment they are engaged in is demoralising, undignified, inconvenient, dangerous to health or to life, or indeed discriminatory as to gender, ethnicity, race, age, religion, and so forth.⁵⁹

4.6 Political alienation

Conflict and strife usually result where an individual is denied the freedom to participate in the political decision-making processes of the society. Man, being a political animal, always sees himself as such and as being free to engage in politics, formally or informally. Nonetheless, he may withdraw tactically, strategically or voluntarily for psychological or other reasons where the prevailing conditions are not conducive to his participation in the political process. In this latter circumstance of withdrawal, especially where it is involuntary, he is said to be politically alienated from society. Political alienation of the individual person or of a group or segment of society breeds conflict and unrest. Aristotle described well the contempt that characterises political alienation within political systems of oligarchy and democracy in observing:⁶⁰

Contempt is a cause of faction and of actual attacks upon the government, for instance in oligarchies when those who have no share in the government are more numerous (for they think themselves the strong party), and in democracies when the rich have begun to feel contempt for the disorder and anarchy that prevails.

Political alienation or contempt can be manifested by both the rich and the poor – in some instances, simultaneously.

⁵⁸ IBRD *Nigeria, employment and growth study* (2009).

⁵⁹ See AA Ikein *The impact of oil on a developing country: The case of Nigeria* (1994) 90 169-170; Olayiwola (n 44 above).

⁶⁰ Aristotle *The Politics* trans H Rackham (1932) 382. See E Burke *Reflections on the revolution in France* (1955).

Situations of this type occur in the petroleum-producing regions and elsewhere in Nigeria. Indeed, the Ogoni situation, at the inception or formative period of the Movement for the Survival of the Ogoni People (MOSOP), is a prime example. It is reported that MOSOP was initially, and has in fact continued to be, a mass movement of the Ogoni People of the Niger Delta oil-producing area with a membership consisting of both the elite and the masses of the Ogoni people. Political alienation resulting in this type of unity of purpose and resolve between the rich and the poor becomes more formidable and intractable for any government, since it makes it more difficult for the government to penetrate the movement and possibly break the rank and file. This situation produced the Oodua People's Congress that contributed substantially to the demise of military dictatorship in Nigeria.

Whichever way the government chooses to counter political alienation, one thing is clear: When an idea is *class-neutral*, that is, when it involves both the high and the low alike, particularly in countries like Nigeria where the middle class is both comparatively tiny and rather inconsequential, the dangers of conflict, dispute and revolutionary conduct are usually quite high. A major factor that leads to political alienation is discrimination in which, to use a popular Nigerian adage, 'monkey de work and baboon de chop', meaning that the monkey works and the baboon consumes. The situation presented itself classically in January 2012, when a mass action was organised to protest the petroleum subsidy programme and policy of the federal government. There were indeed clear and palpable signs of cracks – or at least, tremors – in the corridors of government power.

4.7 Religious and ideological discontent

Both religion and ideology are closely-related concepts in the minds of individuals and social groups. In their pure form, they have universalistic attributes, appealing primarily to the primordial instincts. Thus, such epithets as 'primitive', 'developed', 'civilised', 'traditional' or 'modern' may not in reality be very relevant when used in relation to social groups and their attitudes towards religion and ideology. An ideology, like a religion, is a belief system containing a world view that is accepted as fact or truth by some groups. Ideology and religion are both evaluative, normative and ethical, as well as moral in tone and content. The belief system will largely affect the social processes in the particular society and, indeed, institutions and human relations. Thus, the socialisation and social stratification process or a society's ranking of individual members within the society, including issues of equality which relate to political participation, as well as production, distribution and consumption of wealth, is largely determined by the various and frequently-competing ideologies within a given society. For instance, it is asserted by no less an authority than Engels that the clergy were the 'representatives of the ideology of mediaeval

feudalism', such that the religious precepts and attitudes of the day could not help but sustain the socio-political and economic practices of the period.

In the oil-producing areas of Nigeria we may perceive the same competition between religious and ideological forces as manifest elsewhere in the Nigerian state. Apart from Christianity and Islam, numerous other religions are practised in Nigeria, and these, as would be expected, permeate the prevailing ideological types which compete in the country with various degrees of fervour and levels of followership. Conflict is bound to arise in the ensuing competition between religious and ideological types and their adherents. Thus, for example, in a community where the elders adhere to traditions and religious practices of the ancestors, any deviation by the youth from the norms prescribed by the community is likely to be a cause of conflict. The elders frequently insist on preserving their traditional institutions, while the youth, distrusting the 'old' beliefs, want to do things differently. The contention might revolve around the appropriate approach to the resolution of an emergent conflict between the community and an outsider – for instance, a multinational oil company or a government agency. The entire dynamic is propelled by the innate qualities of religious symbolism, particularly its *multivalence* and capacity to reveal a perspective that can integrate diverse realities into a system. We may be quick to add that ideology – almost invariably, but certainly impliedly – benefits from this character of religion. This may be why both ideas always function side by side. In the Arab world, for instance, the ideology of nationalism has been closely identified with Islam.⁶¹ That is, the dominant religion is viewed as one and the same thing as the state, much as the Protestant ethic was said to be inseparable from public organisation and capitalism.⁶² The same applies to Judaism and the state of Israel,⁶³ and numerous other examples. Without a stretch of the imagination, we may conclude that in a system with a multiplicity of religious experiences and *a priori* ideological leanings, there is bound to be serious conflict, particularly where the religious ideas and experiences are fundamentally different or contradictory.

Nigeria is a prime example in this type of conflict setting and the results have been typical. It is expected, for instance, that the more Christianity grows in the north, the greater the tension between the two dominant religions, both competing for supremacy or hegemony. Nonetheless, while the two most conspicuous and competing religions in Nigeria are Christianity and Islam, the country houses

61 See M Berger *The Arab world today* (1961) 20. See also M Halpern *The politics of social change in the Middle East and North Africa* (1963).

62 M Weber 'Bureaucracy' in *From Max Weber: Essays in sociology* trans HH Gerth & C Wright Mills (1985) 245.

63 See eg B Reigeh 'Israel' in TY Ishmael (ed) *Governments and politics of the contemporary Middle East* (1970) 251-282. See also Halpern (n 61 above).

many other forms of religious experience.⁶⁴ The range of religious and ideological pluralism inevitably propagates complex conflicts. In a community in which elders adhere to the normative traditions of their ancestors, which may include elements of ancestral deification or paganism, any deviation from such norms by the youth and others acting under the influence of 'alien' ideals would usually be regarded as antagonistic to the established norms and order. The emerging conflict in such situations is usually profound and at times paradoxical. The conservative approach of the elders is viewed as benign negligence, even irresponsibility, especially in the face of problems that require urgent solutions, such as adopting appropriate strategies to determine proprietary rights, compensation and environmental remediation. The resulting conflict usually tends in the long run to deprive the community of the aggregate benefits which could have otherwise accrued to it. As Gurr puts it, 'religious cleavages are a chronic source of deprivation-inducing conflict'.⁶⁵ Gurr's theory is quite applicable at the macro-economic levels, particularly in the insurgency that is now playing out in the Niger Delta and northern parts of Nigeria.

In light of the above, it would be rather surprising to conclude that the mediating role of the chief priest and the shrine, or at least their proximity to the events of 24 May 1995 at Gioko in Ogoni land in the conflict between the Ogonis and the oil giant Shell, was fortuitous. In the Ogoni agitation that led to the mob action that resulted in the killing of prominent personalities of the Ogoni land (the oil-rich ethnic group which had a long history of violent protests against the dominant oil company there, namely, the Shell Petroleum Development Company), the chief priest of the ethnic group's deity was reported to have played a significant role by protecting in the deity's shrine certain of the prominent persons who were otherwise targeted for elimination for allegedly collaborating with the oil companies and the state. The incident occurred on 24 May 1995. This protective custody by the chief priest saved some of the targeted persons who would otherwise have been slaughtered.

Likewise, in Bayelsa and Delta States, two of the prominent oil-producing states of the Niger Delta region, a prominent deity called Egbesu is worshipped by believers (or cult members, some would say), mostly of the Izon (also called Ijaw tribe) was frequently used as a rallying point for intense and destructive protests against the state. It would be hardly surprising not to hear the crescendo of Egbesu religious chants and choruses during the effulgence of Izon nationalistic fervour and protests against the perceived ills perpetrated by the state and the oil operators in Izon land of the Niger Delta. In these cases, as has been evidenced elsewhere, religion was used not

⁶⁴ See GT Stride & C Ifeka *Peoples and empires of West Africa* (1971) 321-345.

⁶⁵ TR Gurr 'A causal model of civil strife: A comparative analysis using new indices' (1968) 62 *American Political Science Review* 1110.

as an opiate, but rather as a motivation toward self-determination and nationalistic mobilisation, in this case, a fragmental variant that may be termed sub-state nationalism, a prominent example of political ideology.⁶⁶

5 Conclusion: Nigeria beyond the brink

When it comes to the problems of corruption, nepotism, bribery, murders, kidnapping, indiscipline and the like, we can conclude that, as much as these vices constitute a grave and present danger to the rapid development of a peaceful and great nation, none of them individually or even collectively can break up the country. However, we find that, with the rapidly-growing problem of terrorism associated with insurgency, the country is in grave danger of becoming a failed state and thereby disintegrating.

Historically, insurgency in Nigeria has been localised or regionally based. However, if the present trend toward growing insurgency is allowed to continue unfettered, the regional basis of the scourge will become blurred with time and unpredictable in its potential to destroy the nation. The Nigeria-Biafra civil war was confined to the former eastern region, except for a very brief spill into parts of Delta and Edo States and the eastern periphery of current Ondo State. The Ogoni (MOSOP) upheaval has always been confined to the four local government areas of Rivers State. The war for Warri was localised in the Warri area of Delta State. The MASSOB insurgency still claims the original boundaries of the former eastern region, but it is effectively localised in the current South-East geopolitical zone of Nigeria, containing Abia, Anambra, Ebonyi, Enugu and Imo States, which are home to the Ibo people. The OPC insurgency is also localised in the Yoruba-speaking Western states of Lagos, Oyo, Ondo, Ogun, Osun and Ekiti. The Jos crisis is localised in the Jos metropolis and local government areas contiguous to it and parts of Plateau State. The MEND groups were originally localised in the Niger Delta region but, as has been indicated earlier, there has since been visible evidence of its operations in the Abuja area, Lagos and off-shore.

The current Boko Haram and Ansaru insurgencies are localised in parts of the northern states, but they seem to have the potential of spreading to other parts of the sprawling territory of the north which would be a significant spread of that insurgency. Depending on the public policy response these groups, individually or collectively, have the potential to spread beyond their region or locale of operations. It will be an unfortunate day for Nigeria if all four (Boko, MEND, OPC, MASSOB) major groups are allowed to have a nationwide spread at

⁶⁶ See R Bendix 'The age of ideology: Persistence and changing' in DE Apter *Ideology and discontent* (1964) 294 ff. See also SP Huntington 'Conservation as an ideology' (1957) 51 *American Political Science Review* 454.

the same time because of a wrong, inadequate, ill-informed, ill-timed or superfluous policy response from the authorities.

As far as causative factors are concerned, we can safely conclude that, for Nigeria, there is sufficient potential for full-blown, nationwide terrorism and insurgency, since all causative factors, and possibly more, are eminently represented in the polity. These causative factors, particularly ethnicity, are common to all previous and current insurgent campaigns, except for religion, which is pronounced as a factor only in the Boko Haram and Ansaru insurgencies. There are other causative factors which could not be discussed in the article because of space constraints. These include the gap between the elite and the masses; unfulfilled political and economic promises; income disparity; availability and use of information and communication technology; proliferation of arms; and others which are common to all the insurgent groups in Nigeria.

The presence of a religious element in an insurgency usually has significant implications for policy response. First, such causes are easily sustainable so long as there are adherents to that religion, and particularly if there are new converts. If religion is a way of life and the insurgency is sympathetic to sustaining that way of life, then the insurgency itself is easily sustainable. If an insurgency is easily sustainable because of a belief system, then the basket of policy responses to the insurgency must go beyond the ordinary ones used to address the non-religious causative factors. There must be a special appeal to religious elements, such as peace and peaceful coexistence, a common heritage or fraternity and dialogue and diplomacy. Force, particularly military force, may miss the point as many historical examples outside Nigeria have seemed to indicate.

The most delicate of all the insurgencies currently active or simmering in Nigeria is the Niger Delta (MEND) insurgency. First, it embodies delicate economic implications for the survival of the nation as one entity. Second, if there should be a full-blown insurgency in Nigeria, involving all of the four previously mentioned groups in a free-for-all campaign, the main theatre will likely be the Niger Delta. The economic costs of this hopefully avoidable scenario would be catastrophic. None of the three regions – east, north or west – would like to see a disintegrated Nigeria without its controlling at least a significant portion of the Niger Delta oil. As a matter of fact, for all intents and purposes, what holds Nigeria together for now is the continued existence of oil and gas in the Niger Delta. None of the regions wants another to break away with control over the Niger Delta, and none would want to break away alone without it. In particular, neither the Ibos in the east nor the Hausa-Fulani in the north want to be the land-locked countries; offspring of a disintegrated Nigeria. And we have seen, the level of suspicion between the north and the south regions captured well in the description of retired Chief Justice Musdapher. Thus, we may say that the Niger Delta oil is what holds Nigeria together.

The primary implication for policy of the foregoing analysis is that answering questions related to regionalism of insurgent movements in Nigeria may assist the design of public policy response to ethno-religious relations and security implications and responses to insurgency in Nigeria. Insurgency in Nigeria based on ethno-religious factors will require extra attention, as it might be one of the most potentially devastating. This is based on a number of estimations. First, the growth and dynamism of Islam and Christianity, the two major competing religions in Nigeria, is astounding, particularly in the north. This growth of both religions in the northern states could lead to an outright inter-religious conflict, which might complicate an already complex situation. In the above context and, indeed, in government responses to insurgency in Nigeria, more generally, the legal, constitutional and regulatory mechanisms required for the management of conflict should be overhauled.

Second, in the current insurgency that is associated with Boko Haram and Ansaru in the northern states, one of the problems in designing a response and negotiation strategy for conflict resolution is the lack of a clear statement of the objectives of the group. For example, does Boko Haram want a theocracy for Nigeria? Does it want all Nigerians to adopt Islam as their religion? How does it want to coexist with other religious groups in Nigeria? Should all secular educational systems in Nigeria be scrapped, including universities, colleges of education, and polytechnics and secondary schools? If there were a clearer articulation of the group's objectives, it would be easier to design a policy response that could focus on ending the conflict peacefully and designing policies to move forward.

Finally, there are two factors that are likely to be issues in Nigerian politics for a long time to come. These are ethno-religiosity of politics and income disparities, both of which, as we have seen, are fuels for revolution. To address religious conflicts, in particular, provision should be made for the establishment of a body with constitutional powers composed of the top religious leaders of each of the competing religions in Nigeria and top politicians like state governors. The body should be chaired by a nominee of the President of the Federal Republic of Nigeria or the Vice-President. Such a body could be named the National Supreme Council on Religion. This body would be responsible for deciding all matters of an interreligious nature that may potentially instigate or breed conflict that might result in insurgency. The implementation of these recommendations would go a long way toward avoiding the cataclysmic projections of Chief Justice Musdapher.⁶⁷

67 Musdapher (n 1 above).

The troubled relationship of state and religion in Eritrea

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Summary

Eritrea is a multi-ethnic, multi-lingual and multi-religion country. The country does not have an official state religion. However, since the country's independence in 1991, the relationship between state and religion has been a troubled one. At least four religions are officially recognised by the state: Islam, of the Sunni rite; the Eritrean Orthodox Tewahdo Church, part of the worldwide Coptic Orthodox Church of the eastern rite; the Eritrean Catholic Church, part of the worldwide Roman Catholic movement; and the Eritrean Evangelical Church, part of the Lutheran World Federation. There are also a number of religious beliefs which are not formally recognised by the state. Members of these religious groups practise their belief clandestinely at the risk of insurmountable levels of persecution: If caught practising their religion in whatever form, they are treated harshly. The persecution of these groups takes place mainly in the form of coerced repudiation of one's religion. This is routinely accompanied by various forms of human rights violations, such as prolonged arbitrary detention and solitary confinement, including torture. In extreme cases it also entails extrajudicial execution. In this context, freedom of religion is severely restricted in Eritrea due to the excessive levels of state intervention in matters of personal belief or creed. As such, Eritrea has become a major example of religious persecution in the world. This has prompted, amongst other things, the description of Eritrea as one of the worst abusers in the world, along with North Korea. The relationship between the state and religion has been particularly problematic since the Eritrean government introduced a new policy in

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2002 ordering the 'closure' of all other religions except the four officially-recognised beliefs. This article critically analyses the troubled relationship of state and religion in Eritrea and, in so doing, it addresses the challenge from a human rights perspective.

1 Introduction: Religion and the pre-conflict, in-conflict and post-conflict state

This article discusses the troubled relationship of state and religion in Eritrea. Having obtained *de facto* independence in 1991 after a 30-year war of independence with Ethiopia, and *de jure* statehood in 1993, the country is the second youngest in Africa, the youngest being the newly-born Republic of South Sudan. In this contribution, we discuss the sad state of affairs in Eritrea through the lens of a historical overview of the relationship of state and religion, dating back to the ancient times.

