

AFRICAN
HUMAN
RIGHTS
LAW
JOURNAL

Volume 15 No 1 2015

Pretoria University Law Press
PULP

2015

African Human Rights Law Journal Volume 15 No 1 2015

Published by:

Pretoria University Law Press (PULP)

The Pretoria University Law Press (PULP) is a publisher, based in Africa, launched and managed by the Centre for Human Rights and the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa that have been peer-reviewed. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa.

For more information on PULP, see: www.pulp.up.ac.za

To order, contact:

Centre for Human Rights
Faculty of Law
University of Pretoria
South Africa
0002
Tel: +27 12 420 4948
Fax: +27 12 362 5125
pulp@up.ac.za
www.pulp.up.ac.za

Printed and bound by:

BusinessPrint, Pretoria

Cover design:

Lizette Hermann, Centre for Human Rights, University of Pretoria

ISSN: 1609-073X
EISSN: 1996-2096



The financial assistance of the European Union is gratefully acknowledged

CONTENTS

Editorial.....	iii
Articles	
The protection against discrimination based on sexual orientation under the African human rights system <i>by Annika Rudman</i>	1
Debating love, human rights and identity politics In East Africa: The case of Uganda and Kenya <i>by J Oloka-Onyango</i>	28
Realisation or oversight of a constitutional mandate? Corrective rape of black African lesbians in South Africa <i>by Lea Mwambene and Maudri Wheel</i>	58
Evidence obtained through violating the right to freedom from torture and other cruel, inhuman or degrading treatment in South Africa <i>by Jamil Ddamulira Mujuzi</i>	89
A rights-based approach to environmental protection: The Zimbabwean experience <i>by Tinashe Madebwe</i>	110
Cultural rights versus human rights: A critical analysis of the <i>trokosi</i> practice in Ghana and the role of civil society <i>by Joseph Yaw Asomah</i>	129
Lessons from Ghana and Kenya on why presidential election petitions usually fail <i>by Miriam Azu</i>	150
Public participation in decentralised governments in Africa: Making ambitious constitutional guarantees more responsive <i>by Oliver N Fuo</i>	167
Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice <i>by Ally Possi</i>	192

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).

Also see <http://www1.chr.up.ac.za/index.php/ahrlj-contributors-guide.html> for detailed style guidelines.

2015 Subscriptions

Subscription enquiries and orders to:
Pretoria University Law Press (PULP)
E-mail: pulp@up.ac.za
Fax: +27 12 362 5125

South Africa:
ZAR575-00 (excluding postage)

Rest of the World:
ZAR745-00 (excluding postage)

This *Journal* is an open access free online journal and is available for searching and free download at: <http://www.ahrlj.up.ac.za>

Editorial

This issue of the *Journal* appears at a time of controversy about the rights to equality on the basis of sexual orientation and gender identity (SOGI). In 2014, the African Commission on Human and Peoples' Rights (African Commission) adopted a resolution urging African Union (AU) member states to curb violence – both by state and non-state actors – on the basis of actual or perceived SOGI, and called on states to ensure the effective investigation of crimes and punishment of perpetrators (Resolution 275 on Protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity). In April 2015, the African Commission, reversing a previous decision, granted observer status to the Coalition of African Lesbians (CAL), a non-governmental organisation. However, in June 2015, while considering the African Commission's activity report, the AU Executive Council requested the African Commission to reverse this decision, thus denying observer status to CAL. It did so by requesting

... the ACHPR to take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values; in this regard, REQUESTS the ACHPR to review its criteria for granting Observer Status to NGOs and to withdraw the observer status granted to the Organization called CAL, in line with those African values.

(DOC.EX.CL/Dec 887 (XXVII) Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights)

In timely fashion, therefore, three contributions in this issue of the *Journal* speak to the issue of SOGI in Africa: Rudman evaluates the level of protection on the basis of sexual orientation in the African human rights system; Oloka-Onyango focuses on related developments at the national level by looking at the situation in two countries in East Africa (Kenya and Uganda); and Mwambene and Wheal ask questions about the South African government's responsibility in the context of the pervasive rape of black lesbians in the country.

Another three contributions place the spotlight on human rights-related issues in specific African countries: Mujuzi looks at evidence obtained through torture in South Africa; Madebwe at environmental

protection in Zimbabwe; and Asomah at the clash between culture and human rights in Ghana.

The *Journal* also welcomes contributions on topics or themes more broadly related to democracy or democratisation. One should never lose sight of the fact that human rights prosper or wane due largely to an enabling or constricting political environment. Experience teaches us that human rights are relegated to inconsequential levels when they conflict with power and political interests. In her contribution, Azu looks at election petitions arising from disputed elections. Fuo forwards an argument in favour of greater decentralisation, and for public participation in processes of decentralisation.

In the final contribution of this issue, another theme of emerging interest and importance is scrutinised more fully – the role of African sub-regional organisations in realising human rights. Perhaps due to the weakness of the quasi-judicial mandate of the African Commission, and the relative late advent of the African Court, Africa has seen the innovative exploitation by litigants of the human rights potential in sub-regional judicial fora. One such forum is the East African Court of Justice. Possi investigates to what extent this Court has been able to strike a balance between the norms of the East African Community, on the one hand, and the imperative of human rights, on the other.

The editors convey their thanks to the independent reviewers mentioned below, who so generously assisted in ensuring the consistent quality of the *Journal*: Akinola Akintayo; Carlson Anyangwe; Kwadwo Appiagyei-Atua; Maria Assim; Japhet Biegon; Tim Braimah; Pierre Brouard; Lilian Chenwi; Enoch Chilemba; Rebecca Cook; Solomon Dersso; Jaap de Visser; Busiswe Deyi; Felix Eboibi; Kene Esom; Charles Fombad; Jeremie Gilbert; Roland Henwood; Meetali Jain; Mikkel Jarle Christensen; Charles Ngwena; Adrian Jjuuko; Serges Kamga; Monicah Kareithi; Benjamin Kujinga; Muhammed Ladan; Victor Lando; Annette May; Yolandi Meyer; Freddy Mnyongani; Duncan Munabi; Chacha Murungu; Bright Nkrumah; Mkhululi Nyathi; Catherine O'Regan; Kofi Quashigah; Oliver Ruppel; Rofiah Sarumi; Julia Sloth-Nielsen; Lee Stone; Lucianna Thuo; and Dire Tladi.

The protection against discrimination based on sexual orientation under the African human rights system

Annika Rudman*

Associate Professor, Department of Public Law, Faculty of Law, University of Stellenbosch, South Africa

Summary

Recent legislation proposed or passed in Nigeria, Uganda and The Gambia has put the spotlight on the plights of homosexual persons living in sub-Saharan Africa. In Nigeria, discriminatory laws prohibit same-sex marriages and ban gay clubs and organisations. In Uganda, the Prohibition of the Promotion of Unnatural Sexual Practices Bill of 2014, with contents similar to the notorious Anti-Homosexuality Act, is being considered after a ruling by the Ugandan Constitutional Court rendering the Anti-Homosexuality Act unconstitutional. In The Gambia, the Penal Code has been amended recently to add the crime of 'aggravated homosexuality' with a lifetime prison sentence for any person found guilty. The rights to dignity and equality are protected under the African Charter on Human and Peoples' Rights; however, competing local and global values are arguably growing in Africa, challenging this right. This article explores two main problems: first, how the rights to dignity, equality and non-discrimination should generally be interpreted and applied under the regional African human rights system when related to sexual orientation. In this regard I draw on the interpretation of these rights under international human rights law as well as the jurisprudence of the European Court of Human Rights and its Inter-American counterpart. Second, it analyses the procedural or other hurdles that may stand in the way of bringing a claim of discrimination based on sexual orientation to the African Commission on Human and Peoples' Rights or the African Court on Human and Peoples' Rights. In this regard, I specifically consider the general restrictions placed on individuals and NGOs in bringing

* LLB LLM (Lund), PhD (Gothenburg); arudman@sun.ac.za

complaints to the Court and the real potential of the Commission to act as a conduit to the Court in cases involving rights related to sexual orientation, bearing in mind its inconsistent approach to same-sex sexuality. The article addresses these questions by analysing some key developments by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The main objective is to utilise the approach of these institutions to explore both the legal avenues under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the rights and obligations under the African Charter available to anyone who would want to challenge any domestic law criminalising same-sex consensual sexual acts and/or any of the other related prohibitions.

Key words: *Equality; dignity; sexual orientation; gay and lesbian rights; African Charter on Human and Peoples' Rights*

1 Introduction

Recent legislation proposed or passed in Nigeria¹, Uganda² and The Gambia³ has again put the spotlight on the plight of homosexual persons living in sub-Saharan Africa. In these specific countries, as former British colonies, both male and female consensual same-sex sexual acts were already criminalised⁴ through the relevant Penal Codes,⁵ criminalising acts where 'anyone has carnal knowledge of any person against the order of nature' and through the criminalisation of 'indecent' or 'gross indecent' practices. However, further legislation or amendments to existing legislation have been introduced, building on these particular crimes to, on the one hand, further emphasise and

1 Same-Sex Marriage (Prohibition) Act 2013, NASS/CAN/115/VOL 31/24, 30 December 2013, promulgated on 13 January 2014.

2 Anti-Homosexuality Act 2014 and the Prohibition of the Promotion of Unnatural Sexual Practices Bill of 2014.

3 The Gambia Criminal Code (Amendment) Act, 25 August 2014. Supplement 'C' to *The Gambia Gazette* 15 of 16 October 2014. The Amendment adds sec 144A 'Aggravated homosexuality'.

4 As pointed out in the 2008 Report by Human Rights Watch (HRW) 'This alien legacy - The origins of "sodomy" laws in British colonialism' <http://www.hrw.org/reports/2008/12/17/alien-legacy-0> (accessed 2 April 2015), these codes do not criminalise 'homosexuality' *per se*, but refer to intercourse against the order of nature and indecency, as has been interpreted differently in different legal contexts. In the latest report by the International Lesbian Gay Bisexual Trans and Intersex Association (ILGA), May 2014 http://www.old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf (accessed 13 February 2015), it characterises male and female same-sex consensual sexual acts as illegal.

5 Nigeria: Criminal Code Act, ch 77, Laws of the Federation of Nigeria 1990, ch 21: Offences against Morality, secs 214, 215 & 217. With regard to the crime of 'gross indecency' as stipulated in sec 217, it refers only to 'any male person'. Uganda: ch 120 of the Penal Code Act 1950, ch 14, Offences against Morality, secs 145, 146 & 148. Before the Penal Code Amendment (Gender References) Act 2000 was enacted, only same-sex acts between men were criminalised. In 2000, that Act

put harsher penalties on the crime of 'homosexuality'⁶ and, on the other, widen the scope of the law to reach other, arguably related, areas such as same-sex marriage, advocacy and social life.

In January 2014, the Nigerian President promulgated the Same-Sex Marriage (Prohibition) Act 2013 (SSMA). The SSMA outlaws⁷ same-sex marriages and prescribes ten years' imprisonment for anyone who formalises or witnesses a same-sex marriage. It furthermore bans gay organisations and clubs in Nigeria.⁸ In April 2014, a Nigerian citizen living abroad challenged the validity of the SSMA.⁹ The Federal High Court in Abuja was asked to declare the sections referring to the prohibition and invalidity of same-sex marriages invalid. The petitioner claimed that the SSMA violated fundamental rights of Nigerian citizens protected under the Nigerian Constitution,¹⁰ as well as under the relevant articles of the African Charter on Human and Peoples' Rights (African Charter). The Federal High Court dismissed the case on the ground that the complainant lacked the required *locus standi* to present the claim on behalf of other Nigerians because he, himself, had not suffered from the action of the Federal State under the Act.¹¹

Similarly, in early 2014 the Ugandan President signed the Anti-Homosexuality Bill¹² into law, promulgating the Anti-Homosexuality Act 2014 (AHA). A few months later, the Constitutional Court of Uganda struck down the AHA based on the lack of a quorum¹³ in

was passed and changed references to 'any male' to 'any person', so that grossly-indecent acts between women were criminalised as well, and are now punishable by up to seven years' imprisonment. The Gambia: Criminal Code of 1965 as amended in 2005 and 2014, secs 144(1 & 2) and 144A (see n 3 above and 20 below). The amendment done to the Penal Code in 2005, *The Gambia Gazette* 2 August 2005, criminalised lesbian practices by substituting for the words 'a male' with 'any' and by adding subsec (2) that reads: 'In this section "carnal knowledge of any person against the order of nature" includes (a) carnal knowledge of the person through the anus or the mouth of the person; (b) inserting any object or thing into the vulva or the anus of the person for the purpose of simulating sex; and (c) committing any other homosexual act with the person.'

6 Human Rights Watch (n 4 above) 4.

7 Sec 5(1) of the SSMA states that '[a] person who enters into a same-sex marriage contract or civil union commits an offence and is liable on conviction to a term of 14 years' imprisonment'.

8 Sec 5(2) of the SSMA states that '[a] person who registers, operates or participates in gay clubs, societies and organisation, or directly or indirectly makes public show of same-sex amorous relationship in Nigeria commits an offence and is liable on conviction to a term of 10 years' imprisonment'.

9 *Mr Teriah Joseph Ebah v Federal Government of Nigeria* Suit FHC/ABJ/CS/197/2014. Of 1999.

11 *Ebah* (n 9 above).

12 The Anti-Homosexuality Bill 18 of 2009, Bills supplement to the *Uganda Gazette* 47, Vol CII (25 September 2009).

13 Sec 88 of the Ugandan Constitution of 1995 prescribes that the quorum of parliament shall be one-third of all members of parliament entitled to vote.

parliament when the Bill was passed.¹⁴ As in the Nigerian challenge, the Court did not hear any substantial arguments as presented by the petitioners.¹⁵ Nonetheless, a new Bill with similar contents is being drafted. Only three months after the ruling of the Ugandan Constitutional Court, the first draft of the Prohibition of the Promotion of Unnatural Sexual Practices Bill of 2014 (Sexual Practices Bill) was presented to a number of parliamentarians and leaked to the media.¹⁶ The proposed Sexual Practices Bill does not refer to same-sex sexual acts as such, but to the 'performance of unnatural sexual practices' which is linked to the Ugandan Penal Code¹⁷ and the listed offences against morality. It casts a wide net in defining the acts criminalised in section 145 of the Penal Code as sexual acts 'between persons of the same sex, or with or between transsexual persons, a sexual act with an animal, and anal sex'.¹⁸ These crimes are punishable with imprisonment for life. Comparably to the AHA, the Sexual Practices Bill criminalises the promotion, funding, exhibiting and inducement as related to the crime of unnatural sexual practices. Section 2(h) criminalises the act of solemnisation of a same-sex marriage. Any person who attempts or solemnises a same-sex marriage is liable upon conviction to up to seven years' imprisonment. The Sexual Practices Bill furthermore disqualifies consent as a defence against any of the crimes listed and removes all parental rights from any person convicted under the proposed Act.¹⁹

In The Gambia, the Penal Code has recently been amended to add the crime of 'aggravated homosexuality' with a lifetime prison sentence for any person found guilty under any of the prerequisites.²⁰ In The Gambia, consensual male and female same-sex sexual acts²¹

14 The Court found that the Act of the 9th Parliament in enacting the Anti-Homosexuality Act 2014 on 20 December 2013 without quorum in the House is inconsistent with and in contravention of arts 2(1) and (2) and 88 of the Constitution of the Republic of Uganda 1995 and Rule 23 of the Parliamentary Rules of Procedure and thus null and void. *Oloka-Onyango & 9 Others v Attorney-General* (2014) UGCC 14 20.

15 *Oloka-Onyango* (n 14 above) 22.

16 Human Rights Campaign 'Uganda parliament introduces dangerous anti-LGBT legislation again' <http://www.hrc.org/blog/entry/uganda-parliament-introduces-dangerous-anti-lgbt-legislation-again> (accessed 1 April 2015).

17 n 5 above.

18 The Prohibition of the Promotion of Unnatural Sexual Practices Bill of 2014, sec 1, Interpretation.

19 n 18 above, secs 7 & 8.

20 Sec 144A: 'A person commits this offence if he or she engages in a homosexual act and the (a) person against whom the offence is committed is below the age of eighteen; (b) offender is a person living with HIV/AIDS; (c) offender is a parent or guardian of the person against whom the offence is committed; (d) offender is a person in authority over the person against whom the offence is committed; (e) victim of the offence is a person with disability; (f) offender is a serial offender; or (g) offender applies, administers or causes to be administered by any man or woman, any drug, matter or substance with intent to stupefy or overpower him or her, so as to enable any person to have unlawful carnal connection with any person of the same sex.'

21 n 5 above.

were already criminalised under the existing amended Penal Code. However, the new amendment widened the scope of the criminalisation and increased the sentence prescribed.

These developments do not only re-enforce the existing criminalisation of consensual same-sex conduct in all its forms, but it forces homosexual persons of all ages to live in absolute fear of harassment, torture, extortion, mob violence and denunciation.²² Arguably, these laws and the proposed Bill effectively deprive homosexual persons of their dignity and most basic human rights, rendering them utterly vulnerable and, in some cases, effectively disenfranchised. In this article I use the Nigerian SSMA and the approach by the Ugandan government towards same-sex sexuality in the AHA and the Sexual Practices Bill (discriminatory laws)²³ purely as examples. The discussion is, however, equally relevant to the situation of homosexual persons in The Gambia or any of the other 34²⁴ African countries where consensual same-sex conduct is criminalised.²⁵ It is important at the outset to clarify that I in this article focus exclusively on male and female consensual same-sex sexual acts and their implications for homosexual persons. In this regard, I will be heavily biased towards the discussion about sexual orientation as a suspect ground and very little attention will be given to the equally important protection relating to gender identity.

More than 60 years ago, Arendt wrote:²⁶

Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to a community into which one is born is no longer a matter of course and not belonging no longer a matter of choice ... This extremity, and nothing else, is the situation of people deprived of human rights. We become aware of the existence of a right to have rights ... and a right to belong to some kind of organized community, only when millions of people emerge who had lost and could not regain these rights because of the new global political situation.

Arendt made these observations in the context of the vast number of stateless refugees produced by World War II. However, today Arendt's theoretical framework well frames the marginalisation, violence, discrimination and loss of dignity experienced by many homosexual

22 R Thoreson & S Cook (eds) IGLHRC Report 'Nowhere to turn: Blackmail and extortion of LGBT people in sub-Saharan Africa' (2011) 6; Human Rights Watch (n 4 above) 3-4.

23 The reference to 'discriminatory laws' in this article is made with the understanding that there is at the time of writing this article no law of this nature in force in Uganda.

24 Algeria, Angola, Botswana, Burundi, Cameroon, Central African Republic, Comoros, Egypt, Eritrea, Ethiopia, Ghana, Guinea, Kenya, Lesotho, Liberia, Libya, Malawi, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Senegal, Seychelles, Sierra Leone, Somalia, South Sudan, Sudan, Swaziland, Tanzania, Togo, Tunisia, Zambia and Zimbabwe. See LP Itaborahy & J Zhu 'State-sponsored homophobia - A world survey of laws: Criminalisation, protection and recognition of same-sex love' ILGA Report (n 4 above) 18.

25 As above.

26 H Arendt *The origins of totalitarianism* (1951) 293-294.

persons living in sub-Saharan Africa.²⁷ The right to dignity, which embraces all fundamental human rights, is a prerequisite to the right to have rights, as expressed by Arendt. Ackermann explains that human dignity should be understood as both 'the capacity for and the right to respect as a human being'.²⁸ He describes human dignity as enabling human beings to have self-awareness and a sense of self-worth, to exercise self-determination, to develop their personalities and to strive for self-fulfilment. He furthermore importantly acknowledges that dignity 'arises from the capacity of human beings to enter into meaningful relationships with others'.²⁹ If a person is prevented from accessing the rights to free speech, association and assembly, if he or she cannot marry, if a person's expression of his or her innermost emotions is subject to lifetime imprisonment or the death penalty, that person has no dignity. Archbishop Desmond Tutu framed this argument well when he equated the discrimination against gay people in Uganda with the horrors of Nazi Germany and the apartheid era in South Africa.³⁰

2 Scope

I set out to explore two main problems in this article. Firstly: How should the rights to dignity, equality and non-discrimination be interpreted and applied under the regional African human rights system when related to sexual orientation? In this regard, I draw on the interpretation of these rights under international human rights law as well as the jurisprudence of the European Court of Human Rights (European Court) and its Inter-American counterpart. I specifically put emphasis on a recent case from the Inter-American Court of Human Rights (Inter-American Court), *Atala and Daughters v Chile*³¹ (*Atala* case) to point to similarities between the laws. I use this perspective as I explore non-discrimination and potential human rights violations under the African Charter related to the criminalisation of same-sex consensual sexual acts.

27 See 'From torment to tyranny enhanced persecution in Uganda following the passage of the Anti-Homosexuality Act 2014' 20 December 2013-1 May 2014 2-4, <http://www.sexualminoritiesuganda.com/Torment%20to%20Tyranny%2009-05-2014%20FINAL.pdf> (accessed 27 March 2015); 'Realities and rights of gender non-conforming people and people who engage in same-sex sexual relations in Africa – A civil society report' http://www.cal.org.za/new/?page_id=1490 (accessed 27 March 2015); 'Violence based on perceived or real sexual orientation and gender identity In Africa' 2013 http://www.cal.org.za/new/?page_id=1490 (accessed 25 March 2015).

28 L Ackermann *Human dignity: Lodestar for equality in South Africa* (2013) 86.

29 As above.

30 'Desmond Tutu condemns Uganda's proposed new anti-gay law' *The Guardian* 23 February 2014 <http://www.theguardian.com/world/2014/feb/23/desmond-tutu-condemns-uganda-proposed-anti-gay-law> (accessed 14 February 2015).

31 *Karen Atala and Daughters v Chile* IACHR (23 July 2008) Ser L/Doc 22 Rev 1.

Secondly: What procedural or other hurdles may stand in the way of bringing a claim of discrimination based on sexual orientation to the African Commission on Human and Peoples' Rights (African Commission) or the African Court on Human and Peoples' Rights (African Court)? In this regard, I specifically consider the general restrictions placed on individuals and non-governmental organisations (NGOs) in bringing complaints to the African Court and the real potential of the African Commission to act as a conduit to the Court in cases involving rights related to sexual orientation, bearing in mind its inconsistent approach to same-sex sexuality. I address these questions by analysing some key developments by the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court. The main objective is to utilise the approach of these institutions to explore both the legal avenues under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) and the rights and obligations (as mentioned above) under the African Charter³² available to anyone who would want to challenge any domestic law criminalising same-sex consensual sexual acts or any of the other related prohibitions as set out in the legislation enunciated above. I use the jurisprudence of the Inter-American system as an example, firstly because the level of development and the importance of culture and tradition are easier compared (not similar) than in the European context (as is further elaborated on in section 5); and, secondly, because of the similar positioning and powers of the Inter-American Commission and the African Commission.