However, what is it necessary to analyse the relationship of state and religion in Eritrea? We briefly answer this question based on the observation of Selassie, who asserts that religion is one of the three major forces that define modern politics, the other two forces being nationalism and the demands of constituent parts of a state in national politics.¹ As such, an understanding of the relationship between religion and state is a very important indicator in comprehending the state of human rights and political development, particularly in post-conflict tyrannical states such as Eritrea. However, we note that Eritrea is a very difficult case study in terms of explaining its predicament using the characterisation of a *pre*-, *in*- and/or *post*-conflict state, as explained below.

Before 1991, Eritrea was a battlefield experiencing continuous hostilities that date back at least to the Italian colonial era, at which time the country was created as a modern polity. From 1991 to 1998 it saw a relatively peaceful transition to a much-anticipated democratic order which has as yet not materialised. From 1998 to 2000, it fought a devastating border conflict with Ethiopia. In the words of Cameron: 'From the ashes of this calamitous reversion to war, there arose a *dirigiste* state.'² The nation has already become 'a battalion state'.³ Given its unimpeded high-speed course towards a

1 BH Selassie *Wounded nation: How a once promising Eritrea was betrayed and its future compromised* (2011) 237.

2 G Cameron 'The Eritrean state in comparative perspective' in D O'Kane & TR Hepner (eds) *Biopolitics, militarism and development: Eritrea in the twenty-first century* (2009) 143.

3 C Bundegaard 'The battalion state: Securitisation and nation building in Eritrea' PSIS Occasional Paper 2, 2004, http://mercury.ethz.ch/serviceengine/Files/ISN/20600/ipublicationdocument_singledocument/3cb39359-b77b-4042-a6c6-f99d9e897f83/en/PSIS-OccPap-2_2004-Bundegaard.pdf (accessed 31 January 2014).

'militaristic garrison state',⁴ the nation is just an inch away from becoming another failed state in the Horn of Africa. This region has already produced such a failed state in the last two decades, and it is likely that Eritrea will become another failed state.⁵

Whilst a number of factors have contributed to the sad state of affairs in Eritrea, the repressive political culture of the ruling and sole political party, the People's Front for Democracy and Justice (PFDJ), is the main problem. As noted by Bozzini, the state in Eritrea is authoritarian, unaccountable, volatile and violent; and the political leadership is an all-powerful and capricious, ready to do whatever it can, at the cost of individual basic freedom (including matters of intrinsically personal nature, such as religious creed), in order to hold state power intact. The political leadership continues in power, despite its large de-legitimisation and widespread popular disapproval of its policies.⁶ This provides the broader context within which we try to analyse the troubled relationship of state and religion in Eritrea, which has now become a major cause of unprecedented levels of religious persecution and other forms of human rights violations in the country.

Our article is organised as follows. The current section is the introductory part. In the next section we provide a brief historical overview of the relationship between state and religion, starting from ancient history to the modern era. This provides a broad overview that fits the purpose of our research, particularly in the context of the two most dominant religions in Eritrea: Christianity and Islam. In the third part, we discuss the troubled relationship between state and religion in Eritrea with the emphasis on the post-independence era. However, in order to have a very comprehensive picture, we will touch briefly on the pre-independence history of the state-religion relationship in the country. The fourth part links the debate with the prevailing excessive state interference in religion, a practice which has become a major cause of unprecedented levels of religious persecution in the country. In elaborating this challenge, we discuss a few representative case studies of religious persecution that is currently taking place in

4 TR Hepner & D O'Kane 'Conclusion: Biopolitics and dilemmas of development in Eritrea and elsewhere' in O'Kane & Hepner (n 2 above) 168.

5 D Mekonnen 'Drivers of fragility and the perils of state failure in Eritrea' paper presented at the International Conference on Human Security: Threats, Risks, Crisis 18-19 October 2012, Kadir Has University, Istanbul, Turkey.

6 D Bozzini 'Low-tech surveillance and the despotic state in Eritrea' (2011) 9 *Surveillance and Society* 104-110. Bozzini discusses the political crisis in Eritrea in the context of one of the most controversial government policies, which is mandatory and indefinite military conscription of virtually every adult member of society. For more on this, see G Kibreab 'Forced labour in Eritrea' (2009) 47 *Journal of Modern African Studies* 41-72; SM Weldehaimanot 'From prisoners to refugees: The right to leave and its ramifications in Eritrea' (2011) 17 *East African Journal of Peace and Human Rights* 230-261; N Hirt & AS Mohammad "'Dreams don't come true in Eritrea": Anomie and family disintegration due to the structural militarisation of society' (2013) 51 *Journal of Modern African Studies* 139-168.

Eritrea. Finally, we conclude our article by summarising the main findings of our research.

2 Historical overview of the relationship between state and religion

In much of our contemporary world, the concept of separation of religion and state has been adopted widely and many more aspire to it in principle. Even where states have adopted a state religion, its status is often only limited to some form of formal recognition, with much of the social role of religion or religious institutions having been taken over by the state.⁷ This is the result of a gradual but not always amicable separation of religion and state, going right back to the history. At the same time, it is important to understand that, while the separation of religion and state has never been practised in the world in its strictest sense, some studies in this area indicate that the principle receives greater recognition in democratic societies than in repressive ones.⁸ With the objective of providing a broader overview that fits the purpose of our research, in the following paragraphs we discuss the global history of state-religion relationship in the context of the two most dominant religions in Eritrea: Christianity and Islam.

2.1 Christianity and the state: Global overview

As far as the church-state relationship is concerned, the most important point of departure is the era of the Greek and Roman empires, especially when Christianity was assigned the status of state church of the Roman empire, following a period of intense persecution.⁹ Whilst this status enabled the church to gain certain privileges, it also led to a loss of the church's autonomy, as Constantine and his successors sought to impose their views on the church, increasing the prominence of the emperor in the life of the church. This was particularly the case in the eastern parts of the Roman empire, where the emperor tended to rule over both church and state, heading church councils and deciding on theological controversies. In the west, where the empire was declining, the Bishop of Rome was the single strongest figure, having usurped many prerogatives ascribed to both the church and the state.¹⁰ The confusion continued in different forms well into the medieval period,

7 See, generally, M Cosgel & TJ Miceli 'State and religion' (2009) 37 *Journal of Comparative Economics* 402-416; P Hamburger *Separation of church and state* (2004) 342.

8 J Fox 'World separation of religion and state into the 21st century' (2006) 39 *Comparative Political Studies* 537.

9 W Huber 'Church and state: Theological aspects' in *The encyclopaedia of Christianity* (1999) 502-508.

10 AD Strange 'Church and state in historical perspective' http://www.opc.org/os.html?article_id=43 (accessed 8 January 2013). See also, generally, HJ Berman *Law and revolution: The formation of the Western legal tradition* (1983).

where both collusions and confrontations were prevalent, most notably the Crusades and the Investiture Controversies, respectively.¹¹

With the Protestant reformation, the question of the separation of the church and state, and the relative authority of each with respect to the other, were raised.¹² However, this period is also one of great political tension between the emerging states and the different versions of Christianity that were aligned with the different territorial powers. For example, the Lutherans and Calvinists aligned themselves with local and national political authorities in Northern Europe, thus encouraging the emergence of modern national communities. As such, the church-state issue was not resolved; rather, it was transformed from a tension between the Pope and the emperor to a tension between nations. This led to religious wars with horrendous consequences across Europe and influenced the legal and cultural context of the United States as populations begun to emigrate to that part of the world.¹³

The European religious establishments of the period remained intact, well into the eighteenth century, when the French Revolution disrupted some of them.¹⁴ However, some, including the Church of England, to date remain intact, although various principles that took root subsequently – for example, religious tolerance – have put a check on the exclusivity of the establishment.¹⁵ Even in the United States, colonists brought with them some of their religious establishments, many of which were retained well into the nineteenth century, when the Bill of Rights limited the blurring of the state-church relationship. Political scientist Jonathan Fox notes that of the 152 countries surveyed in his research, the United States is the only country in the world which has full separation (or a ‘wall of separation’) of religion and state in the strictest sense of the term.¹⁶ Speaking about the state-religion relationship in the US context, one notes that the famous phrase ‘wall of separation’ is attributed to Thomas Jefferson, the third President of the United State. Believed to be part of a letter¹⁷ Jefferson sent to the Danbury Baptists Association,

11 M Hughes *Early modern Germany: 1477-1806* (1992) 5; JM Riddle *A history of the middle ages: 300-1500* (2008) 315.

12 E Simon *Great ages of man: The reformation: A history of the world's cultures* (1966) 120-121.

13 ‘History of Europe: Demographics’ *Encyclopaedia Britannica* <http://www.britannica.com/EBchecked/topic/195896/history-of-Europe/58335/Demographics#ref=ref310375> (accessed 4 January 2013).

14 See, generally, F Tallett *Religion, society and politics in France since 1789* (2003).

15 See, generally, SE Ahlstrom *A religious history of the American people* (2004).

16 Fox (n 8 above) 537.

17 J Hutson ‘“A wall of separation”: FBI helps restore Jefferson’s obliterated draft’ (1998) 57 *Library of Congress Information Bulletin* <http://www.loc.gov/loc/lcib/9806/danbury.html> (accessed 4 January 2013).

the phrase is very much associated with the religion clause of the American Constitution which, in its First Amendment, provides:¹⁸

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Yet, it was only by the middle of the twentieth century that the religious clauses of the US Constitution were extensively interpreted by the US Supreme Court as the basis for a religiously pluralistic society, and even then the disentanglement was not straightforward due to controversies such as religious observance in public schools and the influence of religious groups on public policies.¹⁹ By contrast, nations such as India and Japan often emphasise the separation of religion and politics even while religious leaders and groups play an active role in politics.²⁰

From the above it can be concluded that, although our era of 'secularism' has not attained the full separation of the two institutions, the limited separation has resulted in religious bodies losing much of their power to assert exclusivity, as governments increase their focus on aspects of life traditionally considered within the domains of religion. Whilst the above description can serve as a useful framework for observing the relationship between church and the state, the following sub-sections will look at regional differences and the differences across religions in order to ensure a more comprehensive overview.

2.2 Islam and the state: Global overview

As the central religious text of Islam, the Qur'an is the main source of understanding of the relationship between the state and Islam. In addition to the Qur'an, the Hadith (jurisprudence emanating from the teachings of Prophet Muhammad) is regarded as a source on several issues of government and state in Islamic societies. Issues of governance are also resolved by making reference to the wisdom of the *ummah* (community).²¹ Lapidus asserts that, in classical Islamic society, there was no distinction between the religious and political aspects of communal life, because:²²

18 First Amendment (Amendment I) to the United States Constitution of 1791.

19 Some of the most important American cases on the relationship between state and religion are *Reynolds v United States* 98 US (8 Otto) 145 (1878); and *McCullum v Board of Education* 333 US 203 (1948).

20 EO Reischauer & MB Jansen *The Japanese today: Change and continuity* (1988) 215; P Swami 'Protecting secularism and federal fair play' (1997) 14 *Frontline* <http://www.frontlineonnet.com/fl1422/14220170.htm> (accessed 4 January 2013); *SR Bommai v Union of India* [1994] 2 SCR 644 AIR 1994 SC 1918 (1994) 3 SCC1.

21 UK Centre for Legal Education 'Sources of Islamic law' <http://www.ukcle.ac.uk/files/.../797.6c9011e8.SourcesofIslamicLaw.pdf> (accessed 4 January 2013).

22 IM Lapidus 'The separation of state and religion in the development of early Islamic society' (1975) 6 *International Journal of Middle East Studies* 363. See also,

The Caliphate was both the religious and the political leadership of the community of Muslims, whose individual believers and subjects belonged to a polity defined by a religious allegiance ... This view of the seamless web of Islamic political and religious institutions has its basis in the experience of the Muslim community of Medina under Muhammad's leadership. Since Muhammad was the Prophet who revealed God's will in all of life's concerns, belief in Islam entailed both loyalty to a chief whose authority derived from his religious position, and membership in *ummah* - the community that led. In this case, religious and political values and religious and political offices were inseparable.

The *al-sahifah al-Medina* (the Constitution of Medina) speaks of all of the significant tribes and families of Medina as forming one *ummah* (community) in order to act collectively in enforcing social order and security and defending against enemies.²³ However, after the death of Prophet Muhammad, in 632 CE, the first challenge faced by the *ummah* was in fact the problem of government and specifically how to select a successor to the Prophet. The first disagreements that emerged within the Muslim community, which led to the eventual division of Islam, can thus be traced to this challenge.²⁴

Given the limited nature of political guidance in the Qur'an, Muslims had to innovate and to improvise with regard to the form and nature of government. They drew on Qur'anic principles such as Shari'a and the heritage of the regions that they conquered. Islamic political theory took shape much later, subsequent to the historical development that it addressed, and indeed most major political concepts did not develop except during periods when the political institutions about which they were theorising were on the decline.²⁵ Up to the beginning of the nineteenth century, Muslims thought of politics in terms of the *ummah*, and of a caliphate or a sultanate. The term *dawlah* was indeed used by medieval Muslim authors and generally meant 'to turn, rotate, or alternate', but gradually the word came to mean 'dynasty' and then, very recently, state. The concept of Islamic state emerged as a reaction and response to the demise of the last caliphate in Turkey in 1924.²⁶

Contemporary states that call themselves Islamic states are very different from each other and particularly so in their political forms and constitutional arrangements. Saudi Arabia, the earliest

generally, IM Lapidus 'State and religion in Islamic societies' (1996) 151 *Past and Present* 3-27.

23 RB Serjeant 'Sunnah Jami'ah, pacts with the Yathrib Jews, and the Tahrim of Yathrib: Analysis and translation of the documents comprised in the so-called "Constitution of Medina"' (1978) 41 *Bulletin of the School of Oriental and African Studies* 1-42. See also, generally, Q Khan *Political concepts in the Quran* (1982).

24 R Firestone *Jihad: The origin of Holy War in Islam* (1999) 118; M Watt *Muhammad at Medina* (1956) 227-228.

25 As above. See also, generally, B Lewis *From Babel to Dragomans: Interpreting the Middle East* (2004).

26 M Haddad 'Arab religious nationalism in the colonial era: Rereading Rashid Rida's ideas on the caliphate' (1997) 117 *Journal of the American Oriental Society* 253. On the concept of *dawlah*, see F Rosenthal 'Dawla' in B Lewis *et al* (eds) *Encyclopedia of Islam* (1965).

contemporary Islamic state, is a monarchy. Iran, by contrast, is a republic with a constitution, a president, systems and institutions that are not particularly Islamic. In Sudan, the establishment of an Islamic state was through a 'socialist' military regime, and in Pakistan the establishment also came via a military *coup*. Whilst this makes a definition of an Islamic state difficult, the failure of secular systems in many secular states in Muslim majority states always makes the idea of an Islamic state an alternative that many continue to contemplate.²⁷

2.3 Africa and the state-religion conundrum

The modern African state has followed similar patterns to the above in its relationship with religion (both Islam and Christianity), where states alternate between appeasements and confrontations in an attempt to answer the issue of who shall rule, and how the state shall be governed. The religious leaders of Africa have a lot of influence over the state through their connections across society and also due to the fact that religion is more rooted in society than state institutions that are relatively new and alien. There are many examples of positive changes that came out of this dynamic: challenges to dictatorships, injustice and corruption. However, religion has also played a key role in a number of occurrences that are a cause for concern, including the participation of some Roman Catholic priests in the Rwandan genocide and the vast network of organisations and individuals that are associated with Al Qaeda that led to the bombings in Nairobi and Dar es Salaam.²⁸

3 State-religion relationship in Eritrea: Pre-independence era

The relationship between the state and religion in Eritrea is best understood in the context of the religious composition of Eritrean society, which is an example of religious pluralism. Eritrea's religious pluralism is attributed to at least two major factors: (a) the pluralistic nature of the Eritrean society, which constitutes at least nine officially-recognised ethnic groups;²⁹ and (b) the long and successive history of

27 See, generally, AA An-Na'im *Islam and the secular state: Negotiating the future of Shari'a* (2008).

28 AM Ahanotu (ed) *Religion, state and society in contemporary Africa: Nigeria, Sudan, South Africa, Zaire and Mozambique* (1992).

29 The nine officially-recognised ethnic groups, proportional to size, are Tigrinya (ትግርኛ); Tigre (ትግረ); Afar (ፋር); Saho (ሳዎ); Hidarib (ሃዳርብ); Bilen (ብሉን); Nara (ናራ); Kunama (ኩናማ); and Rashaida (ራሻይዳ). However, there are at least two small communities which request official recognition as distinct ethnic groups and whose claim has never been officially addressed by the government. These are the two Muslim communities of Jeberti (ጀበርቲ) and Tekurir (ተኩረር). The Jeberti speak Tigrinya and the government considers them as part of the Tigrinya ethnic group. The Tekurir, who are believed to be recently-settled descendants of the Hausa tribe in Nigeria, speak Arabic with an accent. On the question of Jeberti and

colonialism and trans-continental migration which dates back to the early history of the two most prominent religions in the region: Christianity and Islam. But Eritrea is not a land of only Christians and Muslims. Often forgotten in mainstream discourse are adherents of indigenous belief systems, which include the veneration of ancestral saints and other supernatural forces or agencies. Within the broader category of Christianity, there are many sub-classifications which include Orthodox Christianity, Catholicism, Jehovah's Witnesses, Evangelicalism, Pentecostalism and other Protestant denominations. Under the category of Islam, the most dominant segment is Islam of the Sunni rite. Wahhabism, which is regarded as a conservative branch of Sunni Islam, is also practised in Eritrea. Another religion practised in Eritrea is the Bahá'í Faith. Some reports indicate that Judaism is also practised in Eritrea, albeit in a very small or insignificant proportion compared to other religions.