As a point of departure, it is important to note that the African Commission has to some extent already reacted to questions regarding sexual orientation as a ground for non-discrimination. It has, however, only been faced with one single complaint where this issue was at the centre of the complaint. In 1994, a communication³³ reached the African Commission asking the Commission to consider the legal status of homosexuals in Zimbabwe. According to the complainant, the prohibition of sexual contacts between consenting adult homosexual men in private was enforced in Zimbabwe, and it was furthermore encouraged by statements against homosexuals by the President and by the then Minister of Home Affairs. The complaint was, however, withdrawn by the applicant.³⁴

32 This also includes the relevant articles of the African Women's Protocol and the African Children's Charter as further discussed in subsec 4.

33 *Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995).

34 The commissioner acting as the rapporteur in this case has been quoted as stating the following: '[B]ecause of the deleterious nature of homosexuality, the Commission seizes the opportunity to make a pronouncement on it. Although homosexuality and lesbianism are gaining recognition in certain parts of the world, this is not the case in Africa. Homosexuality offends the African sense of

In 2006, the African Commission handed down its findings in *Zimbabwe Human Rights NGO Forum v Zimbabwe*.³⁵ In this decision, the Commission confirmed that article 2 of the African Charter safeguards 'equality of treatment for individuals irrespective of ... sexual orientation'.³⁶ This opinion by the Commission was, however, expressed *obiter*, as the case did not concern the issue of sexual orientation as such.

The African Commission has furthermore related to issues of sexual orientation as part of the Commission's mandate to grant observer status (which is addressed further in section 5.3) and as part of its promotional mandate by posing questions and expressing its concerns through the state reporting mechanism and the Special Rapporteurship.³⁷ As neither the African Commission nor the African Court has formally acted on a direct or indirect complaint by an individual or NGO, I argue that the issue of the status of sexual orientation under the African Charter is far from settled. Therefore, an analysis of the nature, suggested above, has the potential of revealing how dignity, non-discrimination and equality, as recalled in articles 2 and 3 of the African Charter, articles 1, 2 and 8 of the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol) and article 3 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) should be understood under the regional African human rights system.

In grappling with the problems set out above, I have elected to engage with the understanding of non-discrimination from the perspective of the universality of human rights, more appropriately, the universal application of the rights to equality and dignity. In this regard, the relevance of the development of human rights related to sexual orientation internationally and in other regional contexts becomes paramount in the interpretation of the rights set out in the African Charter, the African Women's Protocol and the African Children's Charter. In this regard, Huber's thoughts on universality puts Arendt's framework, as discussed above, in context in indicating that 'cosmopolitanism takes seriously that everybody matters equally and that human persons have a right to have rights'.³⁸ In line with Huber's argument, a broad-based society, a society that aims to be

dignity and morality and is inconsistent with positive African values.' EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 174, as quoted in F Viljoen *International human rights law in Africa* (2012) 265.

35 (2006) AHRLR 128 (ACHPR 2006).

36 *Zimbabwe Human Rights NGO Forum* (n 35 above) para 169.

37 See R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 102-104; Viljoen (n 34 above) 266.

38 W Huber 'Human rights and globalisation' STIAS lecture (17 February 2013) University of Stellenbosch Faculty of Law (transcript of the lecture on file with the author).

part of the international community, would arguably accept the developments towards inclusion and away from exclusion in line with the idea of the universal approach to human rights. However, it is clear from the reactions of the governments in, for example, Uganda and Nigeria that they do not accept the approach to human rights related to sexual orientation as developed, through soft law, by the international community and in other regional human rights systems, such as the European and Inter-American systems. In this regard, borrowing from Huber again, it appears that exceptionalism as one expression of human rights scepticism is finding an ever-more fertile ground amongst African states and its citizens. The idea that we are, as expressed in the Universal Declaration of Human Rights (Universal Declaration), '[a]ll human beings ... born free and equal in dignity and rights' appears to be a rule with many exceptions if viewed from the perspective of homosexual persons' right to dignity and equality in sub-Saharan Africa, thus making it even more important to analyse the protection against discrimination based on sexual orientation under the African human rights system

3 International and European legal backdrops

As part of the analysis of the first problem set out in the preceding section, I attempt to contextualise, in a brief manner, these rights by looking to international human rights law and the substantive case law of the European Court related to sexual orientation. There is no international legally-binding instrument that specifically lists sexual orientation as a suspect ground. In addition, customary international law cannot be viewed as having developed to a point where it includes discrimination based on sexual orientation, as it has *vis-à-vis* discrimination based on, for example, race.³⁹ State practice is too diverse for a customary norm of this nature to have developed and open expressions of objections to such norms are noticeable. This is particularly visible in the opinions expressed at various United Nations (UN) human rights bodies, such as the UN Human Rights Council (UNHRC). The UNHRC clearly remains divided on the issue of sexual orientation as a suspect ground.⁴⁰ To find support for the inclusion of sexual orientation under the non-discrimination clauses in existing international human rights law, we have to look to soft law. Soft law does not have legally-binding force, but can help us recognise the

39 A Cassese *International law* (2005) 203.

40 See as an example the voting records of the Human Rights Council with regard to the two resolutions on Human Rights, Sexual Orientation and Gender Identity, the UN Human Rights Council's Resolution on Human Rights, Sexual Orientation and Gender Identity UN Doc A/HRC17/L.9/Rev 1, (Human Rights Council 15 June 2011) and the UN Human Rights Council's Resolution on Human Rights, Sexual Orientation and Gender Identity A/HRC/27/L.27/Rev 1, (26 September 2014). With regard to the 2011 Resolution, only two of the 13 African states (Libya suspended) on the Human Rights Council (South Africa as the sponsor and Mauritius) voted in favour of the Resolution. Nigeria and Uganda voted against,

reach of obligations already in force. Soft law can also direct the future development of customary international law. Considerable soft law has been produced within the UN structure; arguably enough to justify the classification of sexual orientation as a suspect ground.⁴¹ Important to this discussion is the decision of the UN Human Rights Committee in *Toonen v Australia*.⁴² In *Toonen*, the Committee concluded that 'reference to "sex" in articles 2, paragraph 1 and 26 [of the ICCPR] is to be taken as including sexual orientation'.⁴³ Decisions of this nature, within the context of the International Covenant on Civil and Political Rights (ICCPR) with its 168 state parties, including all African states except South Sudan, are valuable as soft law and as an important step towards the development of customary international law.

On the regional level, the European Court, in applying the European Convention on Human Rights and Fundamental Freedoms (European Convention), has made very important contributions to the understanding of the protection of rights related to sexual orientation under the European Convention. In this regard, the European Court has covered a number of different topics that are relevant to the protection of a wide array of what can best be referred to as lesbian, gay, bisexual and transgender (LGBT)⁴⁴ rights. The European Court has moved from applying the right to privacy in *Dudgeon v UK*⁴⁵ and

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11167&LangID=E> (accessed 27 March 2015). With regard to the 2014 Resolution, only one of the 11 African states on the Human Rights Council (South Africa) voted in favour of the Resolution <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15109&LangID=E> (accessed 27 March 2015).

41 The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, http://www.yogyakartaprinciples.org/principles_en.htm (accessed 1 April 2015); UN Declaration on Human Rights and Sexual Orientation <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11167&LangID=En> and Gender Identity, UN Doc A/63/635 (UNGA 22 December 2008); the UN Human Rights Council's Resolution on Human Rights, Sexual Orientation and Gender Identity 2011 (n 40 above); Report on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity by the United Nations High Commissioner for Human Rights (UNHCHR), UN Doc A/HRC/19/41 (UNHCHR 17 November 2011); the UN Human Rights Council's Resolution on Human Rights, Sexual Orientation and Gender Identity 2014 (n 40 above); the Report of the United Nations Special Rapporteur on the right to education, UN Doc. A/65/162, 23 (23 July 2010); General Comment 20 UN Doc E/C.12/GC/20, 32 (ESCR Committee 2 July 2009), General comment 13 UN Doc CRC/C/GC/13, 60 and 72(g) (Committee on the Rights of the Child 18 April 2011); General Comment 2 UN Doc CAT/C/GC/2, 21 (Committee against Torture 24 January 2008); General Recommendation 28 UN Doc CEDAW/C/GC/28 18 (Committee on the Elimination of Discrimination against Women 16 December 2010).

42 Communication 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

43 *Toonen* (n 42 above) para 8.7.

44 This acronym is used in its widest sense as presented by the IACHR Rapporteurship on the Rights of LGBT Persons. For further information, refer to 'Relevant concepts and applicable terminology' <https://www.oas.org/en/iachr/lgtbi/mandate/concepts.asp> (accessed 13 February 2015).

45 *Dudgeon v United Kingdom* ECHR (23 September 1981) Ser A 45.

a number of subsequent cases,⁴⁶ to strike down anti-sodomy laws in Europe and onto the judgment in *Salgueiro da Silva Motua v Portugal*,⁴⁷ where the European Court argued that sexual orientation was a distinction prohibited by article 14 of the European Convention. It has furthermore dealt with LGBT rights in the context of the age of consent, freedom of assembly, expression and association, adoption, parental rights and obligations, housing tenure, social and employer benefits, military service, residence permits and extradition, gender reassignment, dress code, blood donation, registration of partnerships, personal refusal of service to LGBT persons and violence and the lack of investigation thereof.⁴⁸ This indicates that the European system has moved well beyond the negative approach to sexual orientation and gender identity based on the right to privacy towards a positive approach by cementing the entitlement to equality based on sexual orientation and gender identity.

The aim of this article is not to provide an in-depth account of either soft law or the jurisprudence of the European Court relating to sexual orientation, but rather to indicate that the African regional human rights system in its consideration of issues relating to sexual orientation is existing and acting within, what I would argue to be, a very defined context. It is true that international law does not generally recognise the effect of precedents and, therefore, the jurisprudence of the other regional courts are of persuasive value only. However, the developments under the European and American Conventions, the latter being the focus of the following section, represent not only regional developments, but also the outcome of a broader development of international human rights law. In conjunction, these developments arguably have to have some effect on how we understand the position of sexual orientation on the African continent. In the following section, I engage with a deeper analysis of process and merits claims relating to sexual orientation within the context of the Inter-American system.

4 Imperative developments under the Inter-American system – The *Atala* case

The Inter-American human rights system has dealt with three cases⁴⁹ relating to human rights violations on the basis of sexual orientation.

46 *Norris v Ireland* ECHR (26 October 1988) Ser A 142; *Modinos v Cyprus* ECHR (22 April 1993) Ser A 259; *Lustig-Preen and Beckett v UK* (2000) 29 ECHR 548.

47 *Salgueiro da Silva Mouta v Portugal* ECHR (21 March 2010) Ser A 741.

48 See ECHR Factsheets on 'Sexual orientation issues' March 2014 http://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf; 'Homosexuality: Criminal aspects' November 2013 http://www.echr.coe.int/Documents/FS_Homo_sexuality_ENG.pdf; 'Gender identity issues' October 2013 http://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf (accessed 27 March 2015).

49 *Marta Lucia Alvarez Giraldo v Colombia* Inter-American Commission of Human Rights, IAm Comm of HR, (4 May 1999), OEA/SerL/V/II 106 Doc 3 rev 211, *Karen*

One of the cases, the *Atala* case,⁵⁰ was heard firstly by the Inter-American Commission and was then referred to the Inter-American Court. Both bodies made important findings discussed below. The *Atala* case concerned Mrs Atala and her three daughters. When Mrs Atala and her husband decided to separate after nine years of marriage, both parties agreed that their daughters should remain with Mrs Atala. However, when Mrs Atala the following year moved in with a new, female, partner, the girls' father filed a complaint with a local court claiming that the children would be harmed if they continued living in their home with their lesbian mother and her new partner. The case made its way through the Chilean courts, and the Supreme Court handed down judgment in May 2004. In this judgment, three of the five justices on the bench characterised the daughters as being in a 'situation of risk' that placed them in a 'vulnerable position in their social environment, since clearly their unique family environment differ[ed] significantly from that of their school companions'.⁵¹

Later in 2004, Mrs Atala filed a petition with the Inter-American Commission. The case was declared admissible before the Commission,⁵² and a unanimous court later found that Chile was responsible for a violation of the right to equality and non-discrimination enshrined in article 24, in conjunction with article 1(1) of the American Convention on Human Rights (American Convention), to the detriment of Mrs Atala. The Inter-American Court concluded:⁵³

Bearing in mind the general obligations to respect and guarantee the rights established in article 1(1) of the American Convention, the interpretation criteria set forth in article 29 of that Convention, the provisions of the Vienna Convention on the Law of Treaties, and the standards established by the European Court and the mechanisms of the United Nations ... the sexual orientation of persons is a category protected by the Convention. Therefore, any regulation, act or practice considered discriminatory based on a person's sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation.

Atala and Daughters v Chile Inter-American Commission of Human Rights, IAm Comm of HR (23 July 2008) OEA/Ser L/V/II130 Doc 22 Rev 1, *Atala* (n 31 above) and. Ángel Alberto Duque v Colombia, Inter-American Commission of Human Rights, IAm Comm of HR, (2 November 2011), Case 123-05, Report 150/11.

50 n 31 above.

51 Judgment of the Supreme Court of Justice of Chile (31 May 2004) para 12, as quoted in *Atala* (n 31 above) para 57. In its decision, the Supreme Court of Justice revoked from Mrs Atala the custody of her three daughters.

52 *Karen Atala and Daughters v Chile*, Inter-American Commission of Human Rights (n 31 above) para 69.

53 *Atala* (n 31 above) para 314.

5 The African Charter on Human and Peoples' Rights in perspective

The *Atala* case is undoubtedly a landmark case in the protection of gay and lesbian rights. It brought together the developments on the international and European levels and cemented the right to equality under the concept of *jus cogens*. It further refuted the common objections to sexual orientation as a ground for non-discrimination and highlighted the need for sexual orientation to be viewed as a suspect category. This case is relevant to the African Commission and Court for a number of reasons. Firstly, the sources of law are very similar in substance, as anchored in the Universal Declaration, and rooted in similar contexts. Secondly, the Commission has on numerous occasions either itself referred to the reports of the Inter-American Commission and the judgments of the Court in its decisions or accepted these sources as introduced either by the complainant or the state.⁵⁴ Thirdly, the jurisdiction of the Court would not exclude case law from other regional courts presiding over human rights instruments of similar content to constitute persuasive value, as indicated in articles 2 and 3 of the Protocol and article 61 of the African Charter. This is furthermore evident in the separate opinion of Judge Ouguergouz in *Yogogombaye v the Republic of Senegal*,⁵⁵ where he uses practice of the Inter-American Commission, the Inter-American Court and the European Court to substantiate his reasoning.

The application of the American Convention by the Inter-American Court is helpful because it sets out an analytical structure which could be used successfully within the context of the African Charter. If the discriminatory laws are considered from the perspective of its respective outcomes, it is clear that they create a category of persons who, by their very nature, regardless of their behaviour, would have no or limited protection of their privacy and liberty; who would not be able to engage in sexual activities of their choice, to openly kiss or touch a loved one, to marry or associate with other individuals over common causes or to speak freely.

There are four immediate features of the African Charter read together with the African Women's Protocol and the African

54 See eg *Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008) para 59; *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire* (2008) AHRLR 75 (ACHPR 2008) para 48; *Zimbabwe Lawyers for Human Rights & Another v Zimbabwe* (2008) AHRLR 120 (ACHPR 2008) paras 64-65, 67, 69 & 79-80, *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) paras 51 & 75; *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 57.

55 African Court on Human and Peoples' Rights *Yogogombaye v the Republic of Senegal* Application 001/2008, separate opinion of judge Fatsah Ouguergouz http://www1.chr.up.ac.za/images/files/documents/africancases/institution/african_court/yogogombaye_v_senegal_separate_opinion_2008.pdf (accessed 8 February 2015).

Children's Charter that become relevant within the context of the *Atala* case: firstly, the reference to 'other status' in article 2,⁵⁶ and the reference to 'every individual' in article 3(2)⁵⁷ with regard to equality before the law; secondly, the lack of protection of privacy in the African Charter and the African Women's Protocol; the protection of privacy is, however, notably prescribed in article 10 of the African Children's Charter. Thirdly, the rights of dignity and liberty alongside freedoms of expression, speech and association are protected; and, fourthly, article 27(2) expresses the possibility of a limitation of the rights in the African Charter. The Charter presents a very similar approach to these basic human rights as the American and European Conventions and other international conventions, such as the ICCPR,⁵⁸ that further strengthens the analogy attempted.

5.1 Non-discrimination and equality before the law

In the application to the Inter-American Court,⁵⁹ the Inter-American Commission used a four-pronged approach to the issue of equality. It firstly considered the interrelation, scope and content of articles 1.1 and 24 of the American Convention (mirroring articles 2 and 3 of the African Charter). Secondly, it considered the differences in treatment, suspect categories, and the strict scrutiny test. Thirdly, the Inter-American Commission explored sexual orientation as a suspect category for distinction; and, fourthly, it undertook a specific analysis of the case at hand, including a discussion about the separate rights and the possibility of a limitation of such rights.⁶⁰

In analysing the first prong of the methodological approach in the context of the African Charter, it is important to acknowledge the Preamble of the Charter. Part of it reads: 'Recognising ... that fundamental human rights stem from the attributes of human beings which justifies their national and international protection ...', indicating that it is not a set of African values or national laws that dictate the contents and context of any given human right, such as equality. Arguably, the phrase 'attributes of human beings' expresses the widest possible diversity in determining fundamental human rights. The right not to be discriminated against is one of the most basic rights resonating in most national constitutions and international human rights instruments alike. It is furthermore a right *erga omnes* and part of the concept of *jus cogens* and, as indicated by the Inter-American Court in the *Atala* case in stating that '[t]he juridical

56 With similar reference in arts 1 & 2 of the African Women's Protocol and art 3 of the African Children's Charter.

57 With similar reference in art 8 of the African Women's Protocol.

58 On the African continent it is only South Sudan that is not a state party to the ICCPR.

59 IAComHR Application 12.502 in the case of *Karen Atala and Daughters v Chile* <http://www.cidh.oas.org/demandas/12.502ENG.pdf> (accessed 13 February 2015).

60 *Atala* (n 59 above) para 72.

framework of national and international public order rests on this principle and permeates the entire legal system'.⁶¹

Discrimination as such is not referred to in the African Charter (or the American Convention).⁶² Article 2 of the African Charter instead refers to 'distinction'. It is in this regard useful to use the definitions contained in the Convention on the Elimination of all Forms of Racial Discrimination (CERD) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) characterising discrimination as⁶³

[any] distinction, exclusion, restriction or preference which is based on any ground ... and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

It is an established rule that not all differentiation in treatment violates the rights to non-discrimination and equality. As expressed by the Inter-American Commission, international judicial and quasi-judicial bodies use certain established tests to evaluate the reasonable and objective reasons for the difference in treatment. However, before such a test can be performed, it has to be determined whether sexual orientation is a suspect category which would require of any state, differentiating on this ground, to substantiate and explain why it would be reasonable and just to do so. In line with the reasoning of Murray and Viljoen and as argued by Goldstone J in *Harksen v Lane NO & Others*,⁶⁴ a new ground for non-distinction, that is, sexual orientation, could be invoked because non-discrimination based on sexual orientation or gender identity impairs the inherent human dignity in a manner which is serious and comparable to the factors, such as sex or social origin, that are already listed. As discussed above, international soft law protects against discrimination based on sexual orientation. Moreover, homosexual persons are protected by the equality clauses in the constitutions of their countries of origin or domicile, the equality clause in the regional agreements and the equality clauses as set out in a number of international human rights instruments, such as the ICCPR, the International Convention on Economic, Social and Cultural Rights (ICESCR), CEDAW, the Convention on the Rights of the Child (CRC) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In the *Atala* case, the Inter-American Commission established:⁶⁵

[S]exual orientation is covered by the phrase 'other social condition' contained in article 1.1, with all the consequences that this implies with

61 n 31 above, para 79.

62 It is, however, well defined in arts 1 and 2 of the African Women's Protocol.

63 Art 1(1) CERD and art CEDAW. See also arts 1 and 2 of the African Women's Protocol.

64 1998 (1) SA 300 (CC) para 46.

65 IAComHR Application (n 59 above) para 95.

respect to the other rights enshrined in the American Convention, including article 24. Therefore, a difference in treatment based on a person's sexual orientation is suspect; it is presumed to be incompatible with the American Convention; and the corresponding state is obliged to prove that it passes the strict scrutiny test ...

There is evidently enough evidence to be able to conclude that 'sex and other grounds' include discrimination based on sexual orientation and/or gender identity and that unjust differentiation based on these criteria is deemed discrimination by the UN, the Inter-American Court and the European Court. Thus, it is impossible to fathom how the African Commission, under the African Charter, could deviate from this established norm, even more so in the light of Resolution 275⁶⁶ as passed by the African Commission in May 2014 and its decisions in *Zimbabwe Human Rights NGO Forum* (as discussed above) and *Purohit & Another v The Gambia*.⁶⁷

In *Purohit*, the African Commission clearly showed its willingness and ability to find corresponding grounds not specifically listed in article 2 of the African Charter. The case concerned the inclusion of disability under article 2 as an analogous ground. In its decision, the Commission argued that, in interpreting and applying the African Charter, the Commission relies on its own jurisprudence and, as provided for by articles 60 and 61 of the Charter, on appropriate and relevant international and regional human rights instruments, principles and standards. It furthermore indicated that it was willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms and standards, taking into account the well-recognised principle of universality which is established by the Vienna Declaration and Programme of Action of 1993. It further stated:⁶⁸

[A]rticles 2 and 3 of the African Charter basically form the anti-discrimination and equal protection provisions of the African Charter. Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter.

In *Purohit*, the African Commission found The Gambia to have violated the African Charter based on the discrimination against disabled persons. This case is not only important because it shows the

66 Resolution 275 'On Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity', African Commission on Human and Peoples' Rights, meeting at its 55th ordinary session held in Luanda, Angola, from 28 April to 12 May 2014, <http://www.achpr.org/sessions/55th/resolutions/275/> (accessed 3 February 2015) (Resolution 275).

67 (2003) AHRLR 96 (ACHPR 2003).

68 *Purohit* (n 67 above) para 49.

possibilities of an analogous ground and the ease with which the Commission accepted this argument, but also its willingness to utilise soft law in concluding the matter before it. The argument of the existence of analogous grounds under article 2 of the African Charter was furthermore confirmed in *Bissangou v Republic of Congo*,⁶⁹ where the Commission indicated that grounds similar in nature to those listed in article 2 would be relevant in a claim of discrimination under the African Charter.

5.2 Violations

When departing from the approach set out in *Atala*, it becomes clear that any law criminalising consensual same-sex sexual acts violates the right to dignity. As was indicated by the African Commission in the *Purohit* case,⁷⁰ human dignity is an inherent basic right which all human beings are entitled to without discrimination. In *Media Rights Agenda v Nigeria*⁷¹ the Commission held that the term 'cruel, inhuman or degrading punishment and treatment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental. Furthermore, in *Modise v Botswana*,⁷² the African Commission stated that exposing victims to 'personal suffering and indignity' violated the right to human dignity. Personal suffering and indignity can take many forms, as is evident in the context of the realities of homosexual persons, for example in Uganda and Nigeria. The discriminatory laws create systems of denunciation similar to the ones used in Nazi Germany and apartheid South Africa to locate and imprison citizens either engaging in same-sex or inter-racial relationships. Discriminatory laws force persons, under the threat of imprisonment, to denounce non-heterosexual marriages and gay clubs, societies or organisations. Discriminatory laws furthermore motivate partners to turn on each other if it is discovered that they have engaged in a homosexual act. As reported by the International Gay and Lesbian Human Rights Commission (IGLHRC), blackmail and harassment of gays and lesbians are rife in sub-Saharan Africa and legislation of this nature aggravates an already critical situation.⁷³ This amounts to a clear violation of the right to dignity, as set out in article 5 of the African Charter as well as in article 3 of the African Women's Protocol.

69 (2006) AHRLR 80 (ACHPR 2006) para 69.

70 *Purohit* (n 67 above) para 57.

71 (2000) AHRLR 262 (ACHPR 2000) para 71.

72 *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000).

73 IGLHRC Report (n 22 above) 5-6.

Ingrained in the right to dignity is also the right to privacy. The right to privacy has been one of the most important rights in the process of declaring national anti-sodomy laws contrary to basic human rights.⁷⁴ As was indicated above, the right to privacy is not explicitly spelled out in the African Charter but, as discussed by Viljoen and Murray,⁷⁵ it can be understood as an implied right under the right to dignity in line with the arguments in the case of *SERAC*.⁷⁶ This was furthermore highlighted in *Atala*, where the Inter-American Court established that privacy fell under the ambit of the protection of dignity. It further concluded that privacy was an ample concept that was not subject to exhaustive definitions and includes, among other protected realms, the sex life and the right to establish and develop relationships with other human beings. Therefore, privacy includes the way in which the individual views himself and to what extent and how he or she decides to project this view to others.⁷⁷ The issue of privacy is, however, a double-edged sword: On the one hand, it is the path of least resistance in that it would not force states such as Nigeria and Uganda to explicitly 'accept' homosexuality. Privacy can be used to encapsulate a 'derogatory' behaviour, while at the same time arguing that as long as it is hidden, it would not be accepted but just ignored. On the other hand, the use of privacy would leave the stigma completely untouched and the state without any positive obligations towards homosexual persons. Furthermore, some of the acts criminalised in the discriminatory laws are by their nature public acts. Same-sex amorous expression and advocating for gay rights are amongst the acts that are criminalised and, in this context, the right to privacy would arguably have very little effect.

Articles 4 and 6 of the African Charter, furthermore, spell out the essential rights to life and integrity well as the right of every person to liberty and security of the person.⁷⁸ These rights can be restricted under article 27(2) and the right to liberty and security of the person can additionally be restricted under certain circumstances in conjunction with the claw-back clause inserted in article 6. Both provisions, however, refer to the strict prohibition of an arbitrary deprivation of these rights. As pointed out by Ouguergouz,⁷⁹ the word 'arbitrarily' does not have the same meaning as 'illegal'; it is

74 See *Lawrence v Texas* 539 US 558 (2003); *Toonen* (n 42 above) and *Croome v Tasmania* 191 CLR 119 (1997).

75 Murray & Viljoen F (n 37 above) 89-90.

76 *SERAC* (n 54 above).

77 *Atala* (n 31 above) para 162.

78 With similar reference in art 4 of the African Women's Protocol and art 5 of the African Children's Charter.

79 F Ouguergouz *The African Charter of Human and People's Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 93.

broadly. In the same vein, the International Court of Justice (ICJ) in the *Eletronica Sicula* case⁸⁰ stipulated:⁸¹

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.

From this perspective, it is important to note that the principle of non-discrimination is not only a well-established legal principle, but it is a *jus cogens* norm, as recognised by the Inter-American Court in *Atala*.⁸² Article 29(2) of the Universal Declaration expresses that

[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

From the above, it is possible to draw two conclusions. Firstly, if a person's rights are limited based only on that person's sexual orientation and/or gender identity, that would constitute an arbitrary deprivation or limitation of that right. Secondly, when it has been established that a right has been arbitrarily deprived or limited, none of the reasons that might fit under article 27(2) – or the 'claw-back' clauses with regard to the nature or reasons of the law, as further discussed below – relieves this fact. In short, it is impossible to justify arbitrariness with morality or common interest. This would lead to the conclusion that if a person's integrity, liberty or security is limited or taken away due to that person's sexual orientation, that person has been arbitrarily deprived of said rights. Similarly, if a person is subjected to a law that would require other individuals to denounce that person's most intimate and private acts and thoughts, solely based on that person's sexual orientation, that would be an arbitrary infringement on that person's integrity. Hence, an act prescribing such actions would violate articles 2 and 4 of the African Charter.

It is furthermore essential to note that it would also be possible to explore the prohibition of same-sex marriages under the African Charter in relation to the principles of equality before the law and of equal protection of the law. The discussion above has centred on rights that are protected in the African Charter and their relationship with the right to non-discrimination. There is no right to marriage in the Charter. However, a law that prohibits marriage solely on a suspect ground is in violation of the right to equality before the law. As was stated by Sachs J in *Minister of Home Affairs & Another v Fourie*

80 Case concerning *Eletronica Sicula SPA (ELSI) United States of America v Italy* (20 July 1989) (1989) ICJ Reports.

81 n 80 above, para 128.

82 *Atala* (n 31 above) para 79.

& *Another*,⁸³ in interpreting the right to equal protection by the law:⁸⁴

At the very least, then, the applicants in both matters are entitled to a declaration to the effect that same-sex couples are denied equal protection of the law under section 9(1), and subjected to unfair discrimination under section 9(3) of the Constitution, to the extent that the law makes no provision for them to achieve the dignity, status, benefits and responsibilities available to heterosexual couples through marriage.

Discriminatory laws furthermore violate a number of freedoms as set out in the African Charter, the African Women's Protocol and the African Children's Charter, namely, freedom of expression, association and assembly. Discriminatory laws prohibit gay clubs, societies, organisations, processions and meetings and, additionally, any person or organisation that funds these types of bodies. These restrictions are only based on sexuality, that is, the laws refer to 'gay' clubs or 'a person who abets homosexuality', clearly indicating a violation of the rights set out, based on sexual orientation. It is within this context that article 27(2) of the African Charter and the 'claw-back' clauses may become relevant. The tests set out by the African Commission and the Inter-American Commission are again useful. Article 27 stipulates that rights and freedoms have to be 'exercised with due regard to the rights of others, collective security, morality and common interest'. This is not a limitation clause *per se*, but refers to the duties of every individual *vis-à-vis* other individuals. Even if this is not a limitation clause in the stricter sense, it has been applied to justify limitations. In this regard, the African Commission has expressed that:⁸⁵

The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained. Even more important, a limitation may never have as a consequence that the right itself becomes illusory.

This provision should be viewed in light of the decision of the African Commission in *Article 19 v Eritrea*,⁸⁶ where the Commission stated that '[i]nternational human rights standards must always prevail over contradictory national law' and '[a]ny limitation on the rights of the Charter must be in conformity with the provisions of the Charter'.⁸⁷

In the context of discriminatory laws, three main arguments have been used to justify these laws: moral values (mainly based either on religion or traditional African values); the threat to the heterosexual family; and the dangers presented to the welfare of children and the

83 2006 (1) SA 524 (CC).

84 *Fourie* (n 83 above) para 79.

85 *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 69-70.

86 (2007) AHRLR 73 (ACHPR 2007) para 105.

87 *Article 19* (n 86 above) para 105.

youth. As mentioned above, in trying to evaluate whether a distinction is 'reasonable and objective' (that is outside the scope of arbitrariness as discussed above), the Inter-American Commission, the Inter-American Court and other international courts and bodies have similarly made use of standard tests involving certain requirements. These tests include, for example, the existence of a legitimate goal; the relation between the goal sought and the distinction; the existence of other alternatives; and the proportionality, understood as the balance between the interests at stake and the level of sacrifice required from one party compared to the level of benefit of the other.⁸⁸ In the *Atala* case, the Inter-American Commission and the Inter-American Court found that the different treatment that Mrs Atala was subjected to during the custody proceedings 'was not justified by a pressing social need and did not comply with the requirements of suitability, necessity, and proportionality'.⁸⁹

From the perspective of the discriminatory laws, it is initially imperative to note the basic yet significant statement in *Article 19* that the standards of the African Charter must always prevail over national legislation and limitations can only be made at the satisfaction of the Charter. When engaging with the justifications, in other words the reference to moral values, it immediately becomes clear that there is very little legal substance in these justifications. What would be the legitimate goal sought to be achieved by this type of discriminatory law? As an example, the motive of the Anti-Homosexuality Act is spelled out in the AHA Bill. It is to '[s]trengthen the nations' capacity to deal with the emerging internal and external threats to the traditional heterosexual family' and to 'protect the children and youth'.⁹⁰ Similar objectives have been raised with regard to the Same-Sex Marriage (Prohibition) Act.

Moreover, in *Atala*, the Inter-American Commission and the Inter-American Court discussed the justification of a distinction on sexual orientation grounded on a pressing social need. In that case, it referred mainly to whether Mrs Atala's daughters would suffer any harmful consequences by being brought up in a household with two women instead of a man and woman. In the context of the discriminatory laws, it would refer to whether, on the one hand, upholding the majority values of heterosexuality and, on the other, saving the youth and the heterosexual family would be such a pressing social need. In *Atala*, the Court found no harm in a lesbian mother bringing up her children within her lesbian relationship, just as no correlation exists between a non-heterosexual orientation and the harm that has been suggested to children and heterosexual marriages in Uganda and Nigeria. Arguably, there is no pressing social need to save children and heterosexual married couples in Nigeria or

88 IAComHR Application (n 59 above) para 86.

89 IAComHR Application, para 101.

90 AHA Bill (n 12 above) 3.0, The objectives of the Bill.

Uganda from people with a same-sex orientation or a gender identity that does not fit in with the male-female binary. No limitations can, therefore, be made on these grounds simply because they would not comply with the requirements of 'suitability, necessity and proportionality'.⁹¹

5.3 Avenues to the African Court

Previously, the monitoring of the African Charter rested solely on the different mechanisms available under the mandate of the African Commission. With the development and inclusion of the African Court, there is potential to move beyond the non-binding decisions of the Commission toward legally-binding decisions and advisory opinions on specific legal issues.⁹² Of importance is the close relationship that is created between the Commission and the Court as set out in the Protocol⁹³ and the 2010 Rules of Procedure of the African Commission.⁹⁴ The objective of the discussion below is to outline the possibilities of the Commission and Court taking a similar procedural approach as the Inter-American Commission and Court in *Atala*. I focus on the African Commission's mandate to bring such a case to the African Court, as the Inter-American in *Atala*, alternatively, the mandate of any individual or NGO to do the same.

In *Atala*, the Inter-American Commission accepted and investigated Mrs Atala's claims and under its mandate it proceeded to present the case to the Inter-American Court based on the report. The procedural avenues to the Inter-American Court and the African Court are not identical, but similar enough, to justify a discussion. Importantly, both the Inter-American Commission⁹⁵ and the African Commission may present cases to the relevant courts and, in addition, the African system allows individuals and NGOs to present claims if the state party has recognised the African Court's jurisdiction in this regard. On face value, the African system could and should offer more opportunities for complaints to reach the African Court than the Inter-American system, considering the direct and indirect access to the African Court, as discussed below. However, this is not the reality thus far. In analysing the relationship between the African Commission and the Court, I depart from the assumption that both the Commission and the Court, in fulfilling their separate yet interlinked mandates, need not only to uphold the African Charter and related regional instruments, but also position themselves in line with comparable

91 IAComHR Application (n 59 above) para 101.

92 This would, however, also relate to the willingness of the AU Assembly to utilise its mandate as spelled out in arts 3, 4, 9(1)(e) and 23(2) of the AU Constitutive Act.

93 Art 2.

94 Rules 114-123.

95 The American Convention only allows state parties and the IAComHR to file complaints with the IACHR under art 61. According to art 61(2) of the American Convention, the procedure in arts 48 and 50 has to be followed for the IAComHR to be able to lodge such a complaint.

international instruments and the recognised interpretations thereof.⁹⁶ From this perspective, it becomes possible to argue, firstly, that the African Commission as a guardian⁹⁷ of the African Charter has the obligation to advance positive rights of homosexual persons in Africa. Secondly, the African Commission and African Court should protect all Africans against the infringement of their rights. Thirdly, the obligation to promote equality does not only involve advocating non-infringement but also a positive duty, reaching beyond the issue of privacy.

Other scholars have dealt with the position of the African Commission on gay and lesbian rights in detail,⁹⁸ and it suffices to say that previously the Commission on occasions has adopted what is strikingly referred to by Viljoen and Murray as the position of 'quiet accommodation'.⁹⁹ This approach was, however, abruptly interrupted when the Commission denied the Coalition of African Lesbians (CAL) observer status in 2010. In that decision, the Commission stated that 'the activities of the said organisation [did] not promote and protect any of the rights enshrined in the African Charter'.¹⁰⁰ The opinion expressed by a majority of commissioners in the CAL matter in 2010 arguably left very little room for any complaint of discrimination based on sexual orientation to be considered by the Commission. The course of the Commission, however, changed at its last, 56th session, where CAL was finally granted observer status.¹⁰¹ The 2015 CAL decision has possibly returned the African Commission to its *obiter* opinion expressed in *Zimbabwe Human Rights Forum*.¹⁰²

Furthermore, in Resolution 275, the African Commission focused specifically on violence against homosexual persons and referred directly to articles 2, 3, 4 and 5 of the African Charter. The Commission strongly urged states to endorse and effectively apply¹⁰³

appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.

This shows that the Commission has accepted that violence on the basis of sexual orientation amounts to discrimination and violates the

96 Art 7 African Women's Protocol and arts 60 & 61 African Charter.

97 Art 45 African Charter.

98 Murray & Viljoen (n 37 above); Viljoen (n 34 above).

99 Murray & Viljoen (n 37 above) 86.

100 See the 28th Activity Report of the African Commission AU Doc EX.CL/600 (XVII) para 33, as quoted in Viljoen (n 34 above) 266.

101 See the 56th Activity Report of the African Commission, <http://www.achpr.org/sessions/56th/info/communique56/> (accessed 29 May 2015), see also AU Doc.EX.CL/856(XXV).

102 n 35 above, para 169. In this decision, the African Commission stated that 'the aim of [equality and non-discrimination] is to ensure equality of treatment for individuals irrespective of ... sexual orientation'.

103 Resolution 275 (n 66 above) para 4.

rights to equality, integrity and dignity. This, however, does not mean that the Commission has accepted non-discrimination based on sexual orientation. It is furthermore important to note that the Commission, in the Resolution, refers to 'the creation of enabling environment that is free of stigma, reprisals or criminal prosecution'.¹⁰⁴ This could be understood as indicating a broader undertaking by state parties targeting other forms of discrimination based on sexual outside the ambit of violent crimes as well as a further understanding of the effects of laws that discriminate on the basis of sexual orientation. This, however, needs further clarification from the Commission. In light of these statements, there appears to have been a drastic change of approach of the Commission, as confirmed by the 2015 CAL decision. It, however, remains unclear how the Commission would approach an individual claim of discrimination based on sexual orientation under the African Charter.

5.3.1 *Locus standi*

Articles 5¹⁰⁵ and 34(6)¹⁰⁶ of the Protocol regulate *locus standi* before the African Court. Read in conjunction, they create three possible¹⁰⁷ scenarios as to who or what entity can bring complaints before the Court. The African Commission,¹⁰⁸ an individual¹⁰⁹ or an NGO accredited with the Commission can file a complaint. In light of the 2015 CAL decision and the more protective position in Resolution 275, there are reasons to be optimistic about the Commission's approach to gay and lesbian rights. It is, however, still impossible to conclude whether it would act as a conduit to the Court, given the right circumstances, in such a claim. A communication will only be considered and subsequently referred to the African Court if a majority of the commissioners are in favour of it.¹¹⁰ It is essential to note that, should the Commission fail in this regard, it would fail two of its most important mandates under the Protocol: firstly to fulfil its role to ensure the protection of all human rights under the African

104 Resolution 275 (n 66 above) para 3.

105 Art 5 grants the Commission, a state party which has lodged a complaint to the Commission, a state party against which the complaint has been lodged at the Commission, a state party whose citizen is a victim of human rights violation and African intergovernmental organisations the right to submit a case to the Court.

106 The Court may furthermore entitle relevant NGOs with observer status before the Commission and individuals to institute cases directly before it if the relevant state has made a declaration accepting the Court's jurisdiction in this regard.

107 This argument ignores the unlikely scenario where a state party whose citizen is a victim of a human rights violation would bring a case to the Court.

108 The Committee on the Rights and Welfare of the Child would also be able to bring cases to the Court as it qualifies as an African intergovernmental organisation under art 5(1)(e). See Viljoen (n 34 above) 407. According to Rule 118(4) of the 2010 Rules of Procedure, '[t]he Commission may seize the Court at any stage of the examination of a communication if it deems necessary'.

109 Does not have to be the victim. There are no victim requirements in the African Charter or the African Women's Protocol.

110 Art 55(2) African Charter.

Charter; and, secondly, to act either as a conduit to the Court for NGOs and individuals claiming violations by states that have not made a 34(6) declaration, or by bringing cases to the Court under its own mandate.

Furthermore, Nigeria, Uganda and The Gambia have not made a 34(6) declaration under the Protocol. It is, therefore, unlikely that the African Court would accept a complaint from any individual or NGO directly or indirectly affected by the discriminatory legislation, as discussed above. This is a fundamental weakness of the African human rights system, as pointed out by the dissenting judges in *Femi Falana v African Union*¹¹¹ and *Atabong Denis Atemnkeng v African Union*.¹¹² It is ostensible that the ability of individuals and NGOs to complain directly to the Court was traded off against the increased willingness of states to commit to the Protocol without the immediate burden of having to face aggrieved individuals in court. This, in itself, as indicated by the dissenting opinion in *Atabong Atemnkeng*, could be viewed as a limitation of the right of access to justice.¹¹³ The African Commission, acting as a conduit to the African Court when the option of direct access is not available, could partly weigh up this deficiency. Thus far, the Commission has only referred two cases to the Court.¹¹⁴

6 Conclusion

The significant outcomes of *Atala* are difficult to ignore. The Inter-American Court approached sexual orientation in a holistic way and substantiated existing jurisprudence and soft law, leaving the 35 member states of the Organisation of American States with little doubt about the scope of the non-discrimination clauses in the American Convention and American Declaration of the Rights and Duties of Man. It will be difficult for any commissioner at the African Commission or any judge at the African Court to ignore the compelling arguments presented in *Atala*. However, the question remains whether a case of discrimination based on sexual orientation can make its way to the Court under the present circumstances. The bleak outlook highlighted in this article clearly indicates that very few avenues are currently open to individuals living in fear and indignity under discriminatory laws. The Inter-American Court (with the assistance of the Inter-American Commission) and the European Court have, however, demonstrated that judges have the power to chart the

111 26 June 2012.

112 15 March 2013, referring to the dissenting opinion of Justices Akuffo (President), Ngoepe and Thompson.

113 As above.

114 *African Commission on Human and Peoples' Rights v The Great Socialist Peoples' Libyan Jamahiriya*, 15 March 2011 and *African Commission on Human and Peoples' Rights v Republic of Kenya*, pending.

territory of the courts and to apply its procedural rules and substantive law to promote the protection of all human rights.

Key to the process of expanding the scope of the African Charter is the ability of the African Union (AU) to elect competent judges. Individuals that serve on the African Commission and African Court are elected using a similar process: Individuals are nominated by state parties and elected by the Assembly of Heads of States and Government of the AU.¹¹⁵ While there is very little material by which it is possible to determine the attitudes of the judges of the Court thus far, the nature of the position of a judge is much different from that of a commissioner, which could prove to be relevant. The Court is populated by judges who, contrary to the commissioners, are prohibited from participating in any activity of a nature that will compromise the independence and impartiality of the judge.¹¹⁶ Article 5 of the Rules of Court, moreover, states that no judge may 'hold a political, diplomatic or administrative position or function as government legal adviser at the national level'. No such requirements are placed on the commissioners. Arguably, the judges of the Court, similarly to the judges on the Inter-American Court, should approach matters before them based on the law within its jurisdiction and other relevant sources, as spelt out in the Protocol and the African Charter with the aim to uphold and protect all human rights. In doing so, they should act separately from the states that have set up this monitoring mechanism to achieve the essential purposes of the Constitutive Act of the AU to promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.¹¹⁷ Udombana has expressed hope that the Rules of Court would be 'broad, flexible and creative so that the purposes of the Banjul Charter will not be defeated by mere technicalities'.¹¹⁸ In the context of building a case around the discriminatory laws discussed in this article, the need for this approach could not be more pressing. Not only is there a need for the Court to borrow from its counterparts in the inter-American and European systems with regard to the interpretation of the law, but also in its holistic approach to the law, embracing both access and outcomes. As former Judge Picado Sotela of the Inter-American Court reflected:¹¹⁹

[A] court of human rights should be much more flexible than a regular court ... The international law of human rights is broader [than international law], and it should have more possibilities to really apply the principles of human rights. If we are going to believe in the enforcement of human rights, we have to take an attitude that is not very positivistic or legalistic, but instead [is in] the spirit of the law in the defence of human

115 Art 33 African Charter and arts 12-14 African Women's Protocol.

116 Art 18 African Women's Protocol.

117 Art 3(h).

118 NJ Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 106.

119 LE Frost 'The evolution of the Inter-American Court of Human Rights: Reflections of present and former judges' (1992) 14 *Human Rights Quarterly* 185.

beings. In this sense, the judge should believe that a court of human rights is obligated to create jurisprudence ... I believe that the court has the obligation to look for openings, because in reality these are new cases and different situations.