There have been varying stages in the relationship between the state and religion throughout in the politico-legal history of Eritrea. Due to the size and long history of the two most dominant religions in the country, Christianity and Islam, we believe they can be used as the two most important reference points from which the relationship of the state and religion and can be assessed.

3.1 Christianity and the state in Eritrea

Christianity is regarded as the third oldest religion in Eritrea, next to ancient Mosaic belief and indigenous belief systems of the country. The latter indigenous belief system is plausibly the eldest and the most persistent religion in Eritrea, practised up to the present time, albeit in a very insignificant proportion. Segments of the Kunama ethnic group are the best known adherents of indigenous belief system in Eritrea.³⁰

The Eritrean Orthodox Church is the oldest embodiment of Christianity in Eritrea. This version of Christianity is part of what anthropologist Jon Abbink describes in the Ethiopian context as an 'indigenous form' of Christianity,³¹ although the validity of Abbink's terminology remains somehow questionable. Antiquity is a distinctive feature of the Eritrean Orthodox Church, which was very strongly influenced by the other oldest African Orthodox Church, the Ethiopian Orthodox Church. Citing other sources, historian Uoldelul Chelati Dirar traces the introduction of Orthodox Christianity into

Tekurir, see, generally, SM Weldehaimanot 'Eritrea: Constitutional, legislative and administrative provisions concerning indigenous peoples' in International Labour Organisation and African Commission on Human and Peoples' Rights *The constitutional and legislative protection of the rights of indigenous peoples: Country reports* Pretoria, 2009 3-4.

30 The late Eritrean scholar, Alexander Naty (himself from the Kunamaland), writes that '[t]he Kunama adhere to Christianity and to the traditional belief system but also include some Moslems'. A Nati 'Environment, society and the state in Western Eritrea' (2002) 72 *Africa* 573.

31 J Abbink 'An historical-anthropological approach to Islam in Ethiopia: Issues of identity and politics' (1998) 11 *Journal of African Cultural Studies* 110.

Eritrea to 320 CE, a time which is known as the early apostolic era. Dirar adds:³²

The local Christian tradition attributes this to the missionary efforts of a group of nine monks who came from different areas of the Oriental Christian world at the end of the fifth century.

From that time, throughout the medieval and post-medieval period up to the mid-eighteenth century, Orthodox Christianity not only enjoyed 'a long season of fervid proselytism' but also 'provided spiritual guidance' and 'a framework for the maintenance and reproduction of the existing social order'.³³

Throughout history, Orthodox Christianity was predominantly practised in the highlands of Eritrea which, for all intents and purposes, were part of the ancient civilisation of the Aksum and later Abyssinia. As a result, the Orthodox Church always maintained a very close relationship with the ruling class, particularly with the kings and emperors of Abyssinia. This long history of a strong relationship between the Orthodox Church and state was further strengthened in the mid-1800s as can be gleaned from the following observation of historian Tricia Redeker Hepner:³⁴

In the mid-1800s, the Orthodox Church formally aligned with the imperial [Abyssinian] monarchy under Yohannes IV and began 'divinely ordaining' emperors as well as exacting taxes on their behalf. The collusion of church and state entrenched the cultural, political, and religious dominance of highland peoples, surrounded by a vast and feared Muslim periphery. The regional, economic, and religious division of the empire into sedentary, highland Orthodox Christians and pastoralist, lowland Muslims (and animists) characterized both Ethiopia and its northern province of Eritrea.

What followed was an elevated rank of the Orthodox Church, compared to other religions. During this time, the status of the Orthodox Church was equivalent to a state religion, particularly in the highlands of Abyssinia (which also included parts of Eritrea), where this particular religion was practised predominantly. With reference to the ancient Abyssinian state, which also includes parts of Eritrea, Abbink says that Christianity has never been officially prescribed as a state religion.³⁵ However, the relationship between the Orthodox Church and the ruling class (the monarchs) was very close. From Abbink's own observation, an emperor of the old Abyssinian state had to be always Christian and he was regarded the 'protector' of the church, while priests have officiated in the crowning ceremony of the emperors. In fact, since the period of the Aksumite Kindgom, the Abyssinian 'state has been defined partly through its association with

32 UC Dirar 'Church-state relations in colonial Eritrea: Missionaries and the development of colonial strategies (1869-1911)' (2003) 8 *Journal of Modern Italian Studies* 392.

33 As above,

34 TR Hepner 'An historical-anthropological approach to Islam in Ethiopia' (2003) 10 *Identities: Global Studies in Culture and Power* 271; see also Dirar (n 32 above) 393.

35 Abbink (n 31 above) 115.

Christianity³⁶ and the ideological framework of the state was framed according to the theological construction of the Orthodox Church. Such has been the practice until the downfall of the last Ethiopian emperor, Haile Sellassie I, in 1974. Ever since the role and function of the Orthodox Church have dwindled considerably. But in both countries, Eritrea and Ethiopia, the church still remains the biggest Christian denomination.

A very important aspect of Christianity in Eritrea is that of the history of Catholicism and Protestantism. While the history of the Catholic Church in the region is traced to the early 1500s, the Protestant church landed in Eritrea only in 1837, a time which also marked the arrival of the Jesuit missionaries, later followed by Lazarists. According to Hepner, the arrival of the Catholic Church in Eritrea can be described as an enabling step for Italian colonial rule.³⁷ Indeed, as the official religion of Italian colonisers, Catholicism was soon to assume a very instrumental role in solidifying Italian colonialism in Eritrea. Eritrea was officially declared an Italian colony only in 1890, at least half a century after the arrival of Catholic missionaries. However, the arrival of the Catholic missionaries has played a crucial role in accomplishing a successful Italian settlement policy. This was evident, according to Dirar, from the level of understanding that was reached, as in so many other missionary scenarios, between the Italian state and the Catholic Church, via its Congregation of Propaganda Fide, the main missionary body of the church. This agreement is believed to have finally led to the substitution of the French Lazarist fathers, the first Catholic missionaries in Eritrea sent by the Vatican, by the Italian Capuchin fathers in 1894.³⁸ Dirar further explains the scenario as follows:³⁹

It also led to the reorganization of the mission which, in keeping with colonial boundaries, was transformed into the Apostolic Prefecture of Eritrea and was thus separated from the previous Mission of Abyssinia. This process was finalized with the expulsion, in 1895, of all French Lazarist Fathers from the territory of the colony. After the Italianization of the mission, the *Associazione nazionale* played a crucial role in trying to make the settlement policy successful. It became directly involved in the selection of candidates from the Italian countryside and, in some cases, even covered part of their initial expenses.

³⁶ As above.

³⁷ Citing T Killion, Hepner writes: 'Catholic missionaries had been present in Ethiopia since the 1500s but attracted more resistance than converts. In 1632, they were expelled by Emperor Fasilidas for their role in the civil strife between Catholic converts and local Orthodox adherents.' TR Hepner 'Religion, nationalism, and transnational civil society in the Eritrean diaspora' (2003) 10 *Identities: Global Studies in Culture and Power* 271. See also T Killion *Historical dictionary of Eritrea* (1998) 132.

³⁸ Dirar (n 32 above) 398-399.

³⁹ Dirar (n 32 above) 399.

Of course, in 1890, by declaring Eritrea to be a 'colony', Italy was trying to use Eritrea 'as a gateway to penetrate into Abyssinia',⁴⁰ a dream which never materialised due to the defeat of the Italians in the famous African resistance against European colonialism, the Battle of Adwa of 1896.⁴¹ However, the Italian influence on Eritrea remained intact for the next 50 years until 1941, when Italy was defeated at the beginning of World War II and by which reason it was driven out from the country by the British. A very important point in this debate is that, during the Italian colonial era, the Eritrean Orthodox Church also fell out of favour with the Italian colonial state machinery, mostly because of the fact that the Italians were chiefly Catholic.

On the other hand, during the pre- and post-Italian era, the Eritrean Catholic Church never enjoyed the kind of close contact its Orthodox counterpart enjoyed with old state structures in Eritrea, except for its brief empowerment by the Italian colonial state. Nonetheless, throughout the Italian colonial era and after it, the Eritrean Catholic Church grew considerably in the number of its followers. One major factor in the growth of the Catholic Church was the conversion to Catholicism, which 'facilitated new social and political opportunities for Eritreans, including education, health services and job opportunities in the colonial administration'.⁴² Even today, the Eritrean Catholic Church is credited for its social services, which include the establishment of orphanages, clinics and schools throughout the country. Perhaps two of the most important contributions of the Catholic Church to date, in addition to its primary mission of spiritual guidance, have been the establishment of the first and only university in the country, the University of Asmara, as well as the country's first press service and newspaper.⁴³

There is a third important segment of Eritrean Christianity. The history of this version of Christianity dates back to the introduction of Evangelism in 1863 by the Swedish Evangelical Mission (SEM).⁴⁴ According to Hepner, this segment of Eritrean Christianity vied 'with Catholics for converts among the Orthodox, and to a lesser extent, Muslims'. Hepner further notes that the movement 'was expelled by Italian colonial authorities in 1935 but returned again in 1941 to create a successful Protestant movement'.⁴⁵ It gained popularity in the period starting from the last decade before Eritrea's independence up to the mid-1990s. Its expansion was further consolidated in the aftermath of the 1998-2000 border conflict with Ethiopia.⁴⁶ This

40 Dirar (n 32 above) 398.

41 R Pankhurst *The Ethiopians: A history* (2001) 190.

42 Dirar (n 32 above) 406.

43 Hepner (n 37 above) 272-284.

44 Hepner (n 37 above) 272.

45 Hepner (n 37 above) 272-289.

46 A Kifleyesus 'Cosmologies in collision: Pentecostal conversion and Christian cults in Asmara' (2006) 49 *African Studies Review* 76-79.

version of Christianity, which traces its origins to the SEM, never garnered official support to reach the level of official state religion. Rather, as will be seen later, followers of this 'new' religious movement have increasingly suffered state persecution in proportions which are exceedingly unacceptable by the standards of civilised states.

3.2 Islam and the state in Eritrea

Islam arrived in Eritrea at the same time that its founder, Prophet Mohammed, begun preaching the religion. The following long quotation from Dirar provides a very clear picture of the arrival of Islam in Eritrea:⁴⁷

[T]he very beginning of Islam is associated in the Islamic tradition with the history of the Abyssinian coasts of the Red Sea. It is significant that in this tradition, the birth of the Prophet Muhammad is traditionally dated to the year 570. This is known as the year of the Elephant because of an Abyssinian military expedition against Mecca led by King Abreha, which included battalions with elephants and ended with the defeat of the invader due to a sudden outbreak of smallpox. Later, following the inception of persecution against the then small community of Muslim believers in Mecca, a group which included one of the daughters of the Prophet was sent to the Abyssinian shores of the Red Sea seeking asylum.

Resonating with the above observation, Abbink states that⁴⁸

the escapees were advised by [Prophet] Muhammad himself to seek refuge across the sea, in the empire of Aksum, where a '... righteous king would give them protection.'

He further discusses Islam as a religion which, from the very beginning, has been a trans-continental religion in that it arrived in the African Red Sea Coast from the Arabian heartland where it emerged. He goes on to note that 'the first converts to the new religion – outside the close circle of the Prophet Muhammad – are assumed to have been Ethiopians'.⁴⁹ However, since there was no place called 'Ethiopia' at that time, Abbink was definitely referring to the old ancient Abyssinian empire, known as the Kingdom of Aksum, which consisted mainly of the northern part of Ethiopia and some parts of present-day Eritrea. Since Islam entered the continent via the Red Sea, through what is today's Eritrea, Eritrea was plausibly the first African country to welcome the religion in its incipient years. The time when the first escapees from Mecca arrived in Aksum is known as the first *Hijra* or migration and it is believed to have taken in the year 615 CE.⁵⁰

47 Dirar (n 32 above) 393. Dirar cites the following sources in support of his narration: SH Selasse *Ancient and medieval Ethiopian history* (1972); JS Trimmingham *Islam in Ethiopia* (1952).

48 Abbink (n 31 above) 111.

49 As above.

50 As above.

Thus, Islam, like Christianity, also has a very long history in Eritrea. In spite of this long history, it never attained the level of support that Christianity enjoyed from state structures, particularly in the era of Abyssinian monarchs. While this observation may hold true for the highlands of Eritrea, which remain predominantly Christian, in the lowlands Islam has always been a dominant religion, regulating every aspect of life, even in the absence of a centralised state or other political institutions. There is, however, one important stage in the spread of Islam in Eritrea and Ethiopia that is vital for our understanding of some aspects of the relationship between Islam and Christianity. This is the campaign launched by Ahmed Ibrahim known as Gagn (left-handed) in the sixteenth century, a campaign which has been characterised as a full scale *jihad* and was accompanied by widespread havoc and destruction of a great number of centres of Abyssinian Orthodox civilisation. With a stated aim of rooting out Christianity, this campaign had far-reaching ramifications which shaped Christian perceptions of Islam in the region.⁵¹

In spite of rare instances of religious conflict, the status of the Abyssinian Orthodox Church has always been elevated, and its cultural and political dominance has created a sense of subjugation on the part of Islamic communities, particularly in those areas of Eritrea where the Orthodox Church has a strong presence today. The impact of this sentiment was particularly visible during the era of the liberation struggle and the immediately preceding years. At this time, the Ethiopian Orthodox Church was regarded as a helper in the legitimisation of Ethiopian rule in Eritrea. The church's role in the political developments of the time was controversial. For example, when the Ethiopian propaganda machinery denounced the Eritrean liberation struggle in the early years of its inception as an 'Islamic separatist' movement, the denunciation strengthened the feeling on the part of Eritrean Muslims that the Orthodox Church was indeed an instrument of the state.⁵² Given the outright support of the Orthodox Church for the unionist movement, this sentiment was justified.

A common feature of the two religions is their long history in Eritrea, dating back to antiquity. In light of this history, both religions have become constitutive elements of Eritrean local identity, functioning 'both as a basic instrument of social cohesion and as a source of legitimacy for political authority'.⁵³ Another striking element of the relationship between Christianity and Islam is that, while Islam is a religion practised by all Eritrean ethnic groups, such is not the case with Christianity. For example, the Afar and Rashaida ethnic groups

51 Abbink (n 31 above) 114; Dirar (n 32 above) 393 (citing G Talhami *Suakim and Massawa under Egyptian rule* (1979)).

52 Hepner (n 34 above) 272.

53 Dirar (n 32 above) 393.

are entirely Muslim societies, with no traces of Christianity within their communities.⁵⁴

4 State-religion relationship in Eritrea: Post-independence era

In the post-independence era there has never been an officially-prescribed state religion in Eritrea. By law, state and religion are separate in Eritrea, as is clearly stipulated in Proclamation 73/1995, known as the Proclamation to Provide for the Activities of Religions and Religious Institutions (Religious Proclamation), promulgated on 15 July 1995. This is the most relevant law in Eritrea as far religious matters are concerned.

The Religious Proclamation starts by recognising the right to freedom of belief and conscience, which the Preamble describes as one of the main justifications for the promulgation of the law.⁵⁵ The right to freedom of belief and conscience is also one of the fundamental rights recognised by the 1997 Constitution of Eritrea (article 19). However, the Eritrean Constitution remains 'unimplemented' since its ratification in 1997, and this has made the country the only one in the world without a working constitution.

In the second sentence of the Preamble, which is another underlying principle of the Religious Proclamation, the law provides that the state and religion should exist separately.⁵⁶ This principle is repeated in article 1(1) of the Religious Proclamation which reads as follows:⁵⁷

In Eritrea, the state as a political system, and religion and religious institutions as a spiritual system should exist separately; the state shall not interfere in religious affairs and religion and religious institutions shall not interfere in political affairs.

On paper, the principle of separation of the state and religion appears very interesting, but in practice this principle has become a victim of the government's pervasive disregard of the rule of law, as is the case in many other issues of governance and human rights. While the

54 However, it should be noted that if the claim of the Jeberti community (which is currently regarded as a sub-group of Tigrinya) for recognition as a separate ethnic group succeeds, the Tigrinya ethnic group will become an entirely Christian community.

55 The first preambular sentence of the *Religious Proclamation*, which is promulgated only in Tigrinya, reads as follows: 'ናይ ነፍሲ-ወከፍ ኤርትራዊ ዜጋ ናይ ሕልናን ሃይማኖትን ነጻነት ብሕጊ ዝተረጋገጸን ስሩት መሰል ምዃኑ ብምግንዛብ፡፡' The English equivalent would be: 'Recognising that the right to freedom of belief and conscience of every Eritrean is a right guaranteed by law.'

56 The original Tigrinya wording reads as follows: 'መንግስቲ ከም ፖለቲካዊ ስርዓት ሃይማኖት ከኣ ከም መንፈሳዊ ስርዓት ክልቲኦም ዝተፈላለዩ ምዃኖም ብምርዳእ ... እዚ ዝስዕብ ኣዋጅ ተኣዊጹ ኣሎ፡፡'

57 The original Tigrinya wording reads as follows: 'ኣብ ኤርትራ መንግስቲ ከም ፖለቲካዊ ስርዓት፡ ሃይማኖትን ሃይማኖታዊ ትካላትን ከኣ ከም መንፈሳዊ ትካላት፡ ነንበይኖም ስለዝኾኑ፡ መንግስቲ ኣብ ሃይማኖታዊ ጉዳያት፡ ሃይማኖትን ሃይማኖታዊ ትካላትን ድማ ኣብ ፖለቲካዊ ጉዳያት ኣይኣትዉን፡፡'

preclusion of religious institutions from political matters can be seen by some as controversial, it would have been more than enough if the government respected its own self-restraint provisions, which proscribed it from interfering in religious affairs. Conversely, the Eritrean government now interferes in religious affairs beyond what can be described as a desirable instance of intervention, thereby making Eritrea one of the worst places in the world in terms of religious freedom. In the US Department of State's annual report on religious freedom and other periodic reports on this topic, Eritrea is normally mentioned at the top of the list of violators of religious rights.⁵⁸ In many other international surveys measuring the protection of fundamental rights, Eritrea competes for last place with such notorious countries as North Korea and Turkmenistan.⁵⁹

Excessive government interference has affected all Eritrea's religions. Nonetheless, there is a very clear pattern of intensification of unwarranted interference, and this is related to the momentous growth of Pentecostalism in the aftermath of the 1998-2000 border war with Ethiopia. As noted by Mekonnen and Van Reisen, this period has seen a revival of Pentecostalism in Eritrea that was intolerable to the government for a number of reasons.⁶⁰

Hepner traces the anti-religion tendency of the government through historical records to the 1977 National Democratic Programme of the Eritrean People's Liberation Front, who formed the current Eritrean government. Article 7D of the National Democratic Programme explicitly committed the Front to fight 'all the imperialist-created new counter-revolutionary faiths, such as Jehovah's Witnesses, Pentecostal, Baha'i, etc'. While Hepner notes that the government remedied its archaic position on religion in its 1987 congress, the recent repression of religious freedom signals a relapse to the old position.⁶¹ This time, it has manifested itself in the worst form of religious persecution the world has seen in recent history. This takes us to the next section, which discusses some prominent case studies of religious persecution that we believe are the outcome of excessive state interference in religious affairs.

58 US Department of State *International Religious Freedom Report* 2011 on Eritrea, <http://www.cfr.org/human-rights/international-religious-freedom-report-2011/p25853> (accessed 22 March 2012).

59 D Connell 'Notes from a speech given at a CIDRIE Symposium in London on 12 May 2012' http://www.cdrie.net/index.php?option=com_content&view=article&id=274:eritrea-2012&catid=34:english-articles&Itemid=53 (accessed 31 January 2014).

60 See, generally, DR Mekonnen & M van Reisen 'Religious persecution in Eritrea and the role of the European Union in tackling the challenge' in N Reilly & SS Furlong (eds) *Religion, gender and the public sphere* (2013).

61 Hepner (n 34 above) 291.

5 Excessive state interference as a major cause of religious persecution⁶²

As we noted in previous sections, for the largest part of its history, Eritrea has been identified as a symbolic place for religious tolerance and the acceptance of all religious paths as equally valid. Generally speaking, the relationship between Eritrean religious communities has predominantly been one of accommodation and compromise, not of antagonism and strife. To a certain extent, this also holds true about the relationship of the state and religion. This was the main foundation for a long history of coexistence of the country's major religions, except for rare instances of religion-induced conflicts. In recent history, the only such major instance was the Eritrean Civil War of the 1970s and 1980s, which is sometimes discussed as a conflict involving religious animosity, even though there has never been consensus on its real and underlying causes.

In the post-independence era, the country saw a brief respite between 1991 and 1998 when fundamental rights and freedoms, such as freedom of religion and worship, were in part respected. This does not mean, however, that there were no instances of religious persecution during this time. The crisis of religious persecution reached disproportionate levels after 2002, when the government ordered the closure of all but the following religious groups: Islam, of the Sunni rite; the Eritrean Orthodox Tewahdo Church, part of the worldwide Coptic Orthodox Church of the eastern rite; the Eritrean Catholic Church, part of the worldwide Roman Catholic movement; and the Eritrean Evangelical Church, part of the Lutheran World Federation.⁶³ According to the 2002 order, several religious institutions and groups, including those which had been active for many years, were arbitrarily ordered to close. Many of these religious groups are now condemned to practise their religion clandestinely at the risk of severe penalty if caught. However, as a matter of historical categorisation, the Jehovah's Witnesses are the first victims of religious persecution in the post-independence era.

5.1 Jehovah's Witnesses: The first victims of religious persecution

The earliest case of religious persecution since 1991 is that of Jehovah's Witnesses. The incident dates back to 1993, when Jehovah's Witnesses refused to vote in the referendum for national independence and to participate in the National Military Service Programme (NMSP) on religious grounds. The 'punishment' for this was harsh. By an executive order issued by the State President on 25 October 1994, Jehovah's Witnesses were prohibited from

⁶² The case studies discussed in this section rely heavily on Mekonnen & Van Reisen (n 60 above).

⁶³ Amnesty International *Eritrea: Religious persecution* AI Index: AFR 64/013/2005 1.

employment in the public sector, refused permission to engage in any commercial enterprise, and deprived of the right to obtain relevant documentation such as national and identity papers. The executive order was not only morally abhorrent, but also legally repugnant. As far as the refusal to vote in the national referendum is concerned, there is no clearly-defined Eritrean law upon which the punishment can be based. However, the law which introduced the NMSP has set clearly-defined punitive provisions for those who refuse to comply with the requirements of the NMSP. The punishment is two years' imprisonment, a fine of Nakfa 3 000, or both,⁶⁴ without prejudice to graver penalties that may be imposed by the Transitional Penal Code of Eritrea. None of the punitive prescriptions in the executive order is based on law.

Amnesty International reports that several Jehovah's Witnesses have been subjected to arbitrary detention by executive decree. Some 250 families have fled the country and sought asylum elsewhere, 100 families have been dismissed from government employment, and at least 36 families have been evicted from their homes.⁶⁵ An important point in the case of the Jehovah's Witnesses is that they did not reject non-military alternatives to the requirements of the NMSP. According to Amnesty International, the NMSP does not recognise international standards and best practices on the right of conscientious objection to military service, especially when based on one's religious, moral or ethical conviction. The law also does not offer alternatives for those who refuse to do military training on the basis of their beliefs. This, by itself, is a flagrant violation of international standards and best practices.

5.2 Persecution of Eritrean Muslims

Eritrean Muslims also suffered persecution in the early years of independence. Some instances are difficult to classify as examples of religious persecution, because they involve other persecutory factors, such as perceived allegiance of the victims to armed opposition groups operating from neighbouring countries. One example in this regard is an incident reported by Amnesty International as having taken place on 5 December 1994. Government forces arrested hundreds of young Muslim teachers who were reportedly extrajudicially executed in May 1997.⁶⁶ There is a stark similarity between the report of Amnesty International and what some writers call the 'Dirfo Massacre', an incident that allegedly took place in June 1997. As reported by the Awate team, the incident involved the extrajudicial execution of some 150 Eritrean Muslims by Eritrean security forces operating under orders given by the chief of National Security,

64 Arts 20 & 37 of Proclamations 11/1991 and 82/1995, respectively.

65 Amnesty International (n 63 above) 7.

66 Amnesty International (n 63 above) 14-15.

Brigadier General Abraha Kassa, and the State President.⁶⁷ The Dirfo Massacre can be described as one of the most shocking mass killings in post-independence Eritrea.⁶⁸

Another example of religious persecution against Eritrean Muslims took place in September 2004. The incident involved the arrest of a dozen Muslim students belonging to a new Islamic religious group, known as Wahhabism. Amnesty International recognises the believers as victims of 'incommunicado' detention because their whereabouts have remained unknown.⁶⁹ Compared to the persecution of Christian minority groups, the persecution of Wahhabis or other Islamic groups remains a hitherto under-researched area. Academic discourse on this particular topic is also quite scarce.

5.3 Persecution of the Pentecostal movement

The most publicised aspect of religious persecution in Eritrea, seen in relation to other instances of persecutions, is that of minority Christian groups. These groups are interchangeably referred to as Evangelical or Protestant Pentecostals. On this point, there is limited academic literature, but Kifleyesus traces the earliest introduction of Pentecostalism to Eritrea to the second half of the nineteenth century.⁷⁰ The movement gained enormous momentum in the aftermath of the 1998-2000 Eritrea-Ethiopia border conflict. As a resident of Asmara from 1991 to 2001, one of the current authors (Mekonnen) remembers how the movement was growing noticeably in the capital city during and after the border conflict with Ethiopia. Kifleyesus observes that, in different historical contexts, Pentecostalism proved to be responsive to the predicament of Eritreans and owes its increasing influence to this particular feature. In understanding the hostility of the Eritrean government towards Pentecostals, it is important to comprehend how the growth of this movement is perceived by non-Pentecostals. Kifleyesus offers an insightful perspective in this regard.

A characteristic feature of the new Pentecostal movement is the repudiation of traditional hierarchies and sources of authority. Kifleyesus notes that, compared to traditional Christian establishments, the new Pentecostal movement has provided young Eritreans with spiritual and material networks extending beyond ethnic and class considerations.⁷¹ The Pentecostal movement's lively, convivial, fraternal, spirit-filled and empowering worship and prayer sessions have also 'revitalised and to some extent revolutionised

67 A Team 'The "executed": No smoking gun, but plenty of circumstantial evidence' <http://www.awate.com/cgi-bin/artman/exec/view.cgi/11/1090> (accessed 13 March 2003).

68 Mekonnen & Van Reisen (n 60 above) 110.

69 Amnesty International (n 66 above) 15.

70 Kifleyesus (n 46 above) 77-79.

71 Kifleyesus (n 46 above) 76.

Christianity' in Eritrea. In addition to bringing about radical cultural transformation, conversion to Pentecostalism makes 'born-again persons more industrious and more socially mobile than many of their [counterparts]'. Kifleyesus in particular notes that 'the Pentecostal movement in [Eritrea] is made up of young educated men and women, secondary school students and teachers, university students and professors, and health-care professionals', who constitute the most politically-conscious part of Eritrea's working and middle classes.⁷²

Two aspects of the Pentecostal movement are apparently in contradiction to the established political culture of the Eritrean government. These are (1) the fact that conversion to Pentecostalism takes place in the context of a conscious break with traditional practices, and (2) the fact that the movement attracts a growing number of Eritrea's middle class. From the viewpoint of the political elite, a conscious break from the *status quo* is seen as a serious threat to its continued political hegemony. Although Kifleyesus did not put it this way, the tendency 'to break away from past practices' is interpreted by the Eritrean government as breeding dissent and spreading discontent within the larger Eritrean society and hence considered incompatible with the political ideology of the ruling elite. The fact that this tendency has enjoyed wider acceptance among Eritrea's middle class makes the threat, from the government's point of view, more imminent. However, Kifleyesus correctly notes that the growing attraction of Pentecostalism among Eritrea's middle class was resented by the traditional Eritrean Christian churches.⁷³

What Kifleyesus misses is that the resentment is also deeply felt by the Eritrean government, by reason of which the government has adopted a very hostile policy towards Pentecostalism. True to its Marxist-Leninist background, the government's ambivalence to religion dates back to its liberation struggle era. The Marxist-Leninist tendency is derived, among other things, from the formal one-year training given to senior liberation struggle leaders by the Chinese Communist Party in the 1960s.⁷⁴ This Marxist-Leninist tendency is evident, for example, in the statement of an army commander in connection with punishment meted out against a member of a Pentecostal movement:⁷⁵

Like in North Korea, this type of religion should never be allowed to spread in our country because this is a religion of the CIA and accordingly no one should be allowed to read and preach the Bible.

The story underscores the fact that religious persecution is perpetrated as a premeditated government policy focusing on certain categories of people.

72 Kifleyesus (n 46 above) 79-84.

73 Kifleyesus (n 46 above) 87.

74 Mekonnen & Van Reisen (n 60 above) 98.

75 EriWengel.com (n 63 above).

5.4 Intensity of violations

According to rights groups, there are currently thousands of Eritreans who are kept in detention without trial simply because they belong to religious groups which are not officially sanctioned by the government. For example, between 2003 and 2005, at least 26 pastors and priests, and over 1 750 church members, including children and 175 women, and some dozens of Muslims, were detained because of their religious beliefs. During this period of time, Amnesty International documented 45 separate incidents of religious persecution involving at least the closure of 36 churches. In August 2005, in an unprecedented violation in the history of the Eritrean Orthodox Tewahdo Church and in contravention of canonical laws, the government dismissed the highest spiritual leader of the church, Patriarch Abune Antonios. A new patriarch was arbitrarily appointed on 27 May 2007.⁷⁶

While a number of reports have described numerous barbaric treatments of Pentecostals, the following examples can be cited as most representative. In 2007, the BBC reported what can be cited as one of the most authoritative accounts on religious persecution. Interviewed by the BBC, Paulos said he was tied up by security agents for about 136 hours in the notorious torture method known as 'helicopter'. As is done with many other victims of religious persecution, Paulos was asked to sign a document in which he was required to recant his belief and agree to not participate in church activities or express his faith in any form.⁷⁷ Another example is that of Nigisti Haile, who was allegedly tortured to death on 5 September 2007 after she refused 'to renounce her faith in Jesus Christ' by signing a letter to that effect.⁷⁸ Similar violations are reported by other rights groups, such as Release Eritrea and the US Department of State.⁷⁹

6 Conclusion

Eritrea is a major part of the ancient civilisation of the Axumite Kingdom, during which time Christianity and Islam were introduced to the African continent from their birth place, namely the Arabian subcontinent. Historical records indicate that due to its geographic proximity to the Arabian subcontinent, Eritrea is actually the first entry

⁷⁶ Amnesty International (n 66 above) 1 10.

⁷⁷ BBC News 'Eritrean Christians tell of torture' <http://news.bbc.co.uk/2/hi/7015033.stm> (accessed 27 September 2007).

⁷⁸ *The Christian Post* 'Young woman killed in Eritrea for refusing to renounce Jesus Christ' <http://www.christianpost.com/news/young-woman-killed-in-eritrea-for-refusing-to-renounce-jesus-christ-29233/> (accessed 8 September 2007).

⁷⁹ Release Eritrea 'The testimony of Helen Berhane' <http://cs.asmarino.com/index.php?blogid=15&archive=2007-12> (accessed 8 December 2007); US Department of State *International Religious Freedom Report 2006 on Eritrea*.

point of Christianity and Islam to Africa. Since time immemorial, save rare instances of violent conflicts instigated by religion, Christianity and Islam have coexisted in Eritrea for many centuries, making the country an island of religious tolerance. Eritrea is also home to indigenous African beliefs which are practised by a small minority of the Eritrean people, such as the Kunama ethnic group.

In spite of its long history of religious tolerance, Eritrea has now become one of the worst places in the world for religious freedom. The history of post-independence religious persecution in Eritrea is comparable with only a few instances in the world and none on the African continent. The practice started with the persecution of the Jehovah's Witnesses in the early 1990s. It then went on to affect some segments of Eritrean Muslims, finally affecting disproportionately the new Pentecostal movement in Eritrea. The persecutory practices of the government do not spare the biggest and dominant Christian denomination in the country, the Orthodox Church. With the unlawful dismissal of the highest spiritual leader of the church, the Orthodox Church and several of its followers have also become victims of the government's anti-religion practice. The overall human rights crisis in Eritrea, including the religious persecution in Eritrea, has reached alarming levels, resulting in Eritrea being described as a *dirigiste* state, a militaristic garrison state, a battalion state, and the North Korea of Africa, and so forth.

Eritrea needs urgently to change direction politically. It is in dire need of a political transition, be it in the form of a revolution or negotiation, in order to facilitate the establishment of a democratic constitutional order at the earliest opportunity. Only then can the challenges of religious persecution, which are part of Eritrea's overall human rights crisis, be addressed in a way that ensures the protection of fundamental rights and freedoms for all.

Freedom of belief for minorities in states with a dominant religion: Anomaly and pragmatism

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Summary

This article provides a European perspective on church and state that may be instructive in understanding current developments in Africa. In particular, the article explores the fragile inter-dependency of minority and majority religions within national systems. It examines various ways of defining dominant and minority religions and various paradigms of church-state relations. The article provides a comparative case study of the English religious establishment model for understanding these concepts and argues for both the inclusion of religion in public discourse and the protection of religious minorities in the ongoing development of law and religion in Africa.

1 Introduction: Church and state in Europe and Africa

Scholarly interest in matters of freedom of religion has grown exponentially in recent years. The European Consortium for Church and State Research¹ has existed for a quarter of a century, and the International Consortium for Law and Religion Studies² held its inaugural conference in Milan in 2009, reconvening some two years later in Santiago, Chile, and thereafter in Virginia, United States of America in 2013. South America has the *Consortio Latinoamericano de Libertad Religiosa*, a forum within which experts in law and religion can meet to exchange research.³ The convening of a conference in

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1 See its website <http://www.churchstate.eu/> (accessed 31 January 2014).

2 See its website: <http://www.iclars.org/> (accessed 31 January 2014).

3 See its website: <http://www.libertadreligiosa.net/> (accessed 31 January 2014).

Ghana to address law and religion in Africa was an ambitious project, but the aspiration was realised with enthusiasm and efficiency.⁴ In addition to the logistical difficulties involved in bringing together so many experts from such a vast and varied continent, it posed conceptual challenges for participants from the northern hemisphere having to re-imagine embedded paradigms and loosen their adherence to accepted principles and practices, which had been reinforced by teaching and experience over generations.