In the judgment of the Inter-American Court in *Atala*, the Court found such openings when it considered that¹²⁰

[h]uman rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living conditions. This evolving interpretation is consistent with the general rules of interpretation set forth in article 29 of the American Convention, as well as those established in the Vienna Convention on the Law of Treaties. In this regard, when interpreting the words 'any other social condition' of article 1(1) of the Convention, it is always necessary to choose the alternative that is most favourable to the protection of the rights enshrined in said treaty, based on the principle of the rule most favourable to the human being.

The procedural choices the African Court makes in how it approaches its mandate to protect human rights on the continent are going to be the most important decision it makes. The importance of this choice, under the circumstances I have set out in this article, is reinforced by the ambivalence the African Commission has expressed in its role to promote and uphold gay and lesbian rights and the potential impact this can have on its role as a conduit to the Court. The success in challenging these discriminatory laws at the Court centres largely on, firstly, reaching the Court and, secondly, persuading the Court to align itself with its regional counterparts. Article 31 of the Vienna Convention on the Law of Treaties promotes a purposive interpretation of any treaty, including the African Charter and the Protocol. The question that remains unanswered is whether the majority of the African Commission and Court would be willing to use the constructive avenues available if they were presented with an opportunity to do so, and whether they would draw on the positive work of their regional counterparts.

120 *Atala* (n 31 above) paras 83 & 84.

Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya

J Oloka-Onyango*

Professor of Law, Makerere University, Uganda

Summary

In the wake of the furore surrounding the passing of the Anti-Homosexuality Act and the declaration of its unconstitutionality by the Constitutional Court in Uganda, the issue of sexual orientation and gender identity has assumed heightened prominence in East Africa. As is the case in many countries around the world, courts of law have become particularly prominent arenas within which the struggles over these issues are being fought. That development raises fundamental questions not only about the suitability of judicial arenas for such encounters, but also about the efficacy of a legal strategy in addressing an issue linked to deeply-held social, cultural and religious structures and beliefs. This article reviews recent developments concerning the situation of lesbian, gay, bisexual, transgender and intersex individuals through legislation and in the courts of law of Uganda and Kenya, exploring the implications for the wider struggles by sexual minorities for enduring legal recognition and accommodation.

Key words: *sexual minorities; right to love; LGBTI community; courts; homophobia*

* LLB (Makerere), LLM SJD (Harvard); joloka@law.mak.ac.ug. I am grateful for the comments of the three anonymous reviewers which made a valuable input into this article. Thanks are also due to the fellows at the Stellenbosch Institute of Advanced Studies (STIAS), South Africa, where an earlier version of the article was presented. Sylvia Tamale provided extensive, much-appreciated comments. Of course, I remain responsible for the main thrust and conclusions of the article.

1 Introduction

'Who says everybody has a right to love?' is the question put to me at one particularly heated public lecture held a few days after the passing of Uganda's Anti-Homosexuality Act (AHA) of 2014.¹ As the lead petitioner in the case which successfully challenged the law, I was placed at the frontline of the debate about sexual minorities and the issue of whether or not they could be accommodated within the country's constitutional and legal regime. Even though asked somewhat sardonically, the question cut to the core of an issue that has provided the most serious recent test to the international human rights movement and to the foundational principles on which it is based.

While the 'right' to love appears in no known legal document – national, regional or global – there is no doubt that it is a universal human sentiment.² If one was to perform a dissection of the right to love, it would be found implicit in several human rights principles – freedom of association and expression, the right to health, the right to privacy and especially in the right to human dignity.³ Despite the absence of the right in normative form, it is a central feature of human existence, especially within the context of sexual expression. To deny its existence is to deny the very essence of our humanity.

And yet, in countries around the world, from Kyrgyzstan to Russia and from Nigeria to The Gambia, new laws are being passed that attack sexual orientation as an expression of the sexual self, as well as gender identity, which is an individual's innate and deeply-felt psychological identification as a man, woman or other gender and which may or may not correspond to the sex assigned at birth. Needless to say, both sexual orientation and gender identity are critical components of the right to love.⁴ In such a context, courts of law have oscillated between enlightened engagement to all manners of legal excuse to retain the *status quo* or to take us even further back.

1 See J Oloka-Onyango 'Of mice and farmers' wives: Unveiling the broader picture behind recent legislation in Uganda' Human Rights and Peace Centre (HURIPeC) Public Dialogue at Makerere University, 25 March 2014, <http://law.mak.ac.ug/article/mice-and-farmers-wives> (accessed 30 April 2015).

2 Of course, this issue has been extensively debated in other disciplines such as literature and philosophy. The 'right of desire' was hinted at in JM Coetzee's Booker prize-winning novel, *Disgrace*, and further developed in André P Brink's novel *The right to desire*.

3 See R Wintemute 'From "sex rights" to "love rights": Partnership rights as human rights' in N Bamforth (ed) *Sex rights: The Oxford Amnesty Lectures 2002* (2005) 186.

4 In the words of Nyanzi, 'Uganda's re-criminalisation of homosexuality is not an isolated case, but rather part of a larger contemporary trend of homophobic legal reversals. Uganda, Nigeria and India are the three ugly sisters who recently ushered into place repressive laws that re-criminalise specific forms of expressing same-sex desire, love, sexualities and eroticism.' S Nyanzi 'The paradoxical geopolitics of recriminalising homosexuality in Uganda: One of three ugly sisters' in Institute of Development Studies *Putting the law in its place: Analyses of recent*

Some courts have simply avoided taking a position. Thus, for example, a two-judge bench of the High Court of Delhi in *Naz Foundation v Government of NCT of Delhi*⁵ declared that the notorious section 377 – on the offence of carnal knowledge against the order of nature – violated the Indian Constitution. In a dramatic twist of events and even before the celebrations over the landmark ruling in the case had ended, the Indian Supreme Court overturned the lower court's decision, stating that it should be parliament that repeals the law, not the judiciary.⁶ In the United States, the Supreme Court's decision in *Lawrence v Texas*,⁷ which declared laws criminalising same-sex conduct unconstitutional, and the more recent *Obergefell v Hodges*,⁸ which upheld the right of same-sex couples to marry under the 14th Amendment to the US Constitution, met with resistance. All these actions are in essence attacking the right to love in its most obvious manifestation: the right to choose who one can love.

The article examines the current situation of the legal struggles surrounding the situation of sexual minorities in the East African countries of Uganda and Kenya. Aside from a common geo-political history, the two share the legacy of the British Victorian era's criminalisation of same-sex conduct and behaviour. Both countries are largely homophobic, strongly influenced by new religious movements and egged on by opportunistic politics. And yet, the direction in Kenya is decidedly more liberal than that taken in Uganda.

The main question explored here is whether, given the varied forces ranged against sexual minority expression, the use of law and legal interventions to address discrimination on the basis of sexual orientation have a future. The exploration begins with an examination of some of the conceptual dimensions that influence the legal frameworks – such as the AHA – that govern same-sex erotics. It then moves on to an examination of the situation in Uganda which, on account of the prominence the issue has assumed over the years, provides a useful starting point for comparison. The article proceeds to look at court developments in Kenya, exploring how the judiciary has responded to the assertion of the rights of sexual minorities. Because transsexual and intersexed individuals are often forgotten in this discussion, the article concludes with a consideration of how the issue has manifested itself in each country. The analysis ends by

developments in law relating to same-sex desire in India and Uganda (2014) 14, <http://mobile.opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/42035PW%20Newsletter%20July%202014%20Final.pdf?sequence=1> (accessed 30 April 2015).

5 160 *Delhi Law Times* 277 (Delhi High Court 2009).

6 See *Suresh Kumar Koushal & Another v Naz Foundation & Others* Civil Appeal 10972 of 2013, <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070> (accessed 30 April 2015).

7 539 US 558 (2003), <http://www.law.cornell.edu/supct/html/02-102.ZS.html> (accessed 30 April 2015).

8 *Obergefell & Others v Hodges & Others* 576 US ___ 2015, http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf (accessed 1 July 2015).

offering some indication of the hurdles that still remain in the way of sexual minorities gaining full acceptance as equal and dignified members of the community of peoples in Uganda and Kenya.

2 Some conceptual issues

To say that we live in an age of sexuality politics is no exaggeration, although we should be careful not to fall into the trap of painting a broad brush of homophobia raging around the African continent. As pointed out by Thoreson, the issue is much more complex:⁹

Although they were ubiquitous, tropes of 'winds' and 'waves' of homophobia are not merely descriptive. Homophobia is difficult to define, much less instrumentalise, and it is far from clear that it can simply 'rise' or 'fall' in any regional, national, or intranational setting. By lumping disparate incidents together, these framings homogenise complex responses to sexual acts, identities, and politics. Decrying a wave of homophobia in 'Africa' also elides local specificity, and bolsters racist dismissals of the Global South as inherently hostile to queers. By glossing both 'homophobia' and 'Africa', these tropes leave little room for the nuance and specificity of sexual politics in post-colonial settings.

The complexity extends to the issue of naming. Thus, the term lesbian, gay, bisexual, transgender and intersex (LGBTI) is used in this article to cover the range of same-sex erotics practised in Uganda and Kenya, as it is the dominant method of description employed worldwide. However, the terms used in the LGBTI alphabet are rooted in culturally-specific norms and values that are not necessarily shared by African people. Hence, it is important to both remember the foreign origins of such terms as well as to take note of the different and varied ways in which individuals and groups in Uganda and Kenya identify themselves. As Nyanzi has observed in an article on Uganda, there are many 'localised variants to being either lesbian or gay'.¹⁰ Indeed, the localised label *kuchu* is generally used as a means of self-identification among many in the same-sex community in the region.¹¹

It is trite to point out that the politics of sexuality are intricately linked to the politics of gender. Gender dynamics are implicated in the discussion by the perceived subversion that same-sex erotics present to the dominant norms of sexuality that govern society. Heteronormativity – the assumption of the existence of only two sexes/genders and the belief that human sexual relations between a man and a woman are natural and normal, with no other possibilities – is especially threatened by gay and lesbian relationships.¹² These

9 RR Thoreson 'Troubling the waters of a "wave of homophobia": Political economies of anti-queer *animus* in sub-Saharan Africa' (2014) 17 *Sexualities* 24.

10 S Nyanzi 'Dismantling reified African culture through localised homosexualities in Uganda' (2013) 15 *Culture, Health and Sexuality* 958.

11 Nyanzi (n 10 above) 959.

12 See S Tamale *African sexualities* (2011) 641.

gender non-conforming practices and identities threaten the dominance of masculinity which places a premium on the control of women's bodies. Sex between women is viewed as a rejection of that ownership, while that between men marks a serious disconnect between sex and reproduction, raising the ire particularly of organised religion. Also, homosexual men are considered effeminate and not 'real' men.

Many countries in Africa today find themselves in the midst of these sexuality/gender battles. The grounds of engagement are numerous: homes, communities, workplaces, parliaments, courts as well as religious and educational institutions. Looking only at the courts, the question is: How have the courts of law in Uganda and Kenya treated the vexed issue of sexuality? In particular, what have the courts said about the intimate relationships between consenting adults that have been outlawed as part of sexuality politics and social control? What about questions of sexual identity and expression? In sum, are the two countries ready to incorporate sexual citizenship into the core of jurisprudential thought in their courts of law?

The question above presupposes a legal framework against which developments in Uganda and Kenya need to be gauged. Indeed, it is necessary to review those developments against changes on the international scene. Individual countries have addressed the matter in different ways, with South Africa going so far as to incorporate a right to non-discrimination on the basis of sexual orientation into its transformative Constitution, thereby becoming the first country in the world to do so.¹³ This was followed soon after with the decision by the Constitutional Court in the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*.¹⁴

On its part, the United States has oscillated between upholding the rights of states to regulate sexual behaviour and its landmark decision in the 2013 case of *US v Windsor*,¹⁵ which declared the Defense of Marriage Act (DOMA) unconstitutional for denying rights of matrimony to same-sex couples.¹⁶ Although the European Court of

13 J Cook 'Engendering gay and lesbian rights: The equality clause in the South African Constitution' in NW Hoad *et al* (eds) *Sex and politics in South Africa: The equality clause/gay and lesbian movement/The anti-apartheid struggle* (2005) 188-209.

14 [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

15 133 S Ct 2675 (2013), http://scholar.google.com/scholar_case?case=6241888197107641609&hl=en&as_sdt=6&as_vis=1&oi=scholarr (accessed 30 April 2015).

16 The Supreme Court held that sec 3 of the Defense of Marriage Act (DOMA), which restricted the federal interpretation of 'marriage' and 'spouse' to apply only to heterosexual unions, was unconstitutional because it violated the due process clause of the Fifth Amendment. According to Justice Kennedy: 'The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the state, by its marriage laws, sought to protect in personhood and dignity.'

Human Rights in *Dudgeon v Ireland*¹⁷ decriminalised same-sex relations in 1982, European countries were similarly inconsistent with varied decisions being made right up to the beginning of the twenty-first century.¹⁸ At the international level, the Human Rights Committee blazed the trail with the decision in *Toonen v Australia*.¹⁹ The Committee held that a statute criminalising various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private, was a violation of the International Covenant on Civil and Political Rights (ICCPR). In the 2010 case of *Irina Fedotova v Russian Federation*,²⁰ the Committee found that the applicant's conviction under the Ryazan Law on Administrative Offences (Ryazan Region Law) which prohibited 'public actions aimed at propaganda of homosexuality among minors' violated her right to freedom of expression, read in conjunction with her right to freedom from discrimination, under the ICCPR.

Developments on the international scene since *Toonen* have been the focus of considerable struggle. In 2004, Brazil's attempt at introducing a resolution on the issue of sexual orientation and gender identity was blocked at the United Nations (UN). However, on 17 June 2011, the UN Human Rights Council (HRC) voted in favour of a resolution calling for a study of the laws and practices of violence against LGBTI persons and how international human rights law could be used to end such violence. It also called for the convening of a panel to discuss the issue at the 19th session of the HRC. The vote was historic because it was the very first time that the question of sexual orientation and gender identity was adopted in a formal UN resolution.²¹ It was particularly important because as recently as November 2010, the General Assembly had successfully voted out the words 'sexual orientation and gender identity' from a report by the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions.

There is no international instrument that has yet been agreed upon. Nevertheless, in March 2007, a group of international law experts came together and formulated the ground-breaking *Yogyakarta Principles on Sexual Orientation and Gender Identity*.²² Billed as a coherent and comprehensive identification of the obligation of states

17 Application 7525/76, decided on 21 October 1981, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22dmdocnumber%22:\[%22695350%22\],%22ite mid%22:\[%22001-57473%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22dmdocnumber%22:[%22695350%22],%22ite mid%22:[%22001-57473%22]}) (accessed 30 April 2015).

18 K Walker 'Evolving human rights norms around sexuality' (2000) 6 *International Law Students Association Journal of International and Comparative Law* 343-353.

19 Communication 488/1992, <http://www1.umn.edu/humanrts/undocs/html/vws488.htm> (accessed 30 April 2015).

20 Communication CCPR/C/106/D/1932/2010.

21 The voting reflected the contentious nature of the issue, with 23 states in favour, 19 against, and three abstentions (Burkina Faso, China and Zambia).

22 Adopted, the Yogyakarta Principles are regarded as the most comprehensive set of international principles relating to sexual orientation and gender identity, <http://www.yogyakartaprinciples.org/> (accessed 30 April 2015).

to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity, the Principles represent the first comprehensive and pan-regional attempt to construct a legal framework to guide interventions on the issue.²³ Although described as 'soft law', the Yogyakarta Principles are important because they are simply a restatement of existing law and not an attempt to formulate a new doctrine or, to put it another way, they are a combination of 'modest demands', 'stable foundations' and 'strategic deployment'.²⁴ The Principles provided a useful guide for assessing or measuring whether there is progress or regression in individual countries, although it needs to be noted that both Uganda and Kenya have been persistent objectors whenever the issue has come up for discussion.²⁵

The cases of Uganda and Kenya offer an important insight into the issue of sexual orientation and gender identity, not only on account of Uganda's recent experience with the AHA, but also because of other kinds of struggles taking place alongside the battle over sexual expression. Kiragu and Nyong'o provide a useful summary of the different forms of discrimination that sexual minorities (particularly LGBTI people) face in East Africa in general:²⁶

Discrimination of sexual minorities can be in the form of criminalisation of homosexuality, institutionalised homophobia, abuse in state institutions, pathologising, forced medication and cruel treatments, neglect of the existence and needs of LGBTI people with disabilities, young and elderly LGBTI persons, diminished access to health care, work place discrimination and violence and harassment from official state representatives including execution. Social repression with or without state tolerance can be manifested in the form of verbal abuse, silence, ridicule, hate crimes, 'corrective rape' of lesbians, honour-related violence and forced marriage.

The above quote summarises the extensive range of legal barriers that confront sexual minorities in the region. To these we can add issues relating to freedom of association concerning the right to form non-governmental organisations (NGOs) and even to meet in public places. Also of concern are questions around the right to privacy and on the right to human dignity as basic civil and political rights. With respect to the observation and protection of economic, social and cultural rights, there are the rights to health, to shelter and to housing. There are the rights to an adequate standard of living, involving the discriminatory treatment of sexual minorities and their

23 M O'Flaherty & J Fisher 'Sexual orientation, gender identity and international human rights law: Contextualising the Yogyakarta Principles' (2008) 8 *Human Rights Law Review* 207-248.

24 RR Thoreson 'Queering human rights: The Yogyakarta Principles and the norm that dare not speak its name' (2009) 8 *Journal of Human Rights* 323-339.

25 A recent exception was registered at the African Commission on Human and Peoples' Rights concerning whether or not to grant observer status to the Coalition of African Lesbians (CAL). Rather than voting against the decision, as would have been expected, the delegate from Uganda abstained.

26 J Kiragu & Z Nyong'o *LGBTI organising in East Africa: The true test for human rights defenders* (2005) 12.

right to work, among other things. The rights to privacy, basic human dignity, equality and non-discrimination are cross-cutting rights. In short, the battle against legalised homophobia is an extensive and multi-faceted one.

There is an additional problem, which is what may be described as the *extra*-legal utilisation of the law in order to achieve goals which are very difficult to realise. Thus, while the Penal Codes of both Kenya and Uganda have provisions criminalising sex against the order of nature, because of the very character of the offence, it is in fact very difficult to secure a conviction.²⁷ As opposed to other offences created by the law, the core of the problem in this instance is that the conduct which has been criminalised is engaged in by consenting adults. One would have thought that, given the rather obvious tension between what the law aspires to achieve and the impracticality of its realisation on the ground, the case for their repeal would have been obvious.

The poor record of conviction in relation to these offences, however, does not prevent the police and other authorities from deploying them as tools of harassment, intimidation and bribery, especially through the mechanisms of arbitrary arrest and pre-trial detention. According to HRAPF and the Civil Society Coalition surveying the situation relating to convictions on such offences in Uganda, these laws hang over the heads of sexual minorities like the sword of Damocles.²⁸

[O]ver the period 2007-2011, there is neither a single conviction nor an acquittal for consensual same-sex conduct on file in any magistrate's court in Kampala. In an egregious example of a waste of both police and judicial resources, all cases that were filed in court during the period 2007-2011 in Kampala district ended in dismissal for want of prosecution. Though not conclusive since cases before magistrate's courts largely go unreported, attempts to look for other acquittals or convictions in the Law Reports revealed no single conviction or acquittal since the laws were introduced (with the exception of those for non-consensual same-sexual relations with minors before 2007).

In light of these and other developments, it is clear that, while the courts of both countries will be crucial arenas for the struggle and fascinating sites of critical appraisal, are they up to the task? Assessing cases which have been decided as well as the emerging jurisprudence

27 In the case of *Mamoon v Canada* [2009] FC 578, the Federal Court of Canada held that criminal laws punishing homosexuality are rarely applied in Tanzania (para 12), <http://www.refugeelaidinformation.org/tanzania-lgbti-resources#sthash.uYRq9YJZ.dpuf> (accessed 30 April 2015).

28 Human Rights Awareness and Promotion Forum (HRAPF) and Civil Society Coalition on Human Rights and Constitutional Law (CCHRCL) *Protecting "morals" by dehumanising suspected LGBTI persons? A critique of the enforcement of the laws criminalising same-sex conduct in Uganda* (October 2013) 13, http://www.hrapf.org/sites/default/files/publications/section_145_research_report_full_version.pdf (accessed 30 April 2015). See also Chapter Four *Where do we go for justice?: The abuse of the rights of sexual minorities in Uganda's criminal justice system* (2015).

and seeking explanations as to the different directions which courts have taken constitutes an important and timely contribution to a debate that is set to get even more intense in future. Consequently, the following sections of this article look at the cases of Uganda and Kenya before making broad conclusions on the implications of these developments on the situation of sexual minorities in the two countries.

3 Addressing homophobia through legal means in Uganda

The situation in Uganda provides a useful point of departure for a consideration of these issues on account of the numerous (and peculiar) developments that have recently taken place there in relation to the situation of sexual minorities. Uganda has witnessed a considerable number of public interest cases in this area, starting with the 2008 case of *Mukasa & Another v Attorney-General*,²⁹ and culminating most recently with the 2014 case of *Oloka-Onyango & 9 Others v Attorney-General*.³⁰ The *Mukasa* case is important, not simply because it was the first involving LGBTI individuals decided after the adoption of the relatively progressive 1995 Constitution, but also because of what it both said and omitted to say about this kind of discrimination.

Victor Mukasa was a well-known activist for the rights of LGBTI individuals.³¹ One evening, Local Council (LC) officials and local defence unit (LDU) operatives led by the LC1 Chairperson of her village raided her home and found her roommate, the second applicant (Oyo), in the house. They forcibly entered the house, removed several personal items from it and held Oyo in forced detention for several hours, subjecting her to sexual harassment, intimidation and inhuman treatment. Justice Arach-Amoko found that Oyo had been arrested by the LC1 Chairperson while she was in Mukasa's house resting. Following the arrest, Oyo was forcibly taken to the police post and denied the use of the toilet. She was also forcibly undressed and 'examined', and fondled by the Police Officer-in-Charge to establish her sex.³² The court thus observed:³³

The acts of the police, LDU's and the Chairman were high-handed, illegal, humiliating and did not only cause them grief, injury and apprehension, but above all, these acts were a breach of several constitutional rights which are guaranteed by the Uganda Constitution which the Police, LC1

29 (2008) AHRLR 248 (UgHC 2008).

30 Constitutional Case 8 of 2014, <http://www.ulii.org/ug/judgment/constitutional-court/2014/14> (accessed 30 April 2015).

31 Originally, Victor self-identified as a lesbian, hence my use of the word 'her' in this account of the case. She subsequently changed her identity to a transgender man.

32 *Mukasa* (n 29 above) 16, para 41.

33 *Mukasa* 6, para 18.

Chairman and LDU's are enjoined to protect and defend. They were acting in the usual course of their employment and the Attorney-General is therefore vicariously liable.

The court concluded by finding that a variety of rights had been violated, including the right to privacy of person and property, protection from inhuman treatment and the sanctity of the right to one's dignity. The court emphasised that the case was a human rights case: 'This case, as Mr Rwakafuzi rightly pointed out in his submission is, however, about abuse of the applicants' human rights and not abuse of office.'³⁴ The court went on to state: 'It is also not about homosexuality. This judgment is therefore strictly on human rights.'³⁵

Despite the irony of the decision in divorcing the right of sexual expression from broader human rights, the case was an important one for the related questions of sexual orientation and gender identity. Heralded as Uganda's first case to make a decision in favour of a sexual minority, Victor Mukasa's case nevertheless needs to be treated with some caution. On the one hand, the fact of the applicant's sexual orientation did not cloud the opinion of the court and stop it from rendering a judgment which affirmed the rights of two individuals who had been grossly mistreated by the authorities. It would have been quite easy for the court to have found that the two were engaged in an 'illegal act' (the state alleged that they were caught 'kissing' in public), and either dismiss the case or issue a sanction against them because of their sexual orientation and conduct.

On the other hand, it is quite clear from the facts of the case that the kind of harassment and violence to which co-applicant, Oyo, was subjected was done primarily on account of her presumed sexual orientation and her relationship to Mukasa, despite the assertion by the judge that the case was 'not about homosexuality'. According to Kabumba, the issue of sexual orientation was the 'large elephant in the room'.³⁶ This is evident not only from the several allusions to the practice in the proceedings, but also from the stature of the applicants, at least one of whom was a well-known activist for the rights of LGBTI individuals in Uganda.

The *Mukasa* case was successfully prosecuted and won in the Ugandan courts. Although it received considerable coverage internationally, the reaction within Uganda was rather lukewarm. Outside the community of activists, the case did not draw much attention even within local media. However, it underscored the structural nature of the violence that LGBTI individuals routinely faced, as well as the general position of the state and the public at large as one of passive acceptance (if not active encouragement) of such

34 *Mukasa* 16, para 41.

35 As above.

36 B Kabumba 'The *Mukasa* judgment and gay rights in Uganda' (2009).15 *East African Journal of Peace and Human Rights* 221.

violence. This point surfaced in bold relief in the later case of *Kasha Jacqueline, David Kato Kisuule & Onziema Patience v Rolling Stone Ltd & Giles Muhame (Kasha-1)*.³⁷ The case involved a cover story in the inaugural issue of the *Rolling Stone* newspaper which printed the pictures of several individuals who were gay or alleged to be so, with the caption 'Hang them: They are after our kids!'³⁸ It was quite obvious that the tabloid capitalised on the populist and sensational headline to attract sales, targeting profits at the expense of a marginalised sexual minority.

The three applicants were among those named in the article, and thus sought a declaration that the newspaper report had violated their rights to privacy of person and property. Repeating the same mantra as in the *Mukasa* judgment, that the case was 'not about homosexuality *per se*', Justice Kibuuka Musoke held that the report was an assault against the dignity of the applicants. The judge was also firm in asserting that the call to violence against sexual minorities, particularly LGBTI persons, was unacceptable.³⁹

Clearly the call to hang gays in dozens tends to tremendously threaten their right to human dignity. Death is the ultimate end of all that is known worldly to be good. If a person is only worthy of death, and arbitrarily (*sic*), then that person's human dignity is placed at the lowest ebb. It is threatened to be abused or infringed.

Although the court stated that the case was not about 'homosexuality', it nevertheless went on to make the crucial point that section 145 of the Penal Code, which criminalises sex 'against the order of nature', could not be used 'to punish persons who themselves acknowledge being, or who are perceived by others to be homosexual'. In order to be regarded as a criminal, stated the court, one has to commit an act prohibited under the section.

The *Rolling Stone's* gay-outing edition may have been extreme. However, the Ugandan media had long been involved in a campaign of vilification of same-sex relations and of sexual minorities.⁴⁰ This demonstrated that the social context within which the stories were released was quite accommodating of this kind of negative targeting. Indeed, the outrage expressed over the *Rolling Stone* article was not widespread and the editor of the publication expressed no remorse for his dastardly actions.

Further legal developments relating to sexual minorities came with a 2005 amendment of the 1995 Constitution to prohibit same-sex marriage, marking out Uganda as the first African country to adopt

37 Miscellaneous Cause 163 of 2010, unreported, <http://iglhrc.org/sites/default/files/2010%20Kasha%20Jacqueline%20v%20Rolling%20Stone.pdf> (accessed 30 April 2015).

38 The article was sub-titled 'Pictures of Uganda's 100 homos leak'.

39 As above.

40 Tamale catalogues 664 articles in the Ugandan mainstream media on sexual minorities and gender issues dating back to 10 April 1997. See S Tamale *Homosexuality: Perspectives from Uganda* (2007) 183-217.

such a position.⁴¹ Then came a last-minute amendment to the 2007 Equal Opportunities Commission Act to prevent the EOC from investigating matters involving behaviour regarded as 'immoral or socially unacceptable' by the majority of cultural groups in Uganda.⁴²

By far the most dramatic development in relation to the situation of sexual minorities was the emergence in 2009 of the Anti-Homosexuality Bill (AHB) by Member of Parliament David Bahati.⁴³ Drawing condemnation from around the world, the AHB sought to recriminalise and expand the range of same-sex relationships subjected to penal sanction, extending the bar to lesbian sex,⁴⁴ and even proposing the death penalty for what was described as 'aggravated homosexuality'.⁴⁵ The AHB was particularly dangerous because it projected existing homophobia in Uganda to an 'entirely different level',⁴⁶ a level that seriously threatened the security, well-being and health of sexual minorities:⁴⁷

The Bill led to a heightened situation of homophobia, not simply by attempting to translate the existing fear into legally-sanctioned forms of targeting the LGBTI community, but by increasing the penalties against same-sex behaviour, extending the sanctions for the alleged 'promotion' of such conduct to counsellors, lawyers and even academics, and providing for the Ugandan government to opt out of any international treaties that went against the spirit of the Bill. If section 145 could be accused of some ambiguity, the Anti-Homosexuality Bill leaves no doubt; it indiscriminately and explicitly targets *all* LGBTI persons and even goes beyond them.

Hence, when President Museveni dramatically signed the Bill into law in early 2014, there was really no choice in the matter but to

41 JD Mujuzi 'The absolute prohibition of same-sex marriages in Uganda' (2009) 23 *International Journal of Law, Policy and the Family* 277-288.

42 This provision of the law was challenged in the case of *Jjuuko Adrian v Attorney-General* Constitutional Petition 1 of 2009. The case was filed on 5 January 2009, and heard on 3 October 2012. As at the time of writing, no judgment had yet been delivered in the case. See HRAPF 'Judgment in *Jjuuko Adrian vs Attorney-General* awaited' <http://www.hrpf.org/news-events/judgment-juuko-adrian-vs-attorney-general-awaited> (accessed 30 April 2015).

43 D Englander 'Protecting the human rights of LGBT people in Uganda in the wake of Uganda's 'Anti-Homosexuality Bill, 2009' (2011) 25 *Emory International Law Review* 3. Although presented as a private member's Bill, there is strong evidence to suggest that the government was the silent, behind-the-scenes actor who actually designed and pushed for its adoption. See James Nsaba Buturo, Minister of Ethics and Integrity, 'Tough anti-gay law due' *Sunday Vision* 26 August 2007 in Tamale (n 40 above) 35-38.

44 It is the general view that the offence of sex against the order of nature refers to male-to-male intercourse and is rooted in the British common law offence of buggery or sodomy, first set down in the Buggery Act of 1533. Over the years, it has been defined to mean anal or oral intercourse by a man with a man or woman or vaginal intercourse by either a man or a woman with an animal.

45 See S Tamale 'A human rights impact assessment of the Anti-Homosexuality Bill' (2009) 15 *East African Journal of Peace and Human Rights* 509-519.

46 J Oloka-Onyango 'We are more than just our bodies: HIV/AIDS and the human rights complexities affecting young women who have sex with women in Uganda' HURIPEC Working Paper 36 (February 2012).

47 Oloka-Onyango (n 46 above) 31.

challenge the Act in the courts of law, particularly since the different attempts to stop the enactment of the Bill had failed.

Unlike the previous cases already reviewed which gingerly skirted around the issue of sexual orientation and instead preferred to focus on the broader rights involved, the *Oloka-Onyango* petition had no choice but to bring the issue directly to the surface; the elephant could no longer be hidden. The petition was thus built around the strategy of compelling the court to directly confront a law that was clearly targeted at gay people. Hence, the petition sought to challenge the broad, arbitrary, imprecise and vague definitions used by the Act. For example, the term 'homosexual' was defined to mean a person who engages or attempts to engage in same-gender sexual activity, while 'homosexuality' was defined as same-gender or same-sex sexual acts. The definition of 'sexual act' was stipulated to include –

- (a) physical sexual activity that does not necessarily culminate in intercourse and may include the touching of another's breast, vagina, penis or anus;
- (b) stimulation or penetration of a vagina or mouth or anus or any part of the body of any person, however slight, by a sexual organ; and
- (c) the unlawful use of any object or organ by a person on another person's sexual organ or anus or mouth.

The law was also problematic for the disproportionate penalties that it prescribed (including life imprisonment), and the introduction of the new offences of 'promotion' and 'recruitment', which were accompanied by extensive discretionary powers conferred on state officials – particularly the Minister and the police – to determine what these offences meant. Finally, the Act had wide implications for Ugandan society at large, including parents, counsellors, the friends of LGBTI individuals, employers, health practitioners, academics, journalists, as well as civil society activists/human rights defenders. All in all, the Act was an unmitigated disaster for the protection of the rights of sexual minorities, but it also greatly impinged on the democratic freedoms and rights of those outside the gay community.

At the same time, the petition was also dictated by pragmatism. The AHB was voted on and passed into law by parliament on 20 December 2013, ostensibly as the promised 'Christmas gift' from the Speaker of the House, Rebecca Kadaga, to the people of Uganda.⁴⁸ It was a lazy Friday afternoon, the last day of the parliamentary session before the Christmas recess. The Bill had been smuggled onto the day's Order of Business on parliament's agenda, demonstrated by the fact that the gallery was filled with proponents of the Bill, including several religious leaders and conservative former politicians, while the human rights and LGBTI activists opposed to it

⁴⁸ See 'Uganda to pass anti-gay law as Christmas gift' 13 November 2012, <http://www.bbc.com/news/world-africa-20318436> (accessed 30 April 2015).

and who had been tracking its development were nowhere near parliament on that day and knew nothing of the impending debate.⁴⁹

The process of passing legislation in Uganda has often been one fraught with problems. Among the most serious of them is the question of quorum. The 1967 Constitution was largely silent on the issue, leaving the matter to the rules of procedure of parliament which could be the subject of manipulation and distortion. More importantly, the application of those rules could not be challenged in a court of law. As a result, many laws were passed in circumstances that left a lot to be desired, especially in relation to the numbers of parliamentarians who were actually in the House chamber when a Bill was debated and passed. In a bid to ensure that there was at least minimal representation of legislators when laws were passed and to ensure an above-board process, for the first time, the 1995 Constitution incorporated the issue of quorum into the premier law. Article 88 stipulated that '[t]he quorum of parliament shall be one-third of all members of parliament'. For a time, there was no controversy over the matter, although it is doubtful whether the numbers were strictly adhered to when passing legislation. However, in the heated debate over the Referendum Bill in mid-1999, the issue was raised by a member of the opposition in a bid to stop the passing of a law considered manifestly unfair to opposition political parties. The matter ended up in court, producing one of the most tense and dramatic stand-offs between the judiciary and the executive since the enactment of the new Constitution.

The details of the case of *Paul K Ssemwogerere and Zackary Olum v Attorney-General*⁵⁰ need not detain us here, save to note that the court declared that there was no quorum when the Referendum Bill was passed rendering it unconstitutional. However, the response to the case was for the government to amend article 88, to state as follows:

- (1) The quorum of parliament shall be one-third of all members of parliament entitled to vote.
- (2) The quorum prescribed by clause (1) of this article shall only be required at a time when parliament is voting on any question.
- (3) Rules of procedure of parliament shall prescribe the quorum of parliament for the conduct of business of parliament other than for voting.

Initially, the government wanted to completely eliminate the question of quorum from constitutional protection, but settled for a compromise. The above reformulation of the quorum provision sought to give parliament greater discretion when dealing with the

49 P Johnson 'Making unjust law: The Parliament of Uganda and the Anti-Homosexuality Act 2014' (2014) 67 *Parliamentary Affairs* 11-14, <http://pa.oxfordjournals.org/content/early/2014/10/05/pa.gsu021.full.pdf+html?sid=3ec86421f433-4a21-a0a4-dc317d7fb3c0> (accessed 30 April 2015).

50 Constitutional Appeal 1 of 2002 (SC). See also *PK Ssemwogerere & Others v Attorney-General* Constitutional Petition 7 of 2000.

issue of voting in the House. Despite the clear attempt to water down the law and subvert the holding of the court in the *Ssemwogerere* case, the provision nevertheless retained its status as a constitutional provision, even though it gave parliament greater discretion over the matter. Quorum remained a mandatory provision of the Constitution.

Given this history, the back-up position for the petitioners in the *Oloka-Onyango* petition was to revert to the issue of quorum.⁵¹ Indeed, this is what won the case, with the court deciding to hear argument only on the question of quorum, and declaring:⁵²

It is our decision that the respondent having been presumed to have admitted the allegations of the petitioners in the petition that there was no *coram*, we find that on the balance of probabilities, the petitioners have proved that at the time the Prime Minister (twice) and Hon Betty Awol raised the objection that there was no *coram* and *coram* was never established, and that was in contravention of the Constitution and the Rules.

Although the decision was thus considered to have been won on a technicality,⁵³ it is clear from the judgment of the Constitutional Court that the issue of quorum in Uganda as a matter of fact and law is a constitutional issue. According to the Court:⁵⁴

Parliament as a law-making body should set standards for compliance with the constitutional provisions and with its own Rules. The Speaker ignored the law and proceeded with the passing of the Act. We agree with counsel Opiyo that the enactment of the law is a process, and if any of the stages therein is flawed, that vitiates the entire process and the law that is enacted as a result of it. We have therefore no hesitation in holding that there was no *coram* in parliament when the Act was passed, that the Speaker acted illegally in neglecting to address the issue of lack of *coram*.

The Court found that resolution of the issue of quorum determined the whole case, and thus declared the AHA unconstitutional.

Nullification of the law allowed for a collective sigh of relief among the LGBTI community and their allies. Conversely, the decision was met by expressions of outrage from members of the anti-gay lobby who immediately began a drive aimed at the re-introduction of the law.⁵⁵ On the positive side, Amnesty International pointed out that the nullification of the AHA helped restore some confidence amongst

51 There were other procedural defects such as the failure to advertise the debate on the Order Paper, as well as 'giving appropriate consideration to the CLPA minority report, and robustly consider pertinent legal concerns raised by the CLPA majority report as well as by other MPs'. See Johnson (n 49 above) 27. However, these could not be considered as constitutional issues.

52 Judgment of the Constitutional Court in *Oloka-Onyango* (n 46 above) 25-26.

53 See N Byekwaso 'Technicality has defeated the people on homosexuality' *New Vision* 5 August 2014.

54 Byekwaso (n 53 above) 20.

55 One Peter Naloda was so outraged by the decision, but turned his wrath instead onto the members who had absented themselves from the parliamentary vote, suing for a declaration that those who stayed away on voting day had contravened their oaths of allegiance and the Anti-Corruption Act. See H Nsambu 'MPs sued over anti-gay Bill' *New Vision* 30 September 2014 6.

healthcare providers to treat LGBTI individuals.⁵⁶ However, the report went on to note that section 145 of the Penal Code, which prohibits sexual intercourse against the order of nature, remains a threat hanging over the rights of LGBTI persons. The report also noted lingering fears over the arrest of LGBTI individuals for visiting groups which offer health and counselling services to the community:⁵⁷

A member of the LGBTI National Security Committee told Amnesty International that 'people still fear going to Walter Reed. They fear arrest.' At Icebreakers, 'the number of clients is growing slowly' but 'it is not increasing at the speed at which it dropped'. The petition by MPs to introduce a new anti-homosexuality Bill in parliament has forced LGBTI people to adopt a 'wait-and-see' approach.

In sum, nullification of the AHA did not mean that the homophobia it had stirred up dissipated or, indeed, that the courts of law would treat the issue of sexual orientation more liberally if confronted with it again. Indeed, the spike in homophobia was evident over the course of the debate of the Bill well before its enactment and continued even after its nullification.⁵⁸ As noted by Khanna:⁵⁹

The most peculiar aspect of the Ugandan story, perhaps, is that in the period of more than four years that the law was a Bill, the state, the media, and sections of society had already begun to behave as though it was, in fact, a law, routinely targeting NGOs and activists working in opposition to the Bill. The Bill, in other words, already had a social and political life even while it did not, strictly speaking, have the legal status as law in force. In this period it was impossible to challenge the instrument - it was not a 'law' subject to judicial review and formal litigation. And yet, it was having the effect of law, generating fear and action against LGBT folk, activists, artists and the like.

If the *Oloka-Onyango* decision was cause for celebration, the case of *Jacqueline Kasha Nabagesera & 3 Others v Attorney-General & Another (Kasha-2)*⁶⁰ threw a damper on the elation. Decided after the AHA was enacted into law but before its nullification by the Constitutional Court, *Kasha-2* underscores the forwards and backwards movement

56 Amnesty International *Rule by law: Discriminatory legislation and legitimised abuses in Uganda* (2014) 65.

57 As above.

58 Civil Society Coalition on Human Rights and Constitutional Law (CSCRCL), Human Rights Awareness and Promotion Forum (HRAPF), Rainbow Health Foundation (RHF), Sexual Minorities Uganda (SMUG) and Support Initiative for Persons with Congenital Disorders (SIPD) *Uganda Report of Violations Based on Sex Determination, Gender Identity, and Sexual Orientation* Kampala, Uganda, October 2014.

59 A Khanna 'The queer body between the judicial and the political – Reflections on the anti-homosexuality laws in India and Uganda' in Institute of Development Studies *Putting the law in its place: Analyses of recent developments in law relating to same-sex desire in India and Uganda* (2014) 11, <http://mobile.opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/4203/SPW%20Newsletter%20July%202014%20Final.pdf?sequence=1> (accessed 30 April 2015).

60 Judgment of Justice Stephen Musota in *Jacqueline Kasha Nabagesera & 3 Others v Attorney-General & Another* Misc Cause 33 of 2012, [2014] UGHC 49, <http://www.ulii.org/ug/judgment/high-court/2014/49> (accessed 2 September 2014).

on the rights of sexual minorities alluded to in the introduction to this article.

The *Kasha-2* case related to the action of the Minister of Ethics and Integrity, the Hon Simon Lokodo, in breaking up a seminar that had been organised by the group Sexual Minorities-Uganda (SMUG) in the town of Entebbe, a few miles outside the capital city Kampala. It must be noted that the Minister's forcible closure of the seminar took place before the passing of the AHA.

The applicants were the organisers of the meeting and sued the Attorney-General (in his official capacity) and Minister Lokodo in his personal capacity for violations, among others, of the freedoms of assembly and association. In responding to the claim, the judge concluded that the Minister was indeed justified in forcibly closing down the workshop. Turning the reading of the notion of 'public interest' on its head, the court stated:⁶¹

My reading of the above provisions – ie article 43 of the Constitution defining the term 'public interest' – persuades me that it recognises that the exercise of individual rights can be validly restricted in the interest of the wider public as long as the restriction does not amount to political persecution and is justifiable, [and] acceptable in a free democratic society. Whereas the applicants were exercising their rights of expression, assembly, etc, in so doing, they were promoting prohibited acts [homosexuality] which amounted to action prejudicial to public interest. Promotion of morals is widely recognised as a legitimate aspect of public interest which can justify restrictions.

What is quite clear from the judgment is that the court was reading much more into a case that was essentially concerned with freedom of expression and assembly and the arbitrary exercise of state power by an errant government official. Indeed, the judgment in this case was all about homosexuality, moreover approached with a thinly-disguised homophobia, a fact which is evident from the following passage taken from the judgment:⁶²

In my ruling I have endeavoured to come to conclusions that while the applicants enjoyed the rights they cited, they had an obligation to exercise them in accordance *with the law*. I have also concluded that in exercising their rights they participated in promoting homosexual practices *which are offences against morality*. This perpetuation of illegality *was unlawful and prejudicial to public interest*. *The limitation on the applicants' rights was thus effected in the public interest specifically to protect moral values*. The limitation fitted well within the scope of valid restrictions under article 43 of the Constitution. Since the applicants did not on a balance of probabilities prove any unlawful infringement of their rights, they are not entitled to any compensation. *They cannot benefit from an illegality*.

The *Kasha-2* case represented a serious setback from the string of cases which had witnessed consecutive successes for sexual minorities in Uganda in terms of their broad protection under the law. While

61 As above.

62 As above.

studiously avoiding making the connection to sexual orientation or questions of identity, the courts in the earlier cases of *Mukasa* and *Kasha-1* were able to protect LGBTI individuals by simply treating them like other human beings. Even though the *Oloka-Onyango* case brought to the surface the issue of same-sex erotics much more directly, the court was nevertheless able to deliver a judgment that got rid of the law without engaging with the more controversial aspects of sexual orientation and gender identity involved. Needless to say, the *Oloka-Onyango* case must be applauded because the Court could have easily made a different conclusion regarding the question of quorum.