Amongst a varied collection of contributions from leading scholars of law and religion in Africa, this article is somewhat unusual. Its author was the sole European participant⁵ in the Ghana conference: a privilege but also a demanding responsibility. I sought to bring to the gathering my expertise in law and religion within the United Kingdom as a scholar, litigator and judge, but with an open-mindedness to learn from the experience and practices of a vibrant continent, shaped by its history – including the legacy of colonialism – but energised by its own culture, values and self-understanding. My presentation comprised a series of questions designed to promote a critical exploration of the fragile inter-dependency of minority and majority religions within national systems. Taking as a case study the historic tradition in England where religious pluralism flourishes despite (or because of) an established state church, this article ventures some reflections as to how the seeming anomaly of a favoured or privileged national church, properly understood, can be an instrument for protecting the rights of minority churches and promoting their support and nurturing.

2 Defining ‘dominant’ and ‘minority’ religions

Defining terms is essential in any study such as this; interest groups are prone to deploy terminology in different ways to reinforce their own positions. Is dominance based in numerical prevalence or political influence? Is twenty-first century dominance based upon historic cultural factors which may have outlived their current relevance and objective justification? Is the dominance of one religion purely ‘self-serving’ or can it benefit all religions by, for example, emphasising the importance of the spiritual in public life and political discourse?

Equally, what constitutes a ‘minority religion’? Is this measured in terms of membership, status, longevity or *de facto* influence? Does the concept of registration serve to facilitate or frustrate freedom of

4 Congratulations are due to Prof Kofi Quashigah, Dean of the Faculty of Law, Ghana University, and to the entire organising committee and institutional sponsors for their efforts in bringing the conference to fruition and establishing a forum for continuing academic discussion throughout Africa.

5 I was subsequently appointed Extraordinary Professor in the Department of Church Polity within the Faculty of Theology at the University of Pretoria.

religion? How does the social dimension of collective religion relate to conscience and belief as an aspect of the dignity of the person?

According to a definition offered in 1977 by Francesco Capotorti, Special Rapporteur of the United Nations (UN) Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is a group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.⁶ It follows that all states will have within their territory multiple sets of self-defining minorities.

3 Varying models of church-state relations

The autonomy of churches and faith communities in any legal system is achieved *actively*, through the express grant and preservation of rights of self-determination, self-governance and self-regulation; and *passively*, through non-interference on the part of organs of state, such as national government, local or regional government or the secular courts. In the United Kingdom, for example, there is no systematic provision made for the autonomy of churches, but the twin principles of non-interference and neutrality are evident from both general and particular laws, and from the judgments of courts and tribunals.

However, models of church and state are infinitely variable and range from strict separation in the USA to theocratic government, as seen in Iran or Afghanistan.⁷ Within Europe, there is no uniform constitutional construct which dictates the relationship between the state and religious organisations. Three broad types can be identified.⁸

3.1 State church or predominant religion

In this model, there are strong links between the state and one particular dominant religious community. Examples include England, Denmark, Greece, Malta and Finland.

⁶ E/CN.4/Sub.2/384/Rev 1 para 568.

⁷ Shari'a is said to be the official basis for state laws in the following countries: Yemen, Afghanistan, Somalia, Sudan, Saudi Arabia, Mauritania, Oman and Iran, and operates in certain regions in Nigeria.

⁸ For the fullest, and most recent, study of the differing models of church and state in the European Union, see N Doe *Law and religion in Europe: A comparative introduction* (2011), whose empirical findings suggest that common to all systems is a degree of co-operation.

3.2 Strict separation

Here the system is founded upon a strict separation between state and religions, broadly in line with the United States model. Examples include France, the Netherlands and Ireland.

3.3 Co-operation

This type features the basic separation of church and state whilst recognising a multitude of common tasks in the fulfilment of which there is active collaboration. Examples include Belgium, Poland, Spain, Italy, Hungary, the Baltic States and Portugal. In some there are high level concordats or covenants between organs of government and the church hierarchy.

The largest religion in Europe is Christianity, with 76,2 per cent of Europeans considering themselves Christians, including Catholic, Eastern Orthodox and Protestant Churches. Following these is Islam, concentrated mainly in the south-east (Bosnia and Herzegovina, Albania, Kosovo, Kazakhstan, North Cyprus, Turkey and Azerbaijan). Other religions, including Judaism, Hinduism and Buddhism, are minority religions (though Tibetan Buddhism is the majority religion of Russia's Republic of Kalmykia). Europe has become a relatively secular continent, with an increasing number and proportion of irreligious, atheist and agnostic people, actually the largest in the Western world. There are a particularly high number of self-described non-religious people in the Czech Republic, Estonia, Sweden, Germany (East) and France.

The diversity of the civil ecclesiastical law systems in the European Union (EU) mirrors the range and variety of national cultures and identities. The relatively recent addition of former communist countries has enriched this diversity and brought into sharper focus state interference in and against religion, the role of religion in the transition process and questions of restitution of property. Civil ecclesiastical law remains rooted in Christianity, but with contributions from Islam and Judaism. There is an increasing number of small religious communities, often linked to larger communities in other parts of the world (the 'diaspora').

Religion is acknowledged as an important element of social life; and one to be fostered and encouraged by the state. Equally, there is a general tendency towards acknowledging the right of self-determination of religious communities. Initially, the guiding principle behind the EU was economic unification,⁹ a process now very far advanced. As this has become consolidated, the reach of the European institutions has progressively extended to embrace the cultural life of member states, through education, labour law, social and welfare concerns, and it now engages with churches and religious

9 Originally styled the European Economic Community, its title subsequently changed to the European Union, reflecting its broader purpose.

organisations.¹⁰ However, the principle of subsidiarity requires a general reticence on the part of the EU itself with regard to questions of the law on religion, where national governments enjoy legislative competence under a wide margin of appreciation.¹¹

4 England: A case study

In many ways, the United Kingdom demonstrates in microcosm the various models of church and state visible throughout the EU. Within the UK, there are various models of church and state: Some churches are established, others are disestablished, while yet others are non-established. Some are 'national', some regional, and some multi-national. There are many myths and misunderstandings about the nature of establishment. The United Kingdom has not one, but two established churches. The (Anglican) Church of England is the established church in England. The (Presbyterian) Church of Scotland (or 'the Kirk') is the established church in Scotland.¹² The Church of England was disestablished in Wales in 1919.¹³

The meaning, effect and future of the establishment of the Church of England is a complex matter of history, ecclesiology, sociology and politics.¹⁴ Historically, the Church of England has discharged an important and influential role in the life of the country and enjoyed special links with central government. But the Church of England as a whole has no legal status or personality: 'The relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the powers or functions of government.'¹⁵

The Church of England and the state are frequently said to have a symbiotic relationship: the Church being the state in its spiritual aspect. The grandeur of establishment may be both mythical and illusory; the grass roots civic religion is real and vibrant. The census in

10 See A Pimor 'A collection of states or a state of mind? The religious and spiritual dimension of European citizenship' in N Doe & R Sandberg *Law and religion: New horizons* (2010) 191-217.

11 For a nuanced forensic critique, see R McCrea *Religion and the public order of the European Union* (2010). Note, by way of example, *Dahlab v Switzerland* App 42393/98, 15 February 2001: 'It is not possible to discern throughout Europe a uniform conception of the significance of religion in society and the meaning or impact of the public expression of a religious belief will differ according to time and context. Rules in this sphere will consequently vary from one country to another according to national traditions.'

12 The Queen is the 'Supreme Governor' of the Church of England. However, the Anglican Church in Scotland (the Scottish Episcopal Church) is not established nor is the monarch its head. North of the border, Her Majesty is a member of the Presbyterian Church of Scotland.

13 See generally M Hill 'Church autonomy in the United Kingdom' in G Robbers (ed) *Church autonomy: A comparative study* (2001) 267-283.

14 For an instructive overview, see RM Morris (ed) *Church and state in twenty-first century Britain: The future of church establishment* (2009).

15 *Aston Cantlow & Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 para 61 *per* Lord Hope of Craighead.

the United Kingdom conducted in 2011 contained, for the second time, an optional question on religious affiliation. It revealed that 59 per cent of the population declared themselves to be Christian.¹⁶

However, it is vitally important that liberal democracies in the twentieth century do not lose sight of the presence of the spiritual in society. That the government interacts with the Church of England at its highest level reflects the weight to be given to matters of faith and belief in society at large.¹⁷ It is noticeable that the voices in favour of Church of England bishops remaining in the House of Lords are to be found in the Catholic, Muslim and Jewish communities.

Religious bodies of all denominations can make a useful contribution to law making. The constitutional presence of Church of England bishops in the House of Lords and the customary inclusion of members of other faith communities give credibility to spiritual concerns. Empirical research suggests that many bishops regard themselves as representing religion.¹⁸ Moreover, members of minority religious groups tend to welcome the Bishop's presence in the House of Lords. Establishment means that political figures and officials become familiar with consulting faith groups and recognise the existence of religion in the public sphere.

The English courts, by convention, adopt a self-denying ordinance whereby they decline to enter into doctrinal disputes or matters concerning the organisation or operation of faith communities.¹⁹ Indeed, the courts have shown a marked reluctance to interfere with the internal management and administration of churches.²⁰ Lord Justice Hoffman, in giving judgment in *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan*, remarked:²¹

The attitude of the English legislator to [horse] racing is much more akin to his attitude to religion ... it is something to be encouraged but not the business of government.

16 In the previous census conducted in 2001, 3% were Muslim, with Hindu, Sikh, Jewish and Buddhist declarants amounting to fewer than 1% each. There were 16% who declared themselves to be of no religion and for 7% none was stated. Of those declaring themselves to be Christian, there were 1.3 million for the Church of England; 1 million Catholics; 300 000 Methodists; 200 000 Pentecostal; 200 000 Orthodox; 180 000 Mormons; 150 000 Baptist; and 125 000 Jehovah's Witnesses.

17 For a broader discussion and reflection in a European context, see M Hill 'Voices in the wilderness: The established Church of England and the European Union' in L Lustean & J Madeley *Religion, politics and law in the European Union* (2010).

18 A Harlow *et al* 'Bishops in the House of Lords: A critical analysis' (2008) *Public Law* 490.

19 See M Hill 'Judicial approaches to religious disputes' in R O'Dair & A Lewis (eds) *Law and religion* (2001), an approach adopted by Mr Justice Gray in *Blake v Associated Newspapers Limited*, 31 July 2003 (unreported) and subsequently by the Court of Appeal in *Khaira v Shergill* [2012] EWCA Civ 893.

20 For a general discussion, see D McClean 'State and church in the United Kingdom' in G Robbers (ed) *State and church in the European Union* (1996) 307.

21 [1993] 1 WLR 909.

Because the Church of England has an existence quite separate and distinguishable from that of the state, it is able to be outspoken in its criticism of government policy. Lord Williams of Oystermouth, formerly Archbishop of Canterbury, condemned the illegal act of aggression on the part of President Bush in launching a war on Iraq, and the complicity of Prime Minister Blair in supporting him. Likewise, his successor, Justin Welby, has been critical of the banking industry and its flawed regulation.

There is nothing inherently wrong or offensive in states entering into special relationships with majority religions, provided discriminatory consequences are avoided. This has been recognised by the European Court of Human Rights.²² Successive waves of European Directives have embedded strong anti-discrimination provisions into national legislation, which has the effect of strengthening the protection afforded to minorities by ensuring that it is equal to that given to the majority of favoured group.²³ Equal treatment does not mean identical treatment. Majority churches (whether established or not) carry a heavy social duty, which is responsibly discharged in various states of Northern Europe. This includes the promotion of all religions and belief systems, an essential instrument of ecumenism. It also embraces social and humanitarian action in the fields of education, medical treatment and care of the young, the elderly and the infirm. The responsibility is founded upon trust and becomes workable as a result of the confidence engendered by the prolonged security of safeguarding fundamental freedoms. It is a delicate but effective means of promoting tolerance and religious freedom. The state also carries an obligation. It cannot favour one religion or denomination over others, nor must it work too adroitly to separate church and state with an artificial rigidity. Instead, it must value all equally.

For example, British legislation provides that an exemption from local tax liabilities is provided for certain places of worship.²⁴ A temple belonging to the Church of Jesus Christ of Latter-Day Saints is open only to Mormons of good standing. This has been held by the UK domestic courts not to be a place of *public* worship, and therefore not entitled to the exemption. An appeal is pending to the European Court of Human Rights alleging religious discrimination, and the judgment is awaited.²⁵

22 *Darby v Sweden* (1991) 13 EHRR 774.

23 For a detailed comparative evaluation, see M Hill (ed) *Religion and discrimination law in the European Union* (2012).

24 Sec 117 Local Government Finance Act 1992; sec 51 sch 5 para 11 Local Government Finance Act 1988.

25 *Gallagher v Church of Jesus Christ of Latter-day Saints* [2008] UKHL 56, which is currently the subject of an appeal to the European Court of Human Rights in Strasbourg: *Church of Jesus Christ of Latter-day Saints v United Kingdom*, App 7552/09.

5 Religion and public discourse

There are a number of reasons why it is important for religious communities to be given a seat at the table of national life and legislature. First, it is a bastion against secularism, consistent with a global re-awakening of religiosity. In a typically English manner, the subtle placing of religion within public life, combined with the growth in pluralism, have helped in preventing secularism gaining a more dominant hold. A positive recognition of the spiritual element embraces agnosticism and humanism and is a constant reminder of the benefits which result from the recognition of a healthy mix of belief systems.

The existence of one or more established churches does not preclude the co-existence and thriving of other religions and denominations. On the contrary, a state which engages with one religion at the highest level of its governance may be more likely to be sympathetic to all religions, and to none. It is difficult to improve upon the statement made by Her Majesty Queen Elizabeth II, Supreme Governor of the Church of England, at a reception for faith communities during the course of the celebrations of the sixtieth anniversary of her accession:²⁶

We should remind ourselves of the significant position of the Church of England in our nation's life. The concept of our established Church is occasionally misunderstood and, I believe, commonly under-appreciated. Its role is not to defend Anglicanism to the exclusion of other religions. Instead, the Church has a duty to protect the free practice of all faiths in this country. It certainly provides an identity and spiritual dimension for its own many adherents. But also, gently and assuredly, the Church of England has created an environment for other faith communities and indeed people of no faith to live freely. Woven into the fabric of this country, the Church has helped to build a better society – more and more in active co-operation for the common good with those of other faiths.

6 Protection of religious minorities

Article 1 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities²⁷ provides that states 'shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities' and adopt appropriate legislative and other measures to achieve those ends. However, the Declaration is not prescriptive as to the means to be adopted, recognising – quite properly – the infinite variety of church-state relations as discussed above.

²⁶ From the speech of Her Majesty Queen Elizabeth II to a multi-faith reception convened at Lambeth Palace on 15 February 2012. The full text is at <http://www.royal.gov.uk/LatestNewsandDiary/Speechesandarticles/2012/TheQueensspechatLambethpalace15February2012.aspx> (accessed 15 June 2013).

²⁷ Adopted by General Assembly Resolution 47/135 of 18 December 1992.

What protection or support should a state give to minority religions? Some suggest that states with a majority religion afford special protection to religious minorities. The requirement for registration, however, can be seen as a two-edged sword: a means of providing support and benefits to those who choose to register or an instrument of control and supervision. There is a broad historic trajectory, discernible in the United Kingdom as well as in other European jurisdictions, which demonstrates a progression from religious persecution, through a mild level of toleration, through systematic accommodation, culminating in equality of treatment. One might wonder whether the next step in this progression will be the positive fostering of minority religions. This will raise further questions as to how the state achieves practical engagement with minority religions. Who has authority to speak for or represent a particular faith group or minority religions collectively? Ought minority religions collaborate together to achieve effective engagement with government? How far should the state foster and promote the interests of minority religions – is the time now ripe for positive discrimination (affirmative action)?

7 Conclusion: Toward African conceptions of law and religion

There is no single model of church-state relations. Freedom of religion is both an individual and a collective right; and the securing of that right is subject to an infinite number of variations. There is nothing objectionable in a state having a dominant religion which enjoys a special relationship. There may well be historic reasons for this, the unravelling of which could have major constitutional implications. There can be advantages for all religious organisations by having a concept of the spiritual overtly recognised within manifestations of the state at a relatively high level. The guiding principles are neutrality and non-interference. Favours a dominant religion violates neither the freedom of religion provision (article 9) nor the anti-discrimination provision (article 14) of the European Convention on Human Rights.

The challenge for comparative scholars of law and religion in Africa is to consider the extent to which European and North American notions of church-state relations have attained traction in African jurisprudence. But, more particularly, it is to recognise uniquely African conceptions of law and religion, not least the place for traditional religion, and provide a vocabulary and fresh paradigms from which global scholarship will benefit in generations to come, serving to encourage religious liberty and to promote minorities through active engagement with the majority. There is no 'one size fits all' solution. Together we live and learn.

Recent developments

Human rights developments in the African Union during 2012 and 2013

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Summary

Positive developments in 2012 and 2013 included an increased impetus by the African Commission to reach decisions on petitions submitted to it and measures, such as hearings, to promote the implementation of its decisions. Concerns include the lack of publication of numerous decisions on individual cases and the lack of referral of cases from the Commission to the African Court in 2013. Despite the lack of referrals, the African Court now has a substantial docket and can focus on judicial work rather than the promotional work it has been focusing on over the last few years. The African Union political bodies continue to provide inadequate support, in particular to ensure sufficient staffing of the Commission and ensuring peer pressure in relation to the implementation of findings of the monitoring bodies. Projects such as expanding the mandate of the African Court to become a regional alternative to the International Criminal Court should be shelved until such time that a clear commitment to the existing institutions becomes evident.