In contrast, the *Kasha-2* case took the struggle back to the sexual apartheid encapsulated in section 145, which outlaws sex against the order of nature, and related laws, such as being idle and disorderly or causing a public nuisance – laws that are often deployed to harass and disenfranchise members of the LGBTI community. Furthermore, the judge in the *Kasha-2* case also added into his judgment considerations – such as the ‘promotion’ of homosexuality – that could only have been derived from the Anti-Homosexuality Bill, even though the events relating to the case occurred before the AHB became law.

However, the decision in *Kasha-2* dramatically illustrated how far-reaching the anti-homosexuality law would have been. By inordinately conferring excessive powers to a government agent to act in an arbitrary and draconian manner simply on account of the sexual orientation of the individuals involved, the Court extended the issue well beyond the matter of same-sex erotics. In effect, the decision basically gave government officials *carte blanche* not only to arbitrarily decide that a certain action is illegal, but also on the most appropriate action to take in the circumstances. The *Kasha-2* case is especially dangerous because it reversed basic principles of the law, such as the burden of proof and the presumption of innocence, underscoring a threat that should alarm and concern even those who are not gay. It was a classic case of two steps forward, one step back.

Even though the AHA has ceased to be law in Uganda, activists decided to pursue the matter at the East African Court of Justice. Hence, the case of *HRAPF v AG of Uganda* argues that, despite the declaration of the AHA’s unconstitutionality, it is important that a court of law addresses the insidious implications of the law for the situation of sexual minorities.⁶³ It was also felt important to transmit a message to other governments in the East African Community (EAC) that such legislative intervention violated the treaty of co-operation which established the body.

63 For a summary of the case, see HRAPF ‘Challenging the Anti-Homosexuality Act in international courts: The case of *Human Rights Awareness and Promotion Forum v Attorney-General of Uganda*, Reference No 6 of 2014’ in *The Human Rights Advocate Beyond quorum: Why the Anti-Homosexuality Act 2014 was Illegal* http://www.hrapf.org/sites/default/files/publications/15_04_30_hrapf_second_issue_of_the_human_rights_advocate.pdf (accessed 30 April 2015).

Aside from section 145, there are other laws which are largely overlooked in the discussion about the rights of sexual minorities which pose a serious threat to members of this community. Thus, the Global Commission on HIV and the Law pointed out that there are laws which could be described as much more 'subtle' which⁶⁴

may be laws of general application, on adultery for example, that are applicable to people engaged in same-sex sexual conduct while married to a person of the opposite sex. Laws may be selectively applied to same-sex couples, such as laws on age of consent. Public order laws addressing lewd public behaviour or disorderly conduct have been regularly enforced in gay venues, even where same-sex sexual behaviour is not *per se* illegal. Laws and police may target people who are dressed in a way that is perceived to be inconsistent with their physical gender.

The case of Uganda represents the extreme. How have sexual minorities been treated by legislation and the courts of law in Kenya?

4 The situation of sexual minorities in Kenya

In the immediate aftermath of the enactment of the AHA in Uganda, calls were made in Kenya for similar legislation to be passed.⁶⁵ The same was done in Tanzania, with opposition MP Ezekiel Wenje claiming that he had submitted a draft entitled 'the Bill to Prohibit and Control Any Form of Sexual Relations between Persons of the Same Sex, 2014' as a private member's Bill.⁶⁶ Not much more was heard about the issue in either country and, despite the occasional rhetorical flourishes, neither of the two has taken the debate over sexual minorities to the level it reached in Uganda with the saga of the AHA. This does not mean that these two countries are more liberal; maybe only that they are not quite as extreme. Issues of same-sex orientation and the situation of sexual minorities have been of some concern in Kenya for some years.

Like Uganda, Kenya inherited the same laws from the British, having been enacted as far back as 1897.⁶⁷ Although uncommon, there have also been criminal convictions on the basis of those laws. Thus, in 2006 one Francis Odingi was sentenced to six years in prison for having 'carnal knowledge of MO against the order of nature'.⁶⁸

64 S Burris *et al* 'Laws and practices that effectively criminalise people living with and vulnerable to HIV' paper presented at the first meeting of the Global Commission on HIV and the Law, Working Paper GCHL/MTG1/WP/11 (2010).

65 A Byrd 'Kenyan adventist politician proposes extreme anti-gay Bill' *The Spectrum*, <http://spectrummagazine.org/article/alita-byrd/2014/08/14/kenyan-adventist-politician-proposes-extreme-anti-gay-bill> (accessed 30 April 2015).

66 E Muga 'Dar plans to introduce tougher anti-gay Bill' *The East African* 29 March 2014, <http://www.theeastafrican.co.ke/news/Dar-plans-to-introduce-tougher-anti-gay-Bill--/-/2558/2262374/-/iq7xix/-/index.html> (accessed 30 April 2015).

67 CE Finerty 'Being gay in Kenya: The implications of Kenya's new Constitution for its anti-sodomy laws' (2012) 45 *Cornell International Law Journal* 436-438.

68 (2006) 2011 eKLR (CA Nakuru). He was not given a higher sentence because he was a student at the time of the offence.

Serious concern about issues of same-sex sexualities first surfaced in bold relief in a constitutional debate over whether to include a reference to the right to sexual orientation in the provisions on the new 2010 Constitution, a recommendation which was ultimately rejected after extensive public debate. It happened soon after the adoption of the new Constitution in the public hearings over the appointment of a new chief justice.⁶⁹

Among the candidates contesting for the position of chief justice was Willy Mutunga, a scholar-activist who had strong public backing for the position but who, as director of the Ford Foundation in Nairobi, had supported several gay rights organisations to set up and operate in the country.⁷⁰ On meeting the parliamentary Committee on Implementation of the Constitution (CIOC), Mutunga was forced to address the issue of his own sexual orientation because some church leaders had objected to the ear stud that he wore, which ostensibly put into question 'his morality and probably even [his] sexual orientation'.⁷¹ Mutunga retorted that he wore the stud as part of his religion, and that it was an act protected in the same way as the right of a Catholic to wear a rosary. Following a direct question from Runyenjes MP Cecily Mbarire, Mutunga responded:⁷²

Let me say it straight out, I am not gay. And having said that, let me say also I do not discriminate against gay people. That will be my straight answer.

The response closed the debate on the issue and, given his strength as a candidate, the Committee had no choice but to recommend his appointment, which was enthusiastically welcomed by civil society activists throughout the East African region.

In comparison to Uganda, Kenya has a more vibrant and active LGBTI community which persists in advocacy despite hostility from the general public and government-led outbursts.⁷³ LGBTI activism in Kenya dates back to the late 1990s and is both more apparent and more tolerated.⁷⁴ For example, openly-gay activist David Kuria ran for

69 As one commentator sarcastically stated, 'Kenyan justice is a sex thing, and orientation is at the centre of it.' See K Makokha 'Elephant in the room during approval hearings for judicial jobs nominees' *Saturday Nation* 11 June 2011 12.

70 See FIDA Uganda 'Gay rights are human rights!' – Dr Willy Mutunga, YouTube 31 January 2012, <http://www.youtube.com/watch?v=PPffiwXNuOg> (accessed 30 April 2015).

71 R Njioka "'I am not gay", CJ nominee Mutunga says' *Standard Digital* 7 June 2011, <http://www.standardmedia.co.ke/business/article/2000036698/i-am-not-gay-cj-nominee-mutunga-says> (accessed 30 April 2015).

72 As above.

73 Equal Rights Trust and Kenya Human Rights Commission *In the spirit of Harambee: Addressing discrimination and inequality in Kenya* ERT Country Report Series 1, London, February 2012 114-130.

74 Kenya Human Rights Commission (KHRC) *The outlawed among us: A study of the LGBTI community's search for equality and non-discrimination in Kenya* (2011) 2, http://www.goethe.de/resources/files/pdf31/THE_OUTLAWED_AMONGST_US_1.pdf (accessed 30 April 2015).

election to the Kenya Senate in 2013, although he withdrew from the race before the ballot largely on account of financial reasons.⁷⁵ Such an act would be hard to duplicate in either Uganda or Tanzania. Groups such as the Gay and Lesbian Coalition of Kenya (GALCK) have a fairly prominent profile in the wider human rights community, while local groups, such as Me and You in Meru and the Kisumu Initiative for Positive Empowerment (KIPE), are organisations that operate outside Nairobi manifesting a much wider outreach than their counterparts in Uganda and Tanzania. A common problem is faced in that LGBTI activists were initially denied registration of their organisations, and thus remained marginal to the mainstream. As observed by the Kenya Commission on Human Rights (KHRC):⁷⁶

[H]uman rights advocacy and responses by [mainstream] Civil Society Organisations (CSOs) to human rights abuses against LGBTI persons have been few, reactionary and lacking in strategic focus. Moreover the interventions rarely address the real source of the problem [criminalization], nor do they build on past responses. Further to this is an absence of mainstreamed LGBTI programmes in most organisations especially those that deal with women and gender issues.

That situation has now changed with a decision recently delivered by the High Court. In the case of *Eric Gitari v NGO Co-Ordination Board & The Attorney-General*,⁷⁷ the Court found that the grounds on which the Board sought to deny the group registration were a violation of the Bill of Rights. In a decision that was erudite in its exposition of what the transformation heralded by the 2010 Constitution actually means, the Court roundly condemned the Board, holding:⁷⁸

The upshot of our findings above is that the Board infringed the petitioner's freedom of association in refusing to accept the names he had proposed for registration of his NGO, thereby in effect refusing to contemplate registration of the proposed NGO. There is a whiff of sophistry in the recommendation by the respondent that the petitioner registers his organisation, but by another name. What this recommendation suggests is that the petitioner can register an organisation and call it, say, the Cattle Dip Promotion Society, but carry out the objects of promoting the interests of the LGBTIQ community, which suggests that what the Board wants to avoid is a recognition of the existence of the LGBTIQ groups.

75 Although there were some reports of threats, Kuria himself reported a rather positive experience before he was forced to withdraw from the campaign: 'I had seen changes in the way our people in the villages view gay people. For many people, gay people and gay rights are perceived through mediated interpretation of politicians and religious leaders. For the first time it was possible to talk with the people, answer their questions as well as point out the nexus areas of different forms of marginalisation, including poverty and other challenges that affect them, too.' See D Smith 'Kenya's first gay political candidate reveals why he quit the race' *The Guardian* 25 December 2012 <http://www.theguardian.com/world/2012/dec/25/kenya-gay-candidate-ends-campaign> (accessed 30 April 2015).

76 KHRC (n 74 above) 3.

77 Petition 440 of 2013 [2015] eKLR.

78 *Gitari* (n 77 above) para 145 46.

While this decision represents a major boost for sexual minority groups in Kenya, and the general context for the operation of such groups is bound to get more tolerant, the community still faces a whole range of violations familiar in both Uganda and Tanzania, including harassment by state officials, stigma and exclusion by family and society, physical violence and threats of death, expulsion from learning institutions, blackmail and extortion, poor access to health care and a lack of comprehensive services, as well as medical research abuse.⁷⁹ The KHRC clearly points to the root cause of the problem:⁸⁰

The criminalisation of homosexuality is a legacy which has now passed its use by date. The colonial laws from which the criminalisation of homosexuality emanates, have no place in a world where central to the stability of a society is the need to respect cultural variety. For such reasons, convicting those who have been found to engage in homosexuality activity has no place in a modern society.

Although the issue of decriminalisation and using the courts of law has been a matter under discussion within the LGBTI community, as at the time of writing, no case has yet been filed in the Kenyan courts to take the matter further. The situation is a little different with respect to transgender and intersex individuals.

5 A note on the 'T' and the 'I' in the LGBTI alphabet

Most analyses of sexual minorities concentrate on the first two letters of the LGBTI alphabet with much less attention given to the 'B' (bisexual), 'T' (Transgender) and the 'I' (Intersex). Issues of gender identity and expression, in particular, are usually overshadowed in African analyses of LGBTI rights. Such non-conformity is a factor that facilitates stigma and ostracism.⁸¹ Indeed, the threats of persecution of this kind⁸²

confine[s] individuals to strict gender and sexual norms for fear of being labelled LGBTI; as a result, it maintains power inequalities between men and women. Lesbians and women who have sex with women are particularly vulnerable to the effects of strict gender norms which are perpetuated by anti-homosexuality laws.

Needless to say, East Africa has recently had to come to grips with the complexities presented by the phenomenon of transgenderism and intersexuality.

79 KHRC (n 74 above) 20-41.

80 KHRC 48.

81 Amnesty International *Making love a crime: Criminalisation of same-sex conduct in sub-Saharan Africa* (2013) 47-57, http://www.amnestyusa.org/sites/default/files/making_love_a_crime_-_africa_lgbti_report_emb_6.24.13_0.pdf (accessed 30 April 2015).

82 Amnesty International (n 81 above) 47.

Major issues of voice, image and security affect this category of individuals. As the KHRC points out with respect to the situation in Kenya, which is also applicable to the case of Uganda:⁸³

There is no legal framework that allows or facilitates transgender and intersex individuals to choose their gender and have it recognised by law; most intersex individuals are taken through unnecessary corrective surgeries when they are born or simply assigned a gender role and raised as such without being given a chance to choose their gender or undergo a sex correction surgery when they are of age. The transgender persons suffer lack of legal recognition and are legally bound to a gender they do not want to identify with.

The legal and policy responses in relation to transgender and intersex individuals have been mixed. Once again, Uganda leads the way in the most extreme legal reaction to the issue. Transgender and intersex individuals have been subjected to all forms of harassment, including hate crimes, especially on account of the charge against transgender women that they are masquerading in order to dupe and extort money from the public, or the alternative claim that they are homosexual, confusing the issue of gender identity and sexual orientation. Others have faced lynch mobs and have been beaten, aside from being ostracised, barred from housing and suffering all manners of discrimination in their places of employment, as well as with immigration officers who accuse them of impersonation. The HRAPF/CSCHCRL report on the enforcement of laws criminalising same-sex conduct in Uganda summarises the situation well, pointing out that just being transgender or intersex is apparently sufficient to satisfy the police that one is a homosexual engaged in 'carnal knowledge against the order of nature'.⁸⁴ To compound matters:⁸⁵

The persons arrested are not informed of their rights and the whole circumstances are so humiliating that the suspect cannot reasonably be said to be having a fair trial. When a suspect cannot pay a bribe and charges are placed, and where suspects have no lawyer, persons such as Brian Mpande and Fred Wesukira are not availed of the right to a hearing on bail. Demands for bribes, coupled with ongoing harassment, ensure that suspects cannot have a fair trial. Suspects are also kept in police cells for more than the 48 hours required by the Constitution. Brenda Kizza and George Oundo spent a week in police detention without access to lawyers or to a magistrate. They were then released without being brought before a magistrate but were required to keep on reporting to the police.

The most recent manifestation of the phobia against transgender and intersex individuals was transparent in the debate in the Ugandan Parliament over the Registration of Persons Bill, 2014. Clause 39 of the Report of the Committee that studied the Bill suggested the adoption

83 KHRC (n 74 above) 42.

84 HRAPF/CSCHCRL (n 58 above) 61.

85 HRAPF/CSCHCRL 61-62.

of the following provision from the earlier Births and Deaths Registration Act:⁸⁶

If a child, after being registered, either through an operation or otherwise, changes from a female to a male or from a male to a female and the change is certified by a medical doctor, the registrar of the births and deaths registration district in which the birth is registered shall, with the approval of the Executive Director and on the application of the parent or guardian of that child, alter the particulars of the child which appear on the births register.

An immediate interjection was raised. What followed exemplifies the knee-jerk reaction of Ugandan politicians to anything even remotely connected to sexual minorities. It is thus in order to extensively quote from the *Hansard* of the day:

Chairperson: Honourable members, order!

Mr Ekanya: Madam Chair, is it in order for the Chairperson of the committee to read a statement that is derogative to the Constitution of the Republic of Uganda?

Chairperson: Honourable members, my understanding is that she is reading the provisions of the law which exists.

Ms Namugwanya: Madam Chair, what I am reading here was imported from the Registration of Birth and Death Act, of 1973 of the Republic of Uganda.⁸⁷

Despite the clarification, the response of members of parliament reflected an affixation with an issue that was in fact not the subject under consideration, homosexuality:

Ms Betty Amongi: Thank you, Madam Chairperson. I have no problem with the importation of the law except when it comes to the provision related to a man changing to a woman – (*Laughter*) – or a woman changing to a man. It is good that the Chairperson indicated that those Acts were of 1973 and under our new law, the 1995 Constitution Article 31(2)(a), it states that marriage between persons of the same sex is prohibited. And the provision which talks about any law that contradicts the Constitution is null and void. So in other words, when we come to delete that particular one, it will be in tandem with it; in fact a law, which contradicts the 1995 Constitution would be in tandem with that particular one.⁸⁸

The Chairperson sought to bring some clarity to the matter:

Chairperson: Honourable members, I think we should be a bit careful. There are people who are hermaphrodites; who are born with two sexual organs and at some stage you must decide whether you are going to be a man or a woman – (*Laughter*). Honourable members, this is serious, it is not a joke. There are hermaphrodites in this country. These are born with two sexual organs. There are people who have both a male and female organ and it is the same person.

86 See sec 14 'Change of sex of child', the Births and Deaths Registration Act (Cap 309, Vol XII, 2000 Laws of Uganda).

87 *Hansards* of the Parliament of Uganda, Bills committee stage, the Registration of Persons Bill 2014, 19 February 2015 242.

88 *Hansards* (n 87 above) 248.

Needless to say, the House had already fixed its mind on the matter:

Ms Alaso: Thank you, Madam Chairperson. *I think that God has accorded us an opportunity in this Bill that we are considering to correct something which is now very explosive.* I would like to take cognisance of the fact that there are Ugandans that are born hermaphrodites and there will be need for corrective surgery. But, for us to carry forward these 1973 anomalies in the law which talked of 'otherwise'; what does 'otherwise' mean in our time? We need to boldly contextualise this and read into the possible interpretation in our day and era.

My heart goes out for the children of this country that are being adopted by homosexuals. We read just a month ago, a little boy who was called Jack being told to change into a girl to be called Jacqueline and they took the little fellow who cannot consent, or understand the times, they cut out what they wanted to remove and turned the fellow into a Jacqueline. *This is the time for us to protect the children of this country (Applause) who are going to help the people who are abused?* For tonight, let us be very specific. If we want to say we want our brothers and sisters, who have a disability and anomaly at birth to have a corrective surgery, let us be very specific. But we can no longer leave it to chance.

Madam Chairperson, if you are born and your leg has a problem, and they correct it, it does not change you to something else. You just get facilitated to be better. That is the corrective surgery Dr Bitekyerezo has been telling us about. I think it would be very dangerous in this day and era to leave this provision which is even like hon.⁸⁹ Betty has said – against the provisions of our Constitution! Let us amend it.

Quite clearly, the ghosts of the AHA were once again at play in the House. It was quite clear that members of parliament were discussing an issue on which they had either no knowledge, or not enough of it. The Speaker was forced to adjourn proceedings to the next session on the following day on account of the ruckus. Given the general atmosphere prevailing in Uganda, no attempt has yet been made to institute a public interest action on the behalf of transgender or intersex individuals.

In Kenya, the initial knee-jerk reaction of the courts to the issue of intersexuality was evident in the case of *Richard Muasya v Attorney-General*⁹⁰ that came to the court as early as 2004, even though the decision was not delivered until 2010. In that case, the petitioner sought the recognition of a third gender and damages for poor treatment at the hands of government health authorities. While accepting that the petitioner had indeed been inhumanely treated by state officials, warranting an award of KShs.500,000/=, the court noted that the law recognised only two sexes. Thus, protecting intersex people from discrimination using the category of 'other status' would result in the recognition of a third category of gender. In making the argument that Kenyan society was not ready for such a development, the court stated:⁹¹

⁸⁹ *Hansards* 249 (my emphasis).

⁹⁰ [2010] eKLR (HCK) (Kenya) Miscellaneous Civil Application 890 of 2004.

⁹¹ *Muasya* (n 90 above) para 148.

Kenyan society is predominantly a traditional African society in terms of social, moral and religious values. We have not reached a stage where such values involving matters of sexuality can be rationalised or compromised through science.

A somewhat different conclusion was made by the court in the application by the organisation Transgender Education and Advocacy (TEA)⁹² for judicial review, a case filed in 2013 and decided soon thereafter. In that case, the NGO Co-Ordination Board refused to register the organisation, citing a string of flimsy reasons, but ultimately on account of their trepidation over the issues that such a group would address. The case thus brought to the fore the question of whether it was appropriate for an organisation established to advocate for the rights of transsexuals to be refused registration. The facts of the case indicated that the Board had refused to register TEA despite submission of all the necessary documentation as per the regulations governing NGO registration in the country. The ostensible reasons given were that the names and passport size photographs of two of the officers who had applied on behalf of the organisation were different from those in their national identification cards.⁹³

The Board also claimed that the applicant's change of gender had put a halt to the registration process since there was an ongoing court case where the TEA Chairperson, Audrey Mbugua (previously Andrew Mbugua), had 'sued the national examinations council seeking the removal of the male gender mark from his academic certificate to reflect her female status'.⁹⁴ The Board also claimed that it had not refused registration of TEA, but that it was 'awaiting the outcome of a pending case in which some (TEA) officials had sought to officially change their names and gender'.⁹⁵ The court found that the grounds of the refusal were wrong, given that the Act did not make it a requirement for the officials of an applicant for registration to state their gender. The court very clearly stated:⁹⁶

The introduction of the issue of gender by the first respondent as a ground for refusing registration, however, is not one of the considerations in deciding whether or not to decline registration. By introducing that issue the first respondent has obviously introduced and considered an irrelevant factor.

Having reviewed the law relating to the exercise of discretion and finding that the NGO Board had not correctly applied itself with respect to the first respondent's request for registration, the court concluded:⁹⁷

92 Miscellaneous Application 308A of 2013.

93 TEA (n 92 above) paras 11 & 12, 5.

94 TEA para 13, 6.

95 TEA para 28, 12.

96 TEA para 31, 13.

97 TEA para 36, 18.

Apart from the foregoing, it is my view that to discriminate persons and deny them freedom of association on the basis of sex or gender is clearly unconstitutional.

Why was the decision in the TEA application important? In the first place, it marked a significant departure from the *Muasya* case that adopted an ostrich-in-the-sand position on the question of sexual diversity. Secondly, by allowing the TEA application to succeed, the court affirmed the importance of giving oppressed and marginal sexual minorities the right to secure a voice as a recognised component of civil society. Often the ability to organise and express oneself is the elemental foundation in the process of asserting one's rights. Indeed, as Tenga and Peter assert, the right of association is the 'mother of all rights'.⁹⁸ It is for this reason that the recent case decided in favour of the LGBTI organisation LeGaBiBo in Botswana, challenging the government's rejection of its application for registration, was so important.⁹⁹ The TEA case is also significant because it gave voice to a constituency (alongside the intersexed) that is often described as a 'forgotten' one.¹⁰⁰ Lastly, the TEA case confirmed the essential viability of the constitutional bar against discrimination enshrined in the 2010 Constitution. While numerous issues remain of concern with regard to the rights of intersex and transgender people in Kenya, at least a start has been made with the TEA case.

Action on intersex identity was given a boost with the *Baby A* case, which sought the legal recognition and protection of intersexual children; a declaration that intersexual children are entitled to and or guaranteed equal rights; a declaration that all surgery on intersex infants that is not therapeutic be approved by a court; directions in relation to guidelines, rules and regulations on the treatment of intersex children; and an order directing the government to investigate, monitor and collate data and/or statistics on all intersexual children in Kenya.¹⁰¹

While refraining from ruling on whether or not there should be a third gender, which issue the court said should be left to parliament, the court said that article 27(4) of the 2010 Constitution on non-discrimination needed to be read 'in its own context and language'. According to the court, the article¹⁰²

98 N Tenga & C Peter 'The right to organise as mother of all rights: The experience of women in Tanzania' (1996) 34 *Journal of Modern African Studies* 143-162.

99 See the judgment in the case of *Thuto Rammoge & 19 Others v The Attorney-General* Case [2014] MAHGB-000175-13; and BBC 'Botswana gay rights group wins landmark case' 14 November 2014, <http://www.bbc.com/news/world-africa-30054459> (accessed 30 April 2015).

100 See J Kaggwa 'Intersex: The forgotten constituency' in Tamale (n 12 above) 231-234. On transgenderism, see A Mbugua 'Gender dynamics: A transsexual overview' in Tamale (n 12 above) 238-246.

101 *Baby A & The Cradle v The Attorney-General & 2 Others* Constitutional Petition 266 of 2013 para 61, 16.

102 As above.

categorically states that there shall be no discrimination 'on any ground' from that provision. An inclusive provision is not exhaustive of all the grounds specifically mentioned therein, including sex. That finding will therefore have to mean that intersexuals ought not to be discriminated against in anyway including in the issuance of registration documents such as a birth certificate.

The court also extended its ruling to intersexuals in general 'as opposed to the narrower and specific interests of Baby A who is only one such person in our society'. The court directed that the government develop guidelines to govern, among other things, the registration of intersex children, medical examinations and corrective surgeries, as well as to collect data on them.¹⁰³ These positive jurisprudential developments are doubtlessly of significant importance in the struggle for the improved recognition of an historically-marginalised community.

6 Conclusion

It is quite clear that courts have become an important context within which the struggle over sexual rights and sexual expression in East Africa is being fought, as the examples from Uganda and Kenya illustrate. There is no doubt that it will remain hot-button for a considerable period of time and there is no indication of which direction they will progress in if subjected to judicial intervention. The timing and framing of strategic litigation on such issues will thus have to be carefully thought out before initiation.

The recent decisions in Kenya on transgender and intersex people also point to some hope over the horizon if the lesson of balance and sobriety over these issues can be taken across the border into Uganda. That is not to say that progress in this regard will be easy, given the time it has taken for societies around the world to fully come to grips with the varied dimensions of sexual orientation and gender identity.¹⁰⁴ For lesbian and gay people, while there has been considerable discussion over the issue of decriminalisation, numerous factors would have to be taken into account before court action can be initiated on this front. Ironically, of the two countries, the Ugandan judiciary has had most engagement with the issue and yet an action in those courts would be ill-advised.

¹⁰³ *Baby A* (n 101 above) paras 67 & 68, 17-18.

¹⁰⁴ As the *New York Times* points out: 'For years, writers and academics have argued that gender identity is not a male/female binary but a continuum along which any individual may fall, depending on a variety of factors, including anatomy, chromosomes, hormones and feelings. But the dichotomy is so deeply embedded in our culture that even the most radical activists have been focused mainly on expanding the definitions of the two pre-existing categories.' See J Scelfo 'A university recognises a third gender: neutral' *New York Times* 3 February 2015, http://www.nytimes.com/2015/02/08/education/edlife/a-university-recognizes-a-third-gender-neutral.html?_r=0 (accessed 30 April 2015).

The experiences recounted lead us to ask how appropriate courts of law are for the kinds of battle encapsulated in the cases reviewed in this article. In many respects, the victory over the AHA in Uganda represented by the *Oloka-Onyango* case was a bittersweet one. The fact that the case turned on the issue of quorum meant that the more substantive rights issues involved in the case were not tackled. In other words, the court found an easy way out of nullifying the law without having to address the very controversial substantive rights issues that the AHA raised. What this means is that there has still not been a comprehensive judicial engagement with the issue of discrimination on the basis of sexual orientation. It remains to be seen whether the EACJ will declare that it has jurisdiction to consider the matter. Secondly, at a more practical level, fresh legislation can be introduced and directed towards the same goal of attempting to legally obliterate same-sex orientation from Ugandan society.¹⁰⁵ In such a situation, there is no telling in which direction the courts would move in response.

In contrast, the Kenyan courts have adopted a much more enlightened and forthright posture in dealing with the twin issues of sexual orientation and gender identity. While the two intersex cases (*TEA* and *Baby A*) demonstrate a movement away from the conservative knee-jerk reaction of the *Muasya* case and a deep appraisal of the fairly complex nature of the issue, the *Eric Gitari* case, concerned with the issue of registration of an LGBTI organisation, reflects a bench that is confident in the exercise of a judicial oversight power that is both progressive and transformative. No doubt, the 2010 Constitution takes a good deal of responsibility for this.

At the same time, it is necessary to remain sensitive to the possible negative consequences of heightened judicial intervention in Kenya. Thus, in the aftermath of the *Gitari* decision, the *Weekly Citizen* newspaper published the names and photographs of 12 LGBTI activists, including some who were previously still in the closet.¹⁰⁶ Dennis Nzoika, who was one of the activists named in the paper, responded with the following reflection:¹⁰⁷

105 Recent press reports indicate that this is precisely what has happened. The new Bill is called the Prohibition of Unnatural Sexual Offences Bill, 2014. For a report, see M Danielsen & I Imaka 'New anti-gay Bill in advanced stages' *Daily Monitor* 20 November 2014, <http://www.monitor.co.ug/News/National/New-anti-gay-Bill-in-advanced-stages/-/688334/2528396/-/14e5eauz/-/index.html> (accessed 30 April 2015).

106 J Morgan 'Kenya newspaper prints list of "top homos"' *Gay Star News* 11 May 2015, <http://www.gaystarnews.com/article/kenya-newspaper-prints-list-top-homos110515> (accessed 30 April 2015).

107 F Nzwili 'Kenya's LGBT community gains the right to organise, but religious opposition looms' *HuffPost* (Gay Voices) 29 April 2014, http://www.huffingtonpost.com/2015/04/29/kenya-lgbt-community-ruling-_n_7173726.html (accessed 30 April 2015).

If homophobes were looking to target people, if the police were looking to arrest people, if anti-gay youths were looking to attack some teen they assume is gay, they now have a face and a name.

The religious community also expressed their opposition.

Also implicated in the intervention of the courts in East Africa thus far (and as was amply demonstrated in the Indian *Naz* case in the Supreme Court) are the age-old battles over separation of powers and the claims about the over-judicialisation of social issues. At the regional and international level, there is the question of cultural relativism and the charge of 'sexual imperialism' levelled against those who speak out in support of these issues.¹⁰⁸ Activists in this area of human rights will thus have to shape their interventions in a manner that seeks to address these concerns.¹⁰⁹

At the end of the day, there is no doubt that the basic rights of those who are marginalised and persecuted will eventually triumph, even if the battle will be lonely, long and rough. Although made in relation to the situation of women, the comments of Amissah JP in the famous case of *Unity Dow v Attorney-General of Botswana* are apposite in relation to the existing discrimination against sexual minorities in Uganda and Kenya.¹¹⁰

Today, it is universally accepted that discrimination on the ground of race is an evil. It is within the memory of men still living today in some countries that women were without a vote and could not acquire degrees from institutions of higher learning, and were otherwise discriminated against in a number of ways. Yet today the comity of nations speaks clearly against discrimination against women. Changes occur. The only general criterion which could be put forward to identify the classes or groups is what to the right thinking man is outrageous treatment only or mainly because of membership of that class or group and what the comity of nations has come to adopt as unacceptable behaviour.

In sum, there is no doubt that discrimination against sexual minorities shall also end. However, the demise of such discrimination will in part be contingent on the extent to which courts of law become more sensitised to the intricacies of sexual orientation and gender identity. Only then will our East African countries be set on the right path to giving full recognition to the right to love in all its varied shapes and sizes.

¹⁰⁸ See Nyanzi (n 4 above).

¹⁰⁹ As Andrew Mwenda (one of the co-petitioners in the *Oloka-Onyango* case) points out: 'Law is (and must be) a reflection of the values, belief and traditions of the society that it governs. No state, democratic or authoritarian, can force a lifestyle on a society, which 90 per cent of the population sees as an abomination.' See A Mwenda 'After court annulled AHA, what next?' *The Independent* 8-14 August 2014 9.

¹¹⁰ (2001) AHRLR 99 (BwCA 1992) para.90.

Realisation or oversight of a constitutional mandate? Corrective rape of black African lesbians in South Africa

*Lea Mwambene**

Senior lecturer, Faculty of Law, University of the Western Cape, South Africa

*Maudri Wheal***

Candidate Attorney, Bern Rautenbach Attorneys, Cape Town, South Africa

Summary

Corrective rape is a form of sexual punishment by men towards lesbians in order to cure them of their sexual orientation. Black African lesbians are victims of corrective rape, particularly those in townships who are seen to challenge patriarchal gender norms. Therefore, discrimination on the basis of gender, race, sex and sexual orientation is called into play. The impact of discrimination is rendered more serious and their vulnerability increased by the fact that the victims are also seen as a threat to patriarchy and hetero-normativity which demarcate women's bodies as male property. The article focuses on how South Africa balances its constitutional mandate in relation to black African lesbians affected by corrective rape. The article argues that it is necessary to define corrective rape as a hate crime and not merely a crime of rape for victims of corrective rape to be adequately protected.

Key words: *Corrective rape; black African lesbians; South Africa; discrimination*

* LLB (Hons) (Malawi), LLM LLD (Western Cape); lmwambene@uwc.ac.za

** LLB LLM (Western Cape); Motjie.wheal@gmail.com. This article is an extract from the one author's LLM thesis titled 'Corrective rape of black African lesbians in South Africa: Realisation or oversight of a constitutional mandate?' (2013).

1 Introduction

The aim of the article is to analyse South Africa's legal response to corrective rape amongst black African lesbians. The article is divided into six sections, the first of which is this introduction. The second section examines the definition of corrective rape and discusses the prevalence of cases of corrective rape in order to determine the extent of the problem. The third section of the article contextualises corrective rape within the constitutional and international law dialogues. The fourth section discusses existing legislation and guidelines available to the judiciary by which to prosecute the perpetrators of (corrective) rape. It also examines those cases which have gone to court in order to assess whether or not South Africa is fulfilling its constitutional mandate in relation to the victims of corrective rape. This is followed by a critical analysis of the criminal justice system in South Africa, focusing on the legislature as well as the judiciary in the fifth part. The last section concludes by arguing that, in order to properly prosecute perpetrators of this offence, corrective rape should be considered a hate crime and not merely a crime of rape.

2 Corrective rape and its prevalence

2.1 Definition of corrective rape

Before we define corrective rape, it is useful to note that the terms 'corrective' and 'rape' are defined separately. According to the *Oxford dictionary*, 'corrective' means something which is 'designed to put right something undesirable',¹ whereas the *Cambridge dictionary* defines it as something which 'intends to improve a situation' or something which 'is intended to cure a medical condition'.² Rape, on the other hand, was defined first in terms of the common law until its constitutional validity was challenged in the *Masiya* case,³ where the common law definition was found to be unconstitutional.⁴ The matter was subsequently referred to the Constitutional Court, where the decision of the High Court to develop the common law definition of rape to include 'non-consensual sexual penetration of the male penis into the vagina or anus of another person' was confirmed.⁵ The current definition of rape may be found in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act), which states that a person will be guilty of rape if he

1 *Compact Oxford English dictionary for students* (2006) 219.

2 *Cambridge advanced learner's dictionary* (2003) 273.

3 *S v Masiya (Minister of Justice and Constitutional Development Intervening)* 2006 (2) SACR 357.

4 *Masiya* case (n 3 above) para 60.

5 *Masiya v Director of Public Prosecutions Pretoria (The State) & Another* 2007 (5) SA 30 (CC) para 93.

unlawfully and intentionally commits an act of sexual penetration without consent.⁶

A vast number of definitions have been given by different authors for corrective rape. Mieses⁷ refers to corrective rape as sexual punishment by African men towards black African lesbians for being homosexual and violating traditional gender norms. Nklane,⁸ on the other hand, describes it as a practice whereby men rape lesbians in order to 'turn them straight', or to 'cure' them of their sexual orientation. Similarly, the Institute for Security Studies⁹ refers to corrective rape as a non-consensual sexual violation which is directed towards lesbians by persons of the opposite sex with the aim of punishing them and/or curing or correcting their sexual orientation. ActionAid¹⁰ characterises it as a practice where black African men rape black African lesbians in order to cure them of their lesbianism.¹¹ Brownworth, therefore, suggests that corrective rape 'is ... to cure or correct the sexual orientation of lesbians and to force them to act heterosexually and therefore to behave more like women in accordance with the gendered stereotype'.¹²

From the above definitions, one can infer that the men who rape these women want to 'put right' something which they find 'undesirable'. As also pointed out by Mehrin, the perpetrators want to teach the victims a lesson by showing them how to be real women, thus forcing them to conform to gender stereotypes stemming from patriarchal male domination which is embedded in culture.¹³ As a result, corrective rape has become an epidemic of violence against

6 Sec 3 Sexual Offences Act. According to ch 1 of the Sexual Offences Act, '[s]exual penetration includes any act which causes penetration to any extent whatsoever by (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; (b) any other part of the body of one person or any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or (c) the genital organs of an animal, not or beyond the mouth of another person'.

7 A Mieses 'Gender inequality and corrective rape of women who have sex with women' (2009) <http://www.thebody.com/content/art56244.html> (accessed 22 August 2012).

8 M Nklane 'Protest against "corrective rape"' (2011) <http://www.sowetanlive.co.za/news/2011/01/06/protest-against-corrective-rape> (accessed 22 March 2011).

9 E Kinama 'Classifying "corrective rape" as a hate crime in South Africa' (2011) <http://www.polity.org.za/article/classifying-corrective-rape-as-a-hate-crime-in-south-africa-2011-05-25> (accessed 7 July 2012).

10 A Martin *et al* *Hate crimes: The rise of 'corrective' rape in South Africa* (2009) 3.

11 Corrective rape has also been referred to as 'curative rape' by Bernadette Muthien, director of Engender. Further, the 07-07-07 Campaign has used the term 'hate rape' as cited in NR Bucher 'Law failing lesbians on "corrective" rape' (2009) <http://ipsnews.net/news.asp?idnews=48279> (accessed 14 March 2011).

12 VA Brownworth 'Op-ed: The other ex-gay "therapy"' (2013) <http://www.advocate.com/commentary/2013/07/10/op-ed-other-ex-gay-therapy?page=full> (accessed 9 December 2014).

13 SL Mehrin 'Daughters of South Africa' Independent World Report, Issue 6 Spring 2011 <http://www.independentworldreport.com/2011/04/daughters-of-south-africa/> (accessed 13 May 2012).

black African lesbian women, threatening their lives and safety. It is, however, believed that the term 'corrective rape' contributes to the views of the perpetrators.¹⁴ It is thus maintained by Henderson that the term should be used with great caution as it names an act of violence, using the term of reference of the perpetrators, which leads to the belief that rape can in fact be used to correct or cure lesbians of their sexuality.¹⁵

2.2 Prevalence of corrective rape amongst black African lesbians

There have been numerous incidents of corrective rape over the past years, due to the fact that lesbianism is considered 'unnatural'. Victims are raped with the goal of convincing them that their true orientation in fact is heterosexual.¹⁶ A few of the well-known cases will be discussed below.

2.3 Cases of corrective rape

Reliable statistics on incidents of corrective rape are hard to come by, which makes it difficult to determine the true extent of the problem and, in turn, to hold the perpetrators accountable.¹⁷ This can be attributed to the fact that most incidents go unreported, and those that are reported are not properly identified as homophobic attacks because of the sexual orientation of the victims.¹⁸ This is verified by a 2004 study which observed that 41 per cent of incidents of rape and sexual abuse targeting lesbian, gay, bisexual, transgender and intersex (LGBTI) persons in Gauteng in fact were reported to the police, while 73 per cent of the respondents contended that they did not report such victimisation as they feared they would not be taken seriously. Another 43 per cent feared abuse by the police and 33 per cent did not want the police to know their sexual orientation.¹⁹ Similarly, a study by the Forum for the Empowerment of Women found that, out

14 D Robertson 'South African lesbians targeted for rape and violence' (2011) <http://www.voanews.com/english/news/africa/South-African-Lesbians-Targeted-for-Rape-and-Violence-114495619.html> (accessed 30 March 2011).

15 As above.

16 R Martin 'Eudy Simelane: Corrective rape, corrective death' (2009) <http://globalcomment.com/2009/eudy-simelane-corrective-rape-corrective-death/> (accessed 29 March 2011). Thokozane Qwabe Ezkheni, stoned and murdered (2007) Ladysmith, KwaZulu-Natal; Khanyisa Hani, stabbed and murdered (2008); Daisy Dube, shot and murdered (2008); Sibongile Mphelo, raped, shot and her vagina cut out (2008); Girly 'S' Gelane Nkosi, stabbed and murdered (2009); and Nontsikeleo (2011), Nyanga, Western Cape. Went to Wynberg Magistrate's Court, Case SHE 79/12. There have been many more victims; the above-mentioned are the tip of the iceberg.

17 N Pillay 'No place for homophobia here' (2011) <http://www.iglhrc.org/cgi-bin/iowa/article/publications/reportsandpublications/1416.html> (accessed 30 July 2012)

18 As above.

19 R Davis 'SA's gay hate crimes: An epidemic of violence less recognised' (2012) <http://dailymaverick.co.za/article/2012-06-27-sas-gay-hate-crimes-an-epidemic-of-violence-less-recognised> (accessed 30 July 2012).

of 22 lesbians that were raped, 19 failed to report it.²⁰ Although this article only focuses on the prevalence of corrective rape of black African lesbians, the authors by no means disregard the seriousness of the abuse and injustices suffered by the LGBTI community as a whole.

It should be noted that, of the cases that will be discussed below, only three have gone to trial successfully. This is despite the fact that there have been a number of cases across South Africa involving the rape, assault and murder of lesbians.²¹ Some of these cases even involve minors. The youngest victim of corrective rape was only 13 years old when the incident occurred.²² She was raped in Atteridgeville, Pretoria, after she had declared her sexuality.²³ In response to the incident, a spokesperson from the Department of Justice and Constitutional Development made a statement in which he stated that '[g]overnment condemns this senseless and cowardly act of criminality' and promised assistance to the girl and her family.²⁴ In April 2007, Madoe Mafubedu (16) was raped and repeatedly stabbed to death.²⁵ No arrests have been made for the sexual assault and murder of this young woman who lived openly as a lesbian in Soweto, Johannesburg.²⁶

Apart from victims who were minors, a young lesbian couple, Sizakele Sigases (34) and Salome Massooa (23), were raped and murdered in Soweto, Johannesburg, on 7 July 2007.²⁷ Sizakele was an outreach worker at Positive Women's Network and a well-known gay and women's rights activist.²⁸ She lived openly as a lesbian in her community and was subsequently shot six times, her underwear and shoelaces were used to tie her hands and feet and her partner, Salome, was shot in the head.²⁹ Prior to her death, Sizakele had complained to friends that she felt threatened in her community due to the fact that she was a lesbian. One week later, the women were

20 IGLHRC Press Release 'South Africa: IGLHRC condemns the killing of 19 year-old Zoliswa Nkonyana in Cape Town and other violence against lesbians' (2006) <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/249.html> (accessed 19 August 2012).

21 P Mtetwa 'Trial into murder of lesbian soccer player set for 11-13 Feb at Delmas court' <http://www.jwg.org.za/content/view/112/82/> (accessed 30 July 2012).

22 NZ Gay 'Girl, 13, victim of "corrective rape" in South Africa' (2011) http://www.gaynz.com/articles/publish/3/article_10336.php (accessed 15 August 2011).

23 As above.

24 Staff Reporter 'Thirteen year-old a victim of "corrective rape"' (2011) <http://mg.co.za/article/2011-05-07-thirteenyearold-a-victim-of-corrective-rape> (accessed 22 July 2012).

25 Z Muholi 'Mapping our histories: A visual history of black lesbians in post-apartheid South Africa' http://zanelemuholi.com/ZM%20moh_final_230609.pdf (accessed 19 July 2011).

26 R Pithouse 'Only protected on paper' (2011) <http://sacsis.org.za/site/article/644.1> (accessed 20 July 2011).

27 Human Rights Watch "'We'll show you you're a woman" – Violence and discrimination against black lesbians and transgender men in South Africa' (2011) 76.

28 Martin *et al* (n 10 above) 9.

29 Human Rights Watch (n 27 above) 76.

found murdered next to a dumpsite.³⁰ According to a witness, on the fatal night they had suffered homophobic abuse by a crowd of people prior to leaving a local bar.³¹ Three men were detained but subsequently released and the case has since been closed.³² After the double murder of these women in 2007, the 07-07-07 Campaign³³ was started to end the targeting of lesbians for violent sexual crimes.³⁴ The rape and murder of these women have formed part of a continuing and growing pandemic of targeting black African lesbians in order to forcibly make them conform to what is believed to be normal, namely, being heterosexual.