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1 Introduction

The regional African human rights system has witnessed significant developments since the adoption of the African Charter on Human and Peoples' Rights (African Charter) in 1981. This article reflects on the human rights developments within the African Union (AU) in 2012 and 2013. The focus is on the work of the African Commission on Human and Peoples' Rights (African Commission), the African Court on Human and Peoples' Rights (African Court) and the African Committee on the Rights and Welfare of the Child (African Children's Committee). The article also briefly considers the activities of the African Peer Review Mechanism (ARPM) and the African Union (AU) political organs in relation to human rights.

Highlights during the years in review include the entry into force in 2012 of the AU Convention for the Protection and Assistance of Internally-Displaced Persons in Africa (Kampala Convention) which provides a normative framework for the protection of internally-displaced persons (IDPs). The year 2012 also marked the 25th anniversary of the establishment of the main regional human rights monitoring body, the African Commission. The year 2013 marked the 10th anniversary of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) which, by the end of 2013 has been ratified by 36 AU member states. The year 2013 also marked the 50th anniversary of the establishment of the Organisation of African Unity (OAU), which was transformed into the AU in 2002.

2 African Commission on Human and Peoples' Rights

2.1 Composition

The AU Assembly in May 2013 elected Lawrence Mute as commissioner for a six-year term. Commissioner Mute has previously served as a commissioner of the Kenya National Commission on Human Rights. He replaces the former Chairperson of the Commission, Commissioner Dupe Atoki from Nigeria, who did not stand for re-election. At the same summit, the Assembly re-elected Yeung Kam John Yeung Sik Yuen (Mauritius), Soyata Maiga (Mali) and Lucy Asuagbor (Cameroon) for six-year terms.¹ The replacement of Commissioner Atoki with Commissioner Mute saw the number of women on the Commission decline from seven to six. However, the Commission retains a majority of women, unusual among similar bodies in other regions and at the United Nations (UN).²

1 Assembly/AU/Dec.483.(XXI).

2 Eg, Inter-American Commission on Human Rights: 3 out of 7 commissioners <http://www.oas.org/en/iachr/mandate/composition.asp>; Human Rights Committee:

At the 54th ordinary session of the Commission in November 2013, the commissioners elected a new bureau (leadership) composed of Kayitesi Zainabo Sylvie (Rwanda) as Chairperson and Mohamed Béchir Khalfallah (Tunisia) as Vice-Chairperson.³ Both will serve for renewable two-year terms in that capacity.⁴ Prior to their election, Catherine Dupe Atoki and Kayitesi Zainabo Sylvie served as Chairperson and Vice-Chairperson respectively until the expiry of their terms in 2013.

2.2 Sessions

The African Commission holds two ordinary sessions each year and, when necessary, extraordinary sessions. It held the usual two ordinary sessions in 2012 and 2013. Due to the backlog of complaints and state reports, the Commission held two extraordinary sessions in 2012 and two in 2013. The Commission was in session for a total of 44 days in 2012 and 42 days in 2013.⁵

2.3 Resources

In its decisions on the African Commission's Activity Reports, the Executive Council has repeatedly called on the AU Commission to 'expedite recruitment for the Secretariat ... to enable the ACHPR effectively deliver on the mandate entrusted to it'.⁶ The AU approved a staffing structure for the Secretariat in 2009. However, the AU Commission has still not expedited action for the recruitment of staff to the Commission's Secretariat.⁷ While the financial allocation to the Commission in the AU budget has increased significantly in recent years,⁸ such that the total budget for the Commission for 2013 was close to US \$8,5 million, the Commission has expressed concern that no funds for programme activities as allocated in the AU budget was released to the Commission in 2013.⁹ The budget for 2014 was

4 out of 18 members <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx>; Committee against Torture: 2 out of 10 members <http://www.ohchr.org/EN/HRBodies/CAT/Pages/Membership.aspx>; UN Committee on the Rights of Persons with Disabilities: 7 out of 18 members <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx> (accessed 3 April 2014).

3 Final Communiqué of the 54th ordinary session of the African Commission on Human and Peoples' Rights, para 16.

4 F Viljoen *International human rights law in Africa* (2012) 290.

5 11th extraordinary session, Banjul, The Gambia, 21 February to 1 March 2012; 51st ordinary session, Banjul, The Gambia, 18 April to 2 May 2012; 12th extraordinary session, Algiers, Algeria, 30 July to 4 August 2012; 52nd ordinary session, Yamoussoukro, Côte d'Ivoire, 9-22 October 2012; 13th extraordinary session 18-25 February 2013; 53rd ordinary session, Banjul, The Gambia, 9-22 April 2013; 14th extraordinary session, Nairobi, Kenya, 20-24 July 2013; 54th ordinary session, Banjul, The Gambia, 22 October to 5 November 2013. See <http://www.achpr.org/sessions> (accessed 3 April 2014).

6 See eg Decision on the 34th Activity Report of the African Commission on Human and Peoples' Rights Doc EX.CL/796(XXIII) para 8.

7 35th Activity Report of the African Commission para 30.

8 M Killander & A Abebe 'Human rights developments in the African Union during 2010 and 2011' (2012) 12 *African Human Rights Law Journal* 201.

9 35th Activity Report of the African Commission para 31.

reduced to US \$4 million as an operational budget (from member states) and US \$1,5 million as programme budget (from partners).

2.4 State reporting

The consideration of state reports constitutes one of the key aspects of the African Commission's mandate. The African Charter and the African Women's Protocol oblige all states to submit reports to the Commission every two years on the steps taken to implement the provisions of these instruments.¹⁰

In 2012 the Commission considered and adopted concluding observations on the state reports of Angola, Sudan and Côte d'Ivoire,¹¹ and in 2013 on Cameroon, Gabon and Uganda. Consideration of the state reports of Liberia, Mozambique, Sahrawi Arab Democratic Republic (Western Sahara), Malawi, Sierra Leone and Uganda were pending as of the end of 2013. The reports submitted by four countries, Côte d'Ivoire, Liberia, Malawi and Sierra Leone were initial reports, thus bringing down the number of countries which have never submitted a report to the Commission to seven.¹² The only state report so far that covers implementation of the African Women's Protocol is the report of Malawi.¹³

2.5 Resolutions

In 2012 and 2013 the African Commission adopted country-specific resolutions dealing with the situation in Ethiopia, Mali, Nigeria, Senegal, South Sudan, Sudan and Swaziland. In the same period the Commission adopted numerous thematic resolutions. Some of the most important normative resolutions are discussed below.

In the Resolution on the Right to Adequate Housing and Protection from Forced Evictions,¹⁴ the Commission called for an end to forced evictions, in particular evictions in the name of development. The Commission called on states to ensure that evictions were only used as a last resort and that remedies are available to challenge evictions.

¹⁰ Art 64 African Charter; art 27(1) African Women's Protocol.

¹¹ <http://www.achpr.org/sessions/51st/info/communique51/> (accessed 3 April 2014).

¹² Comoros, Djibouti, Equatorial Guinea, Eritrea, Guinea-Bissau, São Tomé and Príncipe and Somalia. The African Commission does not yet view South Sudan as being bound by the African Charter. 35th Activity Report of the African Commission on Human and Peoples' Rights para 17.

¹³ Art 26 of the African Women's Protocol obliges all state parties to 'indicate the legislative and other measures undertaken for the realisation of the rights' of women when submitting their periodic reports in accordance with art 62 of the African Charter. Although other state parties to the Protocol have failed to comply with this provision, Malawi in its 1995-2013 periodic report dedicated 45 pages to the Protocol. See Malawi (1995-2013) 'Report to the African Commission on Human and Peoples' Rights' http://www.achpr.org/files/sessions/55th/state-reports/1-1995_2013/initial_report_combined_1995_2013_eng.pdf (accessed 1 April 2014).

¹⁴ Adopted at the 52nd ordinary session, October 2012.

The Commission further called on states to ensure security of tenure and that alternative housing that is provided in cases of evictions complies with international standards.

In the Resolution on the Right to Nationality,¹⁵ the Commission expressed its deep concern at the arbitrary deprivation of nationality on discriminatory grounds. The Commission urged states to recognise, guarantee and facilitate the right to nationality of every person, especially the registration of births of all children on their territory.

In its Resolution on Illicit Capital Flight from Africa,¹⁶ the Commission called on the Working Group on Economic, Social and Cultural Rights in Africa and the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa to conduct an inquiry into the impact of illicit capital flight on human rights in Africa. African states were requested to examine their legislation to prevent illicit capital flow.

In promoting and protecting women's sexual and health rights, the Commission adopted the Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services.¹⁷ It noted that access to the enjoyment of sexual and reproductive health rights of women in Africa was limited due to harmful practices in addition to HIV-related stigma, discrimination and prejudices. It further expressed concern about the various reports of coerced or involuntary sterilisation of women living with HIV. Against this background, the Commission called on states to put in place mechanisms to ensure that women living with HIV are not subjected to pressure or undue inducement by health care providers in order to secure consent for sterilisation.

With the aim of promoting gender equality and improving women's political and socio-economic status, the Resolution on Women's Rights to Land and Productive Resources was adopted.¹⁸ In this Resolution, the Commission expressed its concern on how women are still deprived of their right to own property and land, although most states have ratified the African Women's Protocol and other instruments on women's rights. The Commission urged states to repeal discriminatory laws and to abolish harmful social practices that have a negative impact on or limit women's access to the use and control of land.

In the Resolution on the Prevention of Attacks and Discrimination against Persons with Albinism,¹⁹ the Commission expressed its deep concern about the social exclusion, discriminatory and systematic attacks against persons living with albinism. It emphasised the need

15 Adopted at the 53rd ordinary session, April 2013.

16 As above.

17 Adopted at the 54th ordinary session, November 2013.

18 As above.

19 As above.

for states to provide special measures for the protection of these vulnerable individuals. The Commission charged states to institute effective mechanisms to eliminate all forms of discrimination and to increase public awareness to protect persons living with albinism. It further called for accountability through speedy prosecution of perpetrators and appropriate remedies for victims.

At its 54th ordinary session in November 2013, the Commission adopted a resolution calling on Kenya to implement the decision of the Commission in the *Endorois* case, adopted by the Commission in 2009. This followed the oral hearing on implementation held at the Commission's 53rd ordinary session in April 2013 and a workshop held by the Commission's working group on indigenous populations/communities in Nairobi in September 2013. The resolution was the result of Kenya's failure to submit a road-map for implementation as agreed at the oral hearing in April 2013.²⁰

2.6 Missions

Commissioners, together with legal officers from the Secretariat, undertake promotional visits to a few countries each year. The aim of such missions is to promote the rights in the African Charter and other regional instruments by engaging governments and civil society as well as gathering information, in particular in relation to the thematic mandates of the commissioners participating in the visit.²¹ Commissioners in 2012 and 2013 embarked on promotional missions to Mauritania,²² Central African Republic,²³ Togo,²⁴ Lesotho,²⁵ Cameroon²⁶ and Chad.²⁷

The AU political organs sometimes request the African Commission to undertake fact-finding missions. Thus, the Commission undertook a fact-finding mission to Algeria in September 2012, investigating the situation in the Sahrawi Arab Democratic Republic (SADR), as

20 Resolution Calling on the Republic of Kenya to Implement the *Endorois* Decision, adopted at the 54th ordinary session, November 2013.

21 See eg African Commission on Human and Peoples' Rights, Report of the Joint Human Rights Promotion Mission to the Republic of Chad, 11-19 March 2013, http://www.achpr.org/files/sessions/54th/mission-reports/chad-promo-2014/misrep_promo_chad_2013_eng.pdf (accessed 3 April 2014).

22 http://www.achpr.org/states/mauritania/missions/promotion_mission-2012/ (accessed 3 April 2014).

23 <http://www.achpr.org/states/central-african-republic/missions/promo-2012/> (accessed 3 April 2014).

24 <http://www.achpr.org/states/togo/missions/promo-2012/> (accessed 3 April 2014).

25 <http://www.achpr.org/states/lesotho/missions/promo-2012/> (accessed 3 April 2014).

26 <http://www.achpr.org/states/cameroon/missions/cameroon-promo-2012/> (accessed 3 April 2014).

27 <http://www.achpr.org/states/chad/missions/chad-promo-2014/> (accessed 3 April 2014).

requested by the AU Assembly in January 2012.²⁸ SADR, an AU member state also known as the Western Sahara, is occupied by Morocco. The delegation did not receive any response from the Moroccan authorities in relation to gaining access to the territory and therefore had to limit its visit to Algeria.

The AU Assembly in 2012 called on the African Commission to investigate the 'massive violations of human rights' committed against the Mali military and civilians in *Aguel'hoc* in January 2012.²⁹ A fact-finding mission was deployed by the Commission from 3 to 7 June 2013 and a report submitted to the Executive Council.³⁰

2.7 Communications

2.7.1 10th extraordinary session, 12-16 December 2011³¹

The Commission in 2011 for the first time decided on the merits in a case concerning the violation of women's rights, Communication 323/06, *Egyptian Initiative for Personal Rights and Interights v Egypt*. The complaint was filed on behalf of four women who were sexually abused during a demonstration in Cairo regarding a referendum on the amendment of the Egyptian Constitution. The complainants claimed that the first victim's clothes were torn, documents seized and her private parts fondled.³² The second, third and fourth victims, all journalists covering the protest, were beaten and sexually harassed by unidentified men and security officers.³³ They also alleged that, when the victims lodged their complaints, they received threats to withdraw the case.³⁴ Their complaints were rejected on the basis that the offenders could not be identified.³⁵ The Commission held that the physical, mental and sexual harm inflicted on the victims affected their physical and mental well-being in violation of the right to health.³⁶ The Commission ordered Egypt to conduct an investigation into the violation and to pay adequate compensation to each of the victims.³⁷

28 Report of the fact-finding mission to the Sahrawi Arab Democratic Republic, 24-28 September 2012, http://www.achpr.org/states/sahrawi-arab-democratic-republic/missions/promotion_mission-2012/ (accessed 3 April 2014).

29 For a discussion of the situation, see B Nkrumah & F Viljoen 'Lessons from ECOWAS for the implementation of article 4(h)' in D Kuwali & F Viljoen (eds) *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act* (2013) 261.

30 35th Activity Report para 32.

31 These cases are covered here as they had not been published at the time of the previous overview of the case law of the Commission. See Killander & Abebe (n 9 above) 199.

32 Para 6.

33 Para 11.

34 Para 20.

35 Paras 22 & 49.

36 Art 16 African Charter; para 259.

37 Para 275.

At its 10th extraordinary session, the Commission also decided Communication 277/2003, *Spilg & Others v Botswana*.³⁸ The complaint concerned the death penalty in Botswana, an issue which previously has been considered by the Commission in the *Bosch* case.³⁹ The complainants alleged that the victim was wrongfully sentenced to death by hanging for the murder of a police officer. Botswana argued that the communication was instituted by non-nationals and, for that reason, the Commission did not have jurisdiction. Botswana further averred that the imposition of the death penalty was reasonable if the crime is of the most serious nature and due process for safeguards is in place.⁴⁰ In responding to Botswana's first argument, the Commission held that limiting the authorship of communications to citizens is not in line with the African Charter.⁴¹ On the merits, the Commission held that, while hanging as a method of execution could constitute a violation of the prohibition on cruel, inhuman or degrading punishment, it had not been shown to constitute such punishment in this case. However, not to inform relatives of the imminent execution constituted a violation of article 5 of the African Charter. The Commission urged Botswana to impose a moratorium on executions with a view to abolishing the death penalty.⁴²

Communication 347/07, *Association Pro Derechos Humanos de Espana (APDHE) v Equatorial Guinea*, and Communication 372/09, *Interights v Ethiopia*, were declared inadmissible.

As of February 2014, these decisions had not been published by the Commission.

2.7.2 11th extraordinary session, 21 February to 1 March 2012

Communication 288/04, *Shumba v Zimbabwe*,⁴³ relates to the cruel, inhuman and degrading treatment of the complainant due to his political association. The Commission found a violation of article 5 of the African Charter and requested Zimbabwe to pay adequate compensation to the victim for the torture and trauma suffered while in detention.⁴⁴

The Commission at this session also declared six communications inadmissible. Communication 278/2003, *Promoting Justice for Women and Children (PROJUST NGO) v Democratic Republic of Congo*, involved

38 http://www.achpr.org/files/sessions/10th-eo/comunications/277_-_03/achpreos10_277_03_eng.pdf (accessed 3 April 2014).

39 *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003).

40 Para 138.

41 Para 84.

42 Para 206.

43 This case has not been published by the Commission on its website but is included in the African Human Rights case law analyser, <http://caselaw.ahrda.org/doc/288.04/> (accessed 3 March 2014).

44 Para 194.

six women who had been arrested in place of their husbands who were either deceased or had fled the country. The complainant alleged that the victims were tortured before being sent to the penitentiary while others were held there with their children.⁴⁵ The complainant submitted that local remedies had been exhausted since the decision of the Military Court which tried the victims could neither be appealed, nor set aside.⁴⁶ The Commission rejected this argument and indicated that the victims had the opportunity to refer the disputed ruling to the Supreme Court for redress. The communication was thus declared inadmissible.

Communication 351/2007, *Chari v Zimbabwe*, concerned the arrest and torture of a student during a peaceful demonstration. He maintained that, following constant harassment from government agents, he had fled to South Africa. He argued that since he escaped and is now resident in another country, domestic remedies could not be pursued and were therefore not available. The Commission rejected this argument on the grounds that it is not a legal requirement to be present in a country in order to access its domestic remedies.⁴⁷ The communication was therefore declared inadmissible.

The inadmissibility decisions on Communication 331/2006, *Kamanakao Association, Reteng and Minority Rights Group v Botswana*, 356/07, *The Gambia Task Force v The Gambia*, 340/07, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, and 314/06, *Zimbabwe Lawyers for Human Rights and Human Rights Trusts of Southern Africa v Zimbabwe*, had as of February 2014 not been published by the African Commission. The same applies to Communication 380/09, *Global Conscience Initiative Cameroon v Cameroon*, which was struck from the list following withdrawal.

At the session, the Commission was seized of two new cases, one against the SADC member states (Communication 409/12) and one against Gabon (Communication 410/12). The case against the SADC member states relates to the suspension of the SADC Tribunal.⁴⁸ This case was declared admissible by the Commission at the 52nd ordinary session and decided on the merits at the 54th ordinary session, as discussed below.

At the session, the Commission also considered the implementation of its decision in *Good v Botswana*. After the decision was adopted, Botswana, through a diplomatic note, informed the Commission that 'it is not bound by the decision of the Commission'. The Commission called on the Executive Council to take 'appropriate action' against Botswana in its 32nd-33rd Activity Report. The Executive Council did not take any action against Botswana at the meeting at which it

45 Para 3.

46 Para 39.

47 Para 78.

48 <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=351130&sn=Detail&pid=71656> (accessed 3 April 2014).

adopted the Activity Report. However, in a more recent decision, it has made general calls on states to comply with the decision of the Commission.⁴⁹

The Commission also decided to refer Communication 381/09, *Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group v Kenya*, to the African Court, basing the referral on non-compliance with provisional measures adopted by the Commission in 2009.⁵⁰

2.7.3 51st ordinary session, 18 April to 2 May 2012

Communication 295/04, *Kazingachire & Others v Zimbabwe*, was filed by the Zimbabwe Human Rights NGO Forum on behalf of four victims. The complaint relates to allegations of wrongful killings and unfair compensation. The complainants argued that on 10 January 2001, a child who was a passenger in his father's car was mistakenly shot and killed by four policemen. The second victim, a motor mechanic, was wrongfully arrested and shot in the head at point blank range by police officers. The third victim, a student, while travelling by train, was assaulted and strangled to death by army officers due to his political affiliation. The complainants further submitted that the fourth victim was beaten to death by police officers during a student riot. The African Commission held that Zimbabwe's accountability system for excessive use of force by law enforcement officers was inadequate and violated the African Charter.⁵¹ The Commission further held that Zimbabwe had failed to provide remedies and had thus violated articles 1 and 4 of the African Charter.⁵² The Commission requested Zimbabwe to pay compensatory damages to the next of kin and legal heirs of the four deceased persons.

The Commission was seized of cases against Libya, Gabon, Angola and Swaziland and held oral hearings in cases against South Africa, Uganda, Sudan and Mauritania.

2.7.4 12th extraordinary session, 30 July to 4 August 2012

The inadmissibility decision with regard to Communication 337/2007, *Gumne & Others v Nigeria and Cameroon*, and the review decision in Communication 384/09, *Gumne & Others v Cameroon*, had as of February 2014 not been published by the Commission.

The Commission was seized of cases against Cameroon, Congo, Nigeria, Ethiopia and Sudan and discussed the implementation of its recommendations in the *Endorois* case.

49 See EX.CL/Dec.804(XXIV).

50 See Application 006/2012, *African Commission v Kenya*.

51 Para 49.

52 Para 68.

2.7.5 52nd ordinary session, 9-22 October 2012

Communication 301/05, *Gabre-Selassie and IHRDA v Ethiopia*, was submitted on behalf of former officials of the Mengistu (Dergue) regime. The former officials alleged that they had been arbitrarily detained since 1991. Ethiopia was found to have violated the right to an impartial hearing, trial within a reasonable time and the presumption of innocence. The Commission accordingly ordered Ethiopia to pay adequate compensation to the victims.⁵³

Communication 286/2004, *Noca v Democratic Republic of the Congo (DRC)*, dealt with the right to property. In 1974 the state adopted legislation which ceded undeveloped and abandoned properties to Congolese nationals. The complainant, an Italian national, entrusted his building to a state agency for management. The building was nonetheless declared abandoned and allocated to other persons. In its analysis, the Commission observed that the DRC had failed in its obligation to protect the rights of foreign nationals living within its borders.⁵⁴ It further indicated that the state could have exercised due diligence or goodwill by returning the property to the victim.⁵⁵ The Commission urged the DRC to reinstate the title deed of the building to the complainant or to pay him just compensation.⁵⁶

Communication 285/2004, *Watumbulwa v Democratic Republic of the Congo*, and Communication 289/2004, *Koné & Another v Côte d'Ivoire*, were struck from the list due to a lack of interest on the part of the complainants. Four other communications, two against Sudan, one against Kenya and Sudan and one against Mozambique, were also struck from the list but had as of February 2014 not been published by the Commission.

The Commission was seized of cases against Cameroon, Egypt, Nigeria and Rwanda. The Commission referred Communication 411/12, *Gaddafi v Libya*, on which it had previously ordered provisional measures, to the African Court.

2.7.6 13th extraordinary session, 18-25 February 2013

The African Commission seized 11 communications.⁵⁷ The Commission decided not to be seized of Communication 422/12, *Sudan v South Sudan*. This was presumably because the Commission considered that South Sudan was not bound by the African Charter as

53 Para 240.

54 Para 137.

55 Para 140.

56 Para 207.

57 427/12, *SERAP v Nigeria*; 428/12, *Isaak v Eritrea*; 429/12, *The Ngambela of Barotseland & Others v Zambia*; 430/12, *Shumba & Others v Zimbabwe*; 431/12, *Kwayelo v Uganda*; 432/12, *Ngoge v Kenya*; 433/12, *Bialufu Ngandu Albert v Democratic Republic of the Congo*; 434/12, *Filimao Pedro Tivane v Mozambique*; 435/12, *Asemie v Lesotho*; 436/12, *Union Nationale v Gabon*; 437/12, *Ngoge v Kenya*; 438/12, *Peter Odiwuor Ngoge v Kenya*.

this country, which only gained independence in July 2011, had not at the time ratified it. However, it is questionable whether this in itself should prevent the Commission from being seized of the case, as a successor state is generally seen as being bound by the human rights commitments of the state to which it used to belong.⁵⁸ The Parliament of South Sudan voted to ratify the African Charter in October 2013, but the President has not yet assented.⁵⁹

Two communications were declared admissible,⁶⁰ one inadmissible⁶¹ and one decided on the merits.⁶² The merits decision in Communication 270/03, *Access to Justice v Nigeria*, had as of February 2014 not been published. Communication 386/10, *Ibrahim v Sudan*, was declared inadmissible despite the Commission finding that the case had been considered by the Constitutional Court and other local remedies could not be exhausted.⁶³ The Commission declared the case inadmissible on the basis that it took the complainant 15 months to submit the case to the Commission after the ruling of the Constitutional Court. The Commission considered this to be an unreasonably long time in terms of article 56(6) of the African Charter.⁶⁴

A case against Egypt was deferred pending the adoption of a new constitution.⁶⁵ Four cases were struck from the list due to a lack of diligent prosecution by the complainants.⁶⁶

2.7.7 53rd ordinary session, 9-22 April 2013

During the session, the African Commission seized eight communications,⁶⁷ rejected the seizure of one,⁶⁸ conducted oral hearings on the merits of one case⁶⁹ and on the implementation of

58 MT Kamminga 'State succession in respect of human rights treaties' (1996) 7 *European Journal of International Law* 481-482.

59 'NGOs urge South Sudan to ratify African Charter' 15 April 2014, <http://talkof.sudan.com/ngos-urge-south-sudan-to-ratify-african-charter/> (accessed 29 April 2014). See also <http://www.radiomiraya.org/news-202/south-sudan/12299-parliament-ratifies-african-charter-on-rights-workers-bill.html#gsc.tab=0> (accessed 3 March 2014).

60 339/07, *Okiring and Aguiro v Uganda*; 387/2010, *Yamgnane v Togo*.

61 386/10, *Redress v Sudan*.

62 270/03, *Access to Justice v Nigeria*.

63 Para 67.

64 Para 77.

65 355/08, *Ezzat and Enayet v Egypt*.

66 290/04, *Open Society Justice Initiative v Cameroon*; 336/07, *Afrademop and Global Welfare v Cameroon*; 321/06, *Law Society of Zimbabwe v Zimbabwe*; 407/11, *Margayan and Sargsyan v Kenya*.

67 439/12, *Ngoge v Kenya*; 441/12, *Ngoge v Kenya*; 442/12, *Ngoge v Kenya*; 443/13, *Issa v Sudan*; 421/12, *Khadafi v Libya*; 447/13, *Oun v Libya*; 448/13, *Daou v Libya*; 449/13, *Khadafi v Libya*.

68 440/12, *Ngoge v Kenya*.

69 385/10, *ICJ-Kenya v Kenya*.

the *Endorois* case decided by the Commission in 2009.⁷⁰ Two cases were considered on the merits.⁷¹ Communication 335/07, *Dabolorivhuwa Patriotic Front v South Africa*, concerned discrimination and a violation of the labour rights of the Vhavenda people.⁷² The Commission held that article 2 of the African Charter permitted different treatment of people equally placed if such treatment is aimed at achieving a legitimate and an objective purpose.⁷³ For this reason, the Commission concurred with the state that the different treatment was based solely on a financial decision made by the complainants and not on grounds prohibited by the Charter.⁷⁴ The communication was therefore dismissed. The decision on Communication 302/05, *Mamboleo v Democratic Republic of Congo*, had as of February 2014 not been published by the Commission.

2.7.8 14th extraordinary session, 20-24 July 2013

The African Commission seized five communications,⁷⁵ declared six admissible⁷⁶ and one inadmissible,⁷⁷ and decided two communications on the merits.⁷⁸ These decisions had as of February 2014 not been published. It is noticeable that Communication 259/02, *Groupe de Travail sur les dossiers judiciaires stratégiques v DRC*, was submitted in 2002 and that it thus took more than a decade to reach a decision on the merits of the case.

The Commission rejected a request for the reconsideration of its decision on Communication 331/06, *Kamanakao Association and Others v Botswana*. The communication, submitted on behalf of minorities in Botswana, called for a review of the Commission's inadmissibility decision which was based on non-exhaustion of local remedies. The complainants argued that they did not approach the Court of Appeal since it was obvious that they were bound to fail based on a judgment of the same court. The Commission held that this did 'not constitute new evidence within the meaning adopted by the Commission'.⁷⁹ The Commission also considered a request for

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

71 302/05, *Mamboleo v Democratic Republic of Congo*; 335/07, *Dabolorivhuwa Patriotic Front v South Africa*.

72 Para 2.

73 Para 117.

74 Para 119.

75 444/13, *Masuku v Swaziland*; 445/13, *Human Rights Council & Others v Ethiopia*; 446/13, *Williams & Others v Zimbabwe*; 451/13-452/13, *Obi & Others v Nigeria*; 452/13, *Askouri and Nasr v Sudan*.

76 426/12, *Uwimana-Nkusi and Mukakibibi v Rwanda*; 419/12, *The indigenous peoples of the lower Omo v Ethiopia*; 389/10, *Mbiankeu v Cameroon*; 392/10, *Muhayeyezu v Rwanda*; 408/11, *Ushiye v DRC*; 370/09, *Social and Economic Rights Action Centre v Nigeria*.

77 413/12, *Mendes v Angola*.

78 259/02, *Groupe de Travail sur les dossiers judiciaires stratégiques v DRC*; 320/06, *Mamboundou v Gabon*.

79 Para 17.

review in Communication 375/09, *Echaria v Kenya*, which had been declared inadmissible in 2011 for failure of submission of the case to the Commission within a reasonable time of exhaustion of local remedies.

2.7.9 54th ordinary session, 22 October to 5 November 2013

The African Commission seized six communications,⁸⁰ decided not to be seized of one,⁸¹ declared four communications admissible⁸² and took four decisions on the merits.⁸³ None of the merits decisions had been published by the Commission as of February 2014. However, the complainant in the case dealing with the dissolution of the SADC Tribunal was after the session informed by the Commission Secretariat that the Commission had not found a violation since the African Charter only refers to national courts.⁸⁴

Communication 280/03, *Phutuka v DRC*, was declared inadmissible after more than a decade on the Commission's roll. The Commission held an oral hearing on Communication 383/10, *Al-Assad v Djibouti*, and discussed follow-up on the implementation of the Commission's 2011 decision in Communication 323/06, *Egyptian Initiative for Personal Rights and Interights v Egypt*.⁸⁵

3 African Court on Human and Peoples' Rights

3.1 Composition

The AU Assembly in July 2012 reappointed two judges for a six-year term, namely, Gerard Niyungeko from Burundi and El Hadji Guisse from Senegal. Ben Kioko from Kenya, formerly the AU legal counsel, was elected as a new appointment on the Court.⁸⁶ Mr Kimelabalou Aba from Togo was elected for a one and a half-year term in January 2013 to replace Justice Mulenga from Uganda who passed away in September 2012.⁸⁷ Justice Sophia Akuffo (Ghana) was elected

80 453/13 *Rasolovoahangy v Madagascar*; 454/13, *Ningo v Cameroon*; 455/13, *Mohamed v Ethiopia*; 456/13, *Uko v South Africa*; 458/13, *Ngoge v Kenya*; 459/13, *Hurman v Mauritius*.

81 457/13, *Mwandi v DRC*.

82 354/07, *Al-Shatir & Others v Egypt*; 398/11, *IHRDA and Congolese Human Rights Observatory v Congo*; 401/11, *Abdallah v Sudan*; 424/12, *Mahmoud and Abdel-Rahman v Egypt*.

83 274/03 & 282/03, *Interights & Others v DRC*; 328/06, *Front for the Liberation of the State of Cabinda v Angola*; 368/09, *Radi & Others v Sudan*; 409/12, *Tembani and Freeth v Zimbabwe & 13 Others*.

84 W Spies & B Freeth 'ACHPR unable to intervene over SADC Tribunal – AfriForum' <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/twitter.com/page71654?oid=559617&sn=Detail&pid=71654> (accessed 23 March 2014).

85 The African Commission's decision in the case is discussed above under the December 2011 session.

86 Assembly/AU/ /Dec.416-449(XIX) 40.

87 Decision on the election of one judge of the African Court on Human and Peoples' Rights, EX.CL/Dec.763(XXII).

President of the Court in 2012 and Justice Bernard Ngoepe (South Africa) replaced Justice Ouguergouz (Algeria) as Vice-President after the latter resigned from this post in September 2012.⁸⁸

3.2 Cases

Seven contentious cases were received in 2012 and five in 2013. Five were finalised in 2012, and four in 2013. Eight cases were pending at the end of 2013.⁸⁹ It is worth noting that most of the applications received by the African Court are brought against states which are not parties to the Protocol or have not deposited the declaration allowing individuals and non-governmental organisations (NGOs) to submit applications. It is questionable whether these cases should be determined judicially.

The Court declined jurisdiction in a case submitted against the AU. In *Femi Falana v African Union*, the applicant contended that he had made several attempts to have Nigeria deposit a declaration under article 34(6) to accept the competence of the Court to hear complaints brought by individuals and NGOs. The AU argued that the obligations of the state parties to the African Charter could not be inferred upon the AU. The Court, by a majority of seven to three votes, held that since the AU is not a party to the Protocol, it could not be subject to its obligations and the Court therefore lacked jurisdiction.⁹⁰

Application 001/2013, *Mtingwi v Malawi*, concerned the wrongful and unfair termination of the employment of the applicant by the Malawi Revenue Authority (MRA). The applicant argued that, after the award of damages by the High Court, he realised that some items that were in the contract of employment were accidentally omitted during the preparation of exhibits submitted to the Court. The applicant further contended that the Supreme Court allowed the appeal of the MRA and dismissed the decision of the High Court which ruled in his favour. The African Court noted that it did not have an appellate jurisdiction to entertain complaints already decided by domestic or regional courts. The Court struck out the application for want of jurisdiction.⁹¹

The first merits judgment of the Court was handed down in June 2013.⁹² The Court had joined two cases submitted against Tanzania dealing with the same issue, namely, whether the prohibition of independent candidates to contest elections violated the African

88 http://www.fhr.org.za/latest_news/fhrs-preferred-candidate-justice-bernard-ngoep-e-both-vice-pr/ (accessed 3 April 2014).

89 African Court on Human and Peoples' Rights 'Cases and decisions' <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/all-cases-and-decisions> (accessed 3 April 2014).

90 001/2011, *Femi Falana v African Union*, judgment of 26 June 2012.

91 001/2013, *Mtingwi v Malawi*, judgment of 15 March 2013.

92 009 & 011/2011 *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania*, judgment of 4 June 2012.

Charter. The Court held that the denial of independent candidates to contest elections violated the right to political participation as set out in article 13 of the Charter.

It is questionable why it should have taken the Court a year to deliver judgment after oral hearings were held in the case in June 2012. In fact, article 28(1) of the Court Protocol provides that the Court should render judgment within 90 days of completing deliberations, but does not say anything about how long the Court may deliberate.

The Court made its first order for provisional measures in 2011 in a case submitted by the African Commission against Libya.⁹³ The substantive case was struck from the roll by the Court in 2013 as the Court did not receive the submissions it requested from the Commission.⁹⁴

Another order for provisional measures was given by the Court in application 002/2013, *African Commission on Human and Peoples' Rights v Libya*. The case deals with the detention of Saif al Islam Gaddafi (son of late Libyan leader Muammar Gaddafi). The Court held that, in view of the failure of Libya to respond to the provisional measures of the African Commission and in light of the right to a fair trial, Libya should refrain from all investigations and judicial proceedings which could cause irreparable damage to the detainee.⁹⁵ After Libya refused to comply with the order of provisional measures, the Court requested the AU Assembly to call upon Libya to comply with the orders of the Court or take 'other measures as it deems appropriate'.⁹⁶ As of the end of 2013, the Court had not yet ruled on the admissibility and merits of the case.

The Court also ordered provisional measures in application 006/2012, *African Commission on Human and Peoples' Rights v Kenya*. The case deals with the eviction of an indigenous community from a forested area in Kenya and had been pending before the African Commission since 2009 when the Commission also issued provisional measures. The Court issued provisional measures in relation to transactions of land within the forest.⁹⁷ As at the end of 2013, the Court had not yet ruled on the admissibility and merits of the case.

The Court has issued provisional measures in one case submitted by an individual applicant under article 34(6). In application 004/2013, *Konaté v Burkina Faso*, the editor-in-chief of a newspaper was sentenced to one year imprisonment and a fine for libel. The Court

93 See Killander & Abebe (n 9 above) 215.

94 004/2011, *African Commission on Human and Peoples' Rights v Libya*, order of 15 March 2013.

95 002/2013, *African Commission on Human and Peoples' Rights v Libya*, order of provisional measures, 15 March 2013, para 18.

96 http://www.africancourt.org/en/images/documents/Reports/AFCHPR_Interim_Report_Non_compliance_by_a_State_-_Libya.pdf (accessed 10 March 2014) 3.

97 006/2012, *African Commission on Human and Peoples' Rights v Kenya*, order of provisional measures, 15 March 2013.

held, by majority, that to order Mr Konaté's immediate release would prejudice the merits of the case. The Court therefore only ordered provisional measures in relation to access to health care and medication as required.⁹⁸

A request for an advisory opinion by the Socio-Economic Rights and Accountability Project (SERAP) was determined by the Court to fall outside the scope of the African Charter and struck off the list.⁹⁹ SERAP has resubmitted an application for an advisory opinion and one of the issues before the Court is whether an NGO has standing to request an advisory opinion from the Court. A request for an advisory opinion submitted by Mali in relation to the status of prisoners in Mali incarcerated following judgments by the International Criminal Tribunal for Rwanda was withdrawn by Mali and struck from the list.¹⁰⁰

4 African Committee on the Rights and Welfare of the Child

4.1 Composition

The 11-member African Committee on the Rights and Welfare of the Child (African Children's Committee) serves as the monitoring body of the African Charter on the Rights and Welfare of the Child (African Children's Charter). Four new members were elected in May 2013 to serve for a five-year term: Sidikou Aissatou Alassane Moulaye (Niger); Suzanne Aho-Assouma (Togo); Joseph Ndayisenga (Burundi); and Azza Ashmawy (Egypt).

4.2 Sessions

The African Children's Committee dedicated its 19th ordinary session in March 2012 to harmful traditional practices affecting children and also discussed the situation of disabled children. At its 21st session, the Committee adopted its Work Plan for 2012-2013. In the Plan, the Committee indicated its intention to develop general comments based on thematic issues such as 'Children of Imprisoned Mothers'. At its 22nd session, the Committee adopted a joint working plan with the AU Peace and Security Council (PSC) aimed at promoting the rights of children during armed conflicts.¹⁰¹ The plan was adopted pursuant to the Decision of the Executive Council at its 21st session,

⁹⁸ Provisional measures order, 4 October 2013.

⁹⁹ Request for advisory opinion 001/2012 by Socio-Economic Rights & Accountability Project, order of 15 March 2013.

¹⁰⁰ Demande d'avis consultative 001/2011 par la République du Mali, ordonnance, 30 March 2012.

¹⁰¹ Draft Programme of Work, <http://acerwc.org/wp-content/uploads/2013/11/Program-of-Work-22nd-ACERWC-Session-2013-English.pdf> 2 (accessed 10 March 2014).

where the PSC and the Committee were requested to hold institutionalised consultations directed at adopting mechanisms and initiatives to promote and protect the rights of the child in armed conflict.¹⁰²

4.3 State reports

The African Children's Committee is mandated by the African Children's Charter to examine state reports.¹⁰³ These reports have to be submitted initially two years after the entry into force of the Charter for the state, and thereafter every three years. The state report has to set out the degree to which the provisions of the Charter are being implemented. It also has to set out the constraints or challenges affecting the fulfilment of the obligation as preserved in the Charter. The Children's Committee considered its first set of state reports in 2008 and, as of the end of 2013, of the 47 states which have ratified the Children's Charter, only 22 had submitted their initial reports.¹⁰⁴ The initial reports of Cameroon, Niger and Senegal were considered at its 21st ordinary session.¹⁰⁵ The Committee has issued concluding observations on all state reports except Senegal and Sudan due to additional information to be submitted by these states.

4.4 Communications

The African Children's Charter mandates the African Children's Committee to receive and examine communications. Akin to the jurisprudence and case law of the African Commission, the Committee's guidelines allow not only victims but other interested persons to submit a communication on behalf of the victim(s). However, according to the Guidelines for Communication, the author should be able to demonstrate that he or she is acting in the best interests of the child.¹⁰⁶

The Children's Committee adopted its first merits decision in March 2011 in a case brought against Kenya. The case dealt with the denial of Kenyan nationality to children of Nubian descent. The Commission found Kenya in multiple violations of the African Children's Charter.¹⁰⁷ The Committee gave Kenya six months within which to report on the implementation of the recommendations. A delegation of the Committee led by its Chairperson conducted a fact-finding

102 K Ngankam 'Press statement of the 420th meeting of the PSC on the Rights and Welfare of the Child (ACERWC)' <http://acerwc.org/> (accessed 10 March 2014).

103 See art 43 of the African Children's Charter.

104 <http://acerwc.org/member-states/state-reports/initial-reports/> (accessed 10 March 2014).

105 EX.CL/744 (XXI).

106 See ch 2(1)(2) of the Guidelines for the Consideration of Communications provided for under art 44 of the African Charter on the Rights and Welfare of the Child, ACERWC/8/4.

107 Arts 6(2), (3) & (4); arts 3, 14(2), (b), (c) & (g) & 11(3) African Children's Charter.

mission to Kenya in February 2013 to assess the government's response to its recommendations.¹⁰⁸

5 African Peer Review Mechanism

As of the end of 2013, 33 African states had signed up to the African Peer Review Mechanism (APRM), a voluntary process for self-reflection and independent assessment of various governance issues, including human rights. Niger joined in 2012 and Chad and Tunisia in 2013. At the end of 2013, 17 states had been reviewed,¹⁰⁹ though country review reports had not been published in relation to all the states which had undergone review. The culmination of the APRM process is the peer review before the APR Forum consisting of the committee of Participating Heads of State and Government (PHSG) or their representatives. This committee appoints a Panel of Eminent Persons to manage and steer the affairs of the process. The APRM process is based on a questionnaire which was finally revised in 2012 after a lengthy process. The country review report of Sierra Leone was discussed at the APR Forum in January 2012 and published later in that year. Tanzania and Zambia came before the APR Forum in January 2013.¹¹⁰ The country review report of Tanzania was published later in the year,¹¹¹ while the country review report of Zambia had not been published by the end of 2013. The APR Forum also considers implementation reports with regard to states that have undergone reviews and adopted a National Programme of Action to address the issues identified through the process.

At the APR Forum in May 2013, the heads of state and government participating in the APRM process decided to elect the President of Liberia, Ellen Johnson Sirleaf, as new Chairperson of the Forum, replacing Hailemariam Desalegn, the Prime Minister of Ethiopia.

Not much has been done to implement the 2010 resolution adopted by the African Commission on closer collaboration between the Commission and the APRM process.¹¹² A former commissioner,

108 D Rachuonyo 'Nubians in Kenya: A people denied' <http://thinkafricapress.com/kenya/people-denied-nubians-kibera> (accessed 10 March 2014).

109 Algeria, Benin, Burkina Faso, Ethiopia, Ghana, Kenya, Lesotho, Mali, Mauritius, Nigeria, Rwanda, São Tomé and Príncipe, Sierra Leone, South Africa, Tanzania, Uganda and Zambia.

110 Communiqué issued at the end of the 18th summit of the Committee of Heads of State and Government participating in the African Peer Review Mechanism (APR Forum) http://aprm-au.org/sites/default/files/18TH%20APR%20FORUM%20-%20COMMUNIQUE_1.pdf (accessed 10 March 2014).

111 African Peer Review Mechanism, The United Republic of Tanzania, country review report 17, January 2013, <http://aprmtoolkit.saiia.org.za/tanzania> (accessed 10 March 2014).

112 See Killander & Abebe (n 9 above).

Julienne Ondziel Gnelenga, was on the APRM Panel of Eminent Persons until her term expired in January 2014.¹¹³

6 African Union political organs

At the July 2012 summit, six new AU commissioners were elected. Aisha Abdullahi from Nigeria is the new Commissioner for Political Affairs, under which all the regional human rights bodies fall, except the African Children's Committee, which falls under the Department for Social Affairs. The new Commissioner for Social Affairs is Mustapha Kaloko from Sierra Leone.¹¹⁴

The dispute between AU member states and the International Criminal Court (ICC) intensified as one of the persons indicted in connection with the Kenyan post-election violence was elected President of Kenya. The cases of two sitting heads of state, President Kenyatta of Kenya and President al-Bashir of Sudan, are thus currently before the Court. At an extraordinary session in October 2013, the AU Assembly reiterated that the attempt by the ICC to prosecute sitting heads of state is detrimental as it has the potential of undermining peace, security and sovereignty in Africa. The Assembly during the session emphasised the need to fast-track the process of expanding the mandate of the African Court to handle international crimes.¹¹⁵ The draft Protocol providing for such jurisdiction had not yet been adopted by the end of 2013.¹¹⁶

The draft Protocol establishes jurisdiction not only for genocide, crimes against humanity and war crimes, but also other crimes such as corruption and - most controversially among states - unconstitutional changes of government. In July 2012 the Executive Council requested the AU Commission, in collaboration with the AU Commission on International Law and the African Court, to come up with a definition of unconstitutional changes of government for the Protocol.¹¹⁷ After receiving the report from the AU Commission, the Executive Council in January 2013 requested the African Commission in collaboration with the Peace and Security Council to look at the issue of legitimacy of popular uprisings in the context of unconstitutional changes of

113 Communiqué issued at the end of the 20th summit of the Committee of Heads of State and Government participating in the African Peer Review Mechanism (APR Forum) para 29.

114 Decision on the election of the commissioners of the African Union, EX.CL/Dec.725XXI).

115 On the proposed Protocol, see J Biegon & M Killander 'Human rights developments in the African Union during 2009' (2010) 10 *African Human Rights Law Journal* 212 231; Killander & Abebe (n 9 above) 221.

116 See Exp/Min/IV/Rev.7.

117 Decision on the Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Doc EX.CL/741(XXI)a, EX.CL/Dec 706(XXI).

government and to consider the 'structural and financial implications' of giving the African Court criminal jurisdiction.¹¹⁸

At the July 2012 session, the Executive Council approved an AU model national law on universal jurisdiction over international crimes and encouraged member states to 'strengthen their national legislations on the prosecution of those accused of international crimes'.¹¹⁹

7 Conclusion

The year 2012 marked the 25th anniversary of the African Commission. Since its inception, the Commission has made some positive contribution towards the realisation of human rights, although it is still confronted with serious challenges. Positive developments include the hearings on the implementation of decisions of the Commission and an increased number of decisions on communications. The submission of state reports by a number of states which have never submitted state reports before is a further positive development.

Concern must, however, be raised over the failure of the Commission to publish its decisions on communications in a timely manner. This is seemingly linked to the fact that the decisions are no longer included as attachments to the activity reports submitted by the Commission to the Executive Council.

The African Court is making slow progress but now has a substantive docket. Seven states have made a declaration allowing direct access for individuals and NGOs to the Court. At the end of 2013, cases against three of these states, Burkina Faso, Rwanda and Tanzania, were pending before the Court, while cases against Kenya and Libya submitted by the African Commission were also pending before the Court. A matter of concern is the non-submission of cases from the Commission to the Court since the decision to refer the *Gaddafi* case in October 2012.

Both the African Commission and African Court took initiatives in relation to follow-up on the implementation of their decisions. The Executive Council of the AU should heed these calls and highlight individual cases of non-compliance in its decisions and not only make a general call for compliance with the decisions of the human rights monitoring bodies. There is a need to intensify co-operation between the Commission and the Court, especially with regard to information sharing. For instance, a case submitted by the Commission to the Court was struck from the roll of the Court in 2013 due to non-receipt

118 Decision on the Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, EX.CL/Dec.766(XXII).

119 Decision on the African Union model national law on universal jurisdiction over international crimes, Doc EX.CL/731(XXI)c, EX.CL/Dec.708(XXI).

of information requested by the Court from the Commission. The failure of the Commission to properly engage with the Court may be linked to the perception of an overly arduous role of the Commission before the Court, where the original applicant before the Commission does not play any role in the proceedings before the Court.

The AU political organs continue to rhetorically support the human rights organs in their resolutions, but not much is done to exercise peer pressure on states that fail to live up to what they have committed to. The rift between the AU and the ICC is set to continue, but even if the draft protocol extending criminal jurisdiction to the African Court is eventually adopted, it is unlikely to be quickly ratified by member states. The limited resources available within the AU could better be used to strengthen the institutional framework that has already been established and which the AU member states have committed themselves to support.

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Bess Nkabinde

Justice of the Constitutional Court of South Africa

David Padilla

Formerly Assistant Executive Secretary, Inter-American
Commission on Human Rights

Sylvia Tamale

Makerere University, Kampala, Uganda

Johann van der Westhuizen

Justice of the Constitutional Court of South Africa

Projects and programmes

- African Human Rights Moot Court Competition
- Master's Programme (LLM/MPhil) in Human Rights and Democratisation in Africa
- Master's Programme (LLM) in International Trade and Investment Law in Africa
- Master's Programme (LLM/MPhil) in Multidisciplinary Human Rights
- Gender Unit
- HIV/AIDS and Human Rights (with the Centre for the Study of AIDS)
- Advanced Human Rights Courses
- Indigenous Peoples' Rights in Africa
- Disability Rights

Regular publications

- African Human Rights Law Journal
- *African Human Rights Law Reports* (English and French)
- *Constitutional Law of South Africa*

CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 December 2014

Compiled by: I de Meyer

Source: <http://www.africa-union.org> (accessed 15 May 2014)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Algeria	01/03/87	24/05/74	08/07/03	22/04/03		
Angola	02/03/90	30/04/81	11/04/92		30/08/07	
Benin	20/01/86	26/02/73	17/04/97		30/09/05	28/06/12
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97		13/09/12	24/08/11
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70				
Chad	09/10/86	12/08/81	30/03/00			11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	
Congo	09/12/82	16/01/71	08/09/06	10/08/10	14/12/11	
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03*	05/10/11	16/10/13
Democratic Republic of Congo	20/07/87	14/02/73			09/06/08	
Djibouti	11/11/91		03/01/11		02/02/05	02/12/12
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02		27/10/09	
Eritrea	14/01/99		22/12/99			
Ethiopia	15/06/98	15/10/73	02/10/02			05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	10/01/11	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99	25/05/05	
Ghana	24/01/89	19/06/75	10/06/05	25/08/04*	13/06/07	06/09/10
Guinea	16/02/82	18/10/72	27/05/99		16/04/12	17/06/11
Guinea-Bissau	04/12/85	27/06/89	19/06/08		19/06/08	23/12/11

Kenya	23/01/92	23/06/92	25/07/00	04/02/04	06/10/10	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05			
Malawi	17/11/89	04/11/87	16/09/99	09/09/08*	20/05/05	11/10/12
Mali	21/12/81	10/10/81	03/06/98	10/05/00*	13/01/05	13/08/13
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03		
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	
Namibia	30/07/92		23/07/04		11/08/04	
Niger	15/07/86	16/09/71	11/12/99	17/05/04		04/10/11
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	01/12/11
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03*	25/06/04	09/07/10
Sahrawi Arab Democratic Rep.	02/05/86			27/11/13		27/11/13
São Tomé and Príncipe	23/05/86					
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04	
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06	
Sierra Leone	21/09/83	28/12/87	13/05/02			17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
South Sudan						
Sudan	18/02/86	24/12/72	30/07/05			19/06/13
Swaziland	15/09/95	16/01/89	05/10/12		05/10/12	
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06*	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	21/10/05	24/01/12
Tunisia	16/03/83	17/11/89		21/08/07		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	54	45	47	27	36	23

* Additional declaration under article 34(6)

Ratifications after 31 July 2013 are indicated in bold