Another victim, Nosizwe Nomsa Bizana, was gang-raped by five men because of her sexuality. She afterwards succumbed to cryptomeningitis and passed away on 16 December 2007.³⁵ Her friend, Luleka Makiwane, who was not ashamed of her sexuality, was raped by her cousin who was HIV positive.³⁶ Community activist, Ndumie Funda, fiancée of the late Nosizwe, started a shelter in 2007 for corrective rape victims in the township of Gugulethu near Cape Town.³⁷ The initiative is named Luleki Sizwe and provides support for lesbian women in the township, and aims to rescue, feed and nurse survivors of corrective rape.³⁸

Zukiswa Gaca was raped first at the age of 15, after which she ran away from the rural village situated in the Eastern Cape, a place she called home, as it was easier than to deal with a community which did not accept her as a lesbian.³⁹ She subsequently moved to Khayelitsha township where she was confronted by more hate, as 'being a lesbian in Khayelitsha is like you are being treated like an animal, like some kind of an alien or something'.⁴⁰ When she was 20, she met a man in a bar who at first seemed fine with her sexual orientation.⁴¹ However, when they left the bar, he attacked and raped her and said that he hated lesbians and that he was going to show her that she was not a

30 E Cameron 'The killing of Sistahs' (2007) <http://www.atlanticphilanthropies.org/news/killing-sistahs> (accessed 20 August 2012).

31 Martin *et al* (n 10 above) 9.

32 As above.

33 Named after the murder to mark the date on which the women were murdered.

34 Martin *et al* (n 10 above) 9.

35 Bucher (n 11 above). See also Mehrin (n 13 above).

36 Mehrin (n 13 above).

37 Bucher (n 11 above).

38 H Haiku 'South Africa: Corrective rape is a hate crime' (2010) <http://globalvoicesonline.org/2010/12/24/south-africa-corrective-rape-is-a-hate-crime/> (accessed 7 April 2011).

39 N Mabuse 'Horror of South Africa's "corrective rape"' (2011) <http://edition.cnn.com/2011/10/27/world/wus-sa-rapes/index.html> (accessed 3 September 2012).

40 As above.

41 L Hazelton 'Raped for being gay: Scourge of South African sex attacks which men claim will "cure" women of being lesbian' (2011) <http://www.dailymail.co.uk/news/article-2055289/Corrective-rape-South-Africa-women-attcked-cure-lesbians.html> (accessed 22 August 2012).

man, that he was the real man who had all the power over her.⁴² Because of fear, she did not report the first assault which occurred when she was 15, but the attack which occurred in December 2009 she reported to the police.⁴³ She accompanied the officer to identify her attacker, upon which he was questioned but subsequently released, and that was where the investigation ended.⁴⁴

Millicent Gaika (30), from the Western Cape, was walking home with friends after a night out.⁴⁵ When they reached her house, they were approached by a man, Andile Ngcoza, whom Millicent was acquainted with, and therefore she told her friends they could walk on.⁴⁶ She was pushed into a shack, after which she was beaten and raped for five hours.⁴⁷ She testified to police that throughout the assault, her attacker repeated the same thing over and over:⁴⁸

You think you're a man, but I'm going to show you you're a woman. I am going to make you pregnant. I am going to kill you.

Her case went to the Wynberg Sexual Offences Court.⁴⁹ Andile was released on R60 bail and fled while he was out.⁵⁰ This led to the case being postponed until his re-arrest, which to date has not happened.⁵¹ Millicent was taken in by Ndumie Funda who helped her recover from the rape and advocated her case.⁵² Since her attack, Millicent has become an icon in the battle against corrective rape in South Africa.

Shortly afterwards, the body of Noxolo Nogwaza (24), openly lesbian, was found in an alley on 24 April 2011.⁵³ Her head was deformed, eyes out of their sockets, her brain split and her teeth were

42 As above.

43 As above.

44 T Alfred 'The growing trend of "corrective rape" in South Africa' (2011) <http://impunitywatch.com/the-growing-trend-of-%E2%80%9Ccorrective-rape%E2%80%9D-in-south-africa/> (accessed 30 July 2012).

45 M Jones 'Five hours of trying to rape a lesbian straight' (2010) <http://news.change.org/stories/five-hours-of-trying-to-rape-a-lesbian-straight> (accessed 22 August 2011).

46 As above.

47 L Middleton "'Corrective rape': Fighting a South African scourge' (2011) <http://www.nsvrc.org/news/3746> (accessed 15 November 2011).

48 As above; Jones (n 45 above).

49 J Arnott 'Tabulated report on the incidents of corrective rape in South Africa' (2012) compiled by the Triangle Project, an organisation which deals with issues faced by the LGBTI community. Information received via e-mail from the director of the organisation on 20 July 2012, director@triangle.org.za; Case SHF 132/10, Case 54/94/2010.

50 As above.

51 As above. See also Haiku (n 38 above).

52 Haiku (n 38 above).

53 Human Rights Watch Report (n 27 above) 77.

scattered around her face.⁵⁴ An empty beer bottle and used condoms were shoved up her genitals and parts of her body were stabbed with glass and the brick used to smash her head was found next to her body.⁵⁵ Her surname, Nogwaza, ironically means 'one who stabs others', but she was the one who became yet another unfortunate victim of corrective rape when a group of men in the Kwa-Thema Township attacked her.⁵⁶

According to a researcher from the LGBTI programme at Human Rights Watch, Noxolo's death was part of a long series of sadistic crimes against lesbians in South Africa. The vicious nature of the assault should serve as a reminder that these attacks are in fact not only premeditated and planned, but that they are committed with impunity.⁵⁷ The case was investigated by the Tsakane police station,⁵⁸ but there have been no arrests made in the matter. In crimes against the LGBTI community, it is literally a matter of life and death for state officials to prosecute the perpetrators and bring them to justice.⁵⁹

Eudy Simelane (31), a well-known Banyana-Banyana soccer player and known lesbian, was gang-raped and murdered on 28 April 2008 in Kwa-Thema, a township near Johannesburg.⁶⁰ She was stabbed more than 20 times, her body found mutilated in an open field.⁶¹ Four suspects were brought to trial at the Delmas High Court in 2009 of which two were convicted, receiving sentences exceeding 30 years, whilst the other two were acquitted.⁶² This could have been a ground-breaking case to deter further hate crimes directed at lesbians as the perpetrators were convicted. However, attempts to establish the relevance of her sexual orientation to her killers' motives were unsuccessful.⁶³ The judge stated that her sexual orientation had no bearing on the case.⁶⁴

54 Ekurhuleni Pride Organising Committee (EPOC) and the Coalition of African Lesbians (CAL) 'Call to action against the brutal rape and murder of South African lesbian Noxolo Nogwaza' (2011) <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/partners/1376.html> (accessed 22 August 2012).

55 As above.

56 E Dlamini 'Lesbian community living in fear after rape' (2011) http://www.thenewage.co.za/17687-1009-53-Lesbian_community_living_in_fear_after_rape (accessed 16 September 2011).

57 D Nath 'South Africa: No arrests in lesbian murder case' (2011) <http://www.hrw.org/en/news/2011/05/02/south-africa-no-arrests-lesbian-murder-case/> (accessed 20 May 2011).

58 EPOC (n 55 above).

59 Nath (n 58 above).

60 Human Rights Watch (n 27 above) 76.

61 ILGHRC Press Release 'South-Africa: Statement by Paula Ettlbrinck on the killing of the former Banyana Banyana soccer player Eudy Simelane' (2008) <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/215.html> (accessed 20 August 2012). See also Human Rights Watch (n 27 above) 76.

62 Human Rights Watch Report (n 27 above) 77.

63 As above.

64 Martin *et al* (n 10 above) 10.

Another victim was Zoliswa Nkonyana (19), who was brutally murdered in Khayelitsha, Cape Town, on 4 February 2006 when she was stabbed, kicked and beaten to death. She lived her life openly as a lesbian which was the ultimate reason she lost her life when she died metres from her home.⁶⁵ Zoliswa was at a tavern with a friend when an argument broke out centred on the lesbians' use of the ladies toilet, while pretending to be 'tomboys'.⁶⁶ They left the tavern and when they separated a group of nine youths caught up with Zoliswa.⁶⁷ The murder of Zoliswa may be seen as a way to communicate to lesbians that they are less than human and that their lives are expendable.⁶⁸ The young men who attacked her were explicit about the fact that they wanted to kill her because she was a lesbian.⁶⁹ This case is a clear example of the intolerance, intimidation and dangers that lesbians face in informal settlements, making them vulnerable and in need of protection.⁷⁰ The case of Zoliswa was one of the longest-running in the country's history as it was postponed 50 times.⁷¹

The most recent victim of corrective rape is Duduzile ('Dudu') Zozo (26), who was brutally murdered on 30 June 2013 and was found partially naked with a toilet brush shoved up her vagina, a mere 40 feet from her home in a neighbour's yard.⁷² Following the attack on Dudu, the Minister of Women, Children and People with Disabilities strongly condemned the attack and stated:⁷³

We strongly condemn and will not tolerate any act of harassment, intimidation or violence against any member of society especially women, children, people with disabilities, the lesbian and gay community.

65 Joint Press Statement (by Social Justice Coalition, Treatment Action Campaign, Free Gender, Triangle Project and Sonke Gender Justice) 'Justice for all! Zoliswa Nkonyana murder trial set to conclude after five years' (2011) <http://www.tac.org.za/userfiles/Zoliswa%20Nkonyana%20Joint%20Statement.pdf> (accessed 15 November 2011).

66 M de Waal 'We'll make you a "real" woman – even if it kills you' (2011) <http://dailymaverick.co.za/article/2011-12-09-well-make-you-a-real-woman-even-if-it-kills-you> (accessed on 19 July 2012).

67 As above.

68 Triangle Project and Free Gender Press Release 'Evidence for sentencing in the Zoliswa Nkonyana murder trial' (2012) <http://www.facebook.com/notes/triangle-project/triangle-project-and-free-gender-testify-in-zoliswa-nkonyana-murder-trial/10150641853203594> (accessed 19 July 2012).

69 N Mkhize *et al* 'The country we want to live in – Hate crimes and homophobia in the lives of black lesbian South Africans' (2010) *Human Sciences Research Council* (HSRC Press) 9.

70 Joint Press Statement (n 66 above).

71 M Thamm 'Not just another murder' (2006) <http://mg.co.za/article/2006-02-26-not-just-another-murder> (accessed 19 July 2012).

72 Brownworth (n 12 above).

73 L Xingwana 'SA: Statement by Lulu Xingwana, Minister for Women, Children and People with Disabilities, condemns the brutal rape and murder of Dudu Zozo' (2013) <http://www.polity.org.za/article/sa-statement-by-lulu-xingwana-minister-for-women-children-and-people-with-disabilities-condemns-the-brutal-rape-and-murder-of-dudu-zozo-03072013-2013-07-04> (accessed 9 December 2014).

The trial of Lesley Motleleng (the accused in the matter) was set to begin in May 2014 but was postponed because (according to the magistrate) there were other 'more important cases at the moment'. The trial was to start in October 2014.⁷⁴ During commemorations for Dudu, it was noted that South Africa was regressing in its constitutional mandate with issues relating to human rights.⁷⁵

3 Contextualisation of incidents of corrective rape within the constitutional and international law dialogue

From the above discussion, several conclusions with constitutional implications may be drawn. It is clear that this practice targets black African lesbians in townships. The intersection of race, ethnicity, gender, sexual orientation and class cannot, therefore, be overlooked. In addition, black African lesbians also lack sufficient support systems.⁷⁶ This can be seen from the 2009 report submitted by ActionAid relating to the difference in the number of white lesbians living in fear of sexual assault as opposed to their black counterparts.⁷⁷ Women of all races are inadequately represented in traditionally male-dominated societies as they are underprivileged as women.⁷⁸ In the context of black African lesbians, however, there is an even greater level of disadvantage based on more concrete factors than merely sex. One must, therefore, acknowledge the unique intersectionality by identifying these women as a designated group in need of advancement. Inevitably, this brings the right to equality into play. Section 9 of the South African Constitution provides:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, region, conscience, belief, culture, language and birth

74 K Legoete 'A year ago – In memory of Duduzile Zozo' (2014) http://www.iranti.org.co.za/content/Africa_by_country/South_Africa/Duduzile-Zozo-trial/Duduzile_Zozo_murder.html (accessed 19 December 2014).

75 J Pereira 'In memory of Duduzile Zozo (1987-2013)' (2013) http://www.iranti.org.co.za/content/Africa_by_country/South_Africa/Duduzile-Zozo-trial/Duduzile_Zozo_murder.html (accessed 19 December 2014).

76 Martin *et al* (n 10 above) 8.

77 As above.

78 *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 para 155.

- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair, unless it is established that the discrimination is fair.

Race, sex, gender, as well as sexual orientation, are listed grounds upon which discrimination is prohibited. Further legislative and other measures must be taken to protect persons who have been targeted previously by unfair discrimination. The aim is to promote the achievement of equality and freedoms in view of unfair discrimination.⁷⁹

The victims of corrective rape are equal before the law and are protected on the basis of express grounds upon which discrimination is prohibited. However, it is important to note the difference between formal as opposed to substantive equality. Formal equality refers to sameness of treatment whereby individuals in similar circumstances are treated alike. This is in contrast to substantive equality which requires equality of outcome by tolerating disparity of treatment to achieve the said goal.⁸⁰ Therefore, it is clear that the victims of corrective rape need to be afforded substantive equality as opposed to formal equality.

According to Albertyn, patterns of inclusion as well as exclusion in which the behaviour of a particular group is stigmatised have resulted in increased vulnerability to physical violence.⁸¹ Therefore, victims of corrective rape should be afforded equal protection as they are women, they are black and they are homosexual, which ultimately increases their vulnerability. It is thus logical to assume that further differential treatment will contribute to the perpetuation or promotion of their unfair social characterisation and, consequently, will have a more severe impact on them as they already are vulnerable.⁸² Equal respect for difference is at the heart of equality and largely depends on the protection of minorities.⁸³ As it was rightly held in the *National Coalition* case:⁸⁴

It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet as soon as we say any ... group is less deserving and unworthy of equal

⁷⁹ *Barnard case* (n 80 above) para 135.

⁸⁰ I Currie & J de Waal *The Bill of Rights handbook* (2005) 233.

⁸¹ C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 255.

⁸² P de Vos & J Barnard 'Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga' (2007) 124 *South African Law Journal* 799.

⁸³ *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 1999 3 BCLR 280 (C) para 112.

⁸⁴ *National Coalition case* (n 85 above) para 22.

protection and benefit of the law all minorities and all of ... society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.

It has been held by the South African Constitutional Court that the concept of sexual orientation as used in section 9(3) should be given a generous interpretation and that it applies to the orientation of all persons who are bi-sexual or transsexual and those persons who are attracted to the same sex.⁸⁵ The only way to recognise sexual orientation as an impermissible ground of discrimination is to base it on a claim to equal protection of the law, which asserts that discrimination on the ground of homosexuality is untenable as sexual orientation should be a matter of indifference, morally as well as constitutionally.⁸⁶ To that end, Sachs J has rightly observed that equality should not be confused with uniformity and that such uniformity may be the enemy of equality as equality does not presuppose the elimination or suppression of difference.⁸⁷

Further, South Africa is committed to the promotion of gender equality and non-discrimination, which is clear from the Preamble of the Promotion of Equality and Unfair Discrimination Act (PEPUDA).⁸⁸ The Act is also clear on its interpretation as it provides that effect must be given to the Constitution in order to protect or advance persons disadvantaged by present discrimination.⁸⁹ This Act specifically acknowledges the necessity of eradicating social and economic inequalities.⁹⁰ Further, it also addresses social structures and practices which encourage or perpetuate unfair discrimination.⁹¹ According to PEPUDA, all practices, including traditional or customary practices which impair the dignity of women, constitute unfair discrimination.⁹² In addition, it is stated that South Africa is under an international obligation to promote equality and to prevent non-discrimination.⁹³

85 *National Coalition* case, paras 20-21.

86 E Cameron 'Sexual orientation and the Constitution: A test case for human rights' (1993) 110 *South African Law Journal* 464.

87 *National Coalition* case (n 85 above) para 132.

88 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

89 Sec 3 PEPUDA.

90 Preamble para 1 PEPUDA,

91 Preamble para 2 PEPUDA.

92 Sec 8(d) PEPUDA.

93 Preamble para 4 PEPUDA specifically refers to South Africa's obligations in terms of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 UNTS 13, signed 18 December 1979 and the Convention for the Elimination of All Forms of Racial Discrimination (CERD) 660 UNTS 195; GA Res 2106 (XX), Annex, 20 UN GAOR Supp (No 14) UN Doc A/6014 (1966). Additional examples of international legislation recognising and protecting the right to equality are the International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 and 1057 UNTS 407/[1980] ATS 23 / 6 ILM 368 (1967), the Universal Declaration of Human Rights GA Res 217A (III), UN Doc A/810 71 (1948), the International Covenant on Economic, Social and

Similarly, at the international level, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) offers protection to all women and places an obligation upon states to embody the principle of equality of men and women in their national constitutions and to adopt legislative and other measures to prohibit all forms of discrimination against women.⁹⁴ In addition, a duty is placed on states to refrain from practices which discriminate against women and to take measures to eliminate such discrimination by private actors.⁹⁵

Section 9 has been phrased in similar terms to the equality clause of the Canadian Charter.⁹⁶ Both the Canadian Supreme Court and the South African Constitutional Court have interpreted their respective equality clauses as prohibiting all forms of disadvantage, stereotyping as well as prejudicial treatment which have the effect of denying people or groups of people their human dignity.⁹⁷ This ultimately means that any state action which has an adverse impact on disadvantaged groups, such as women or homosexuals, will be subject to close scrutiny and must therefore be shown to be necessary and justified.⁹⁸ The victims of corrective rape are thus equal before the law and should enjoy full protection of their right to equality and non-discrimination.

Another right which is violated by corrective rape is the right to human dignity as guaranteed by section 10 of the South African Constitution. It was held by the South African Constitutional Court that the heart of the equality test lies in whether or not there has been an impairment of the right to dignity as well as the extent to which such impairment has taken place.⁹⁹ It has been held further by the Constitutional Court that discrimination means 'treating people differently in a way which impairs their fundamental dignity as human beings'.¹⁰⁰ It is clear that when considering the individual cases of the incidents of corrective rape, the inherent dignity of the victims was in fact impaired by the actions of the perpetrators who justify their actions in the name of culture. This is, however, not tolerated in South

Cultural Rights (ICESCR) GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) 49, UN Doc A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967) as well as the Convention on the Rights of the Child (CRC), UN GA Res 44/25 (1989). These instruments can all be used in efforts to eliminate all forms of discrimination.

94 Arts 2(a) & (d) CEDAW.

95 Arts 2(d) & (e) CEDAW.

96 Sec 15(1) of the Canadian Charter of Rights and Freedoms, RSC1985 Appendix II, No 44; see also Part I (secs 1 to 34) of the Constitution Act, 1982, which provides: 'Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

97 C O'Connell 'The right to equality: A substantive legal norm or vacuous rhetoric?' (2008) 1 *UCL Human Rights Review* 87.

98 As above.

99 *President of Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.

100 *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC) para 31.

Africa as the Constitutional Court has held that the right to dignity is not subject to abrogation or subordination to other rights.¹⁰¹ Similar to the provisions of section 10 of the Constitution is article 1 of the Universal Declaration of Human Rights (Universal Declaration), which states that all people are born free and equal in dignity as well as rights. The right to dignity is regarded as an important right, even in the international arena, as many international conventions recognise the intrinsic worth of this right.¹⁰²

In addition, section 12 of the Constitution guarantees everyone the right to freedom and security of the person.¹⁰³ In terms of this right, every person has the right to be free from all forms of violence from public or private sources.¹⁰⁴ In the *Carmichele* case it was held that the state had a positive duty to protect individuals through laws and structures and that, in the event that it is necessary, it has to take preventative measures where such an individual's life or person is at risk from the criminal conduct of a third party.¹⁰⁵ This right, therefore, means that everyone has the right to be free from assault and interference from third parties, a right which is infringed by the perpetrators of corrective rape.

Further, this section grants everyone the right to bodily as well as psychological integrity, which includes the right to security and control over one's own body.¹⁰⁶ This means that everyone has the right to make their own choices with regards to their bodies without interference from other members of society. It is evident from the case studies that the victims were subjected to violence resulting from the criminal conduct of the perpetrators, which inevitably violated their bodily as well as psychological integrity. In a discussion document commissioned by the Deputy Minister of Justice, it was stated that the crime of rape affects all women's sense of safety and their physical integrity as it restricts their mobility and freedom of movement.¹⁰⁷

The right to life is another right which is protected in the Constitution under section 11, which states that everyone has the right to life. This right is, however, unqualified whereas other jurisdictions and international instruments have qualified the right to

101 RD Glensy 'The right to dignity' (2011) 43 *Columbia Human Rights Law Review* 99, as cited in *S v Makwanyane* 1995 (3) SA 391 (CC).

102 See also the ICESCR, Preamble paras 1 & 2 and art 13, and the ICCPR, Preamble paras 1 & 2 and art 10.

103 Sec 12(1) Constitution.

104 Sec 12(1)(c) Constitution.

105 *Carmichele v Minister of Safety and Security & Another* 2001 (4) SA 938 (CC) paras 44-45.

106 Sec 12(2)(b) Constitution. See also international instruments granting persons the right to physical integrity such as the Universal Declaration in arts 1 & 3, the ICESCR in its Preamble, the ICCPR in its Preamble and art 9(1) as well as the CRC in art 19.

107 Discussion document 'Legal aspects of rape in South Africa' (1999) commissioned by the Deputy Minister of Justice 3.

life by providing that it may not be deprived arbitrarily.¹⁰⁸ According to O'Regan J, the right to life is antecedent to all other rights in the Constitution as one cannot exercise any of the rights enshrined in the Bill of Rights without life.¹⁰⁹ It was further held that the right to life goes hand in hand with the right to dignity as, without dignity life is substantially diminished.¹¹⁰ Reflecting on the victims of corrective rape, many lost their lives, which is a direct violation of their right to life.

It is thus clear from the above that the fundamental rights of the victims of corrective rape are infringed by the acts of the perpetrators. In support of this, it was held by the Supreme Court of Appeal that judicial officers are aware of the extent to which sexual violence deprives women of their rights to dignity and bodily integrity.¹¹¹ Further, in *S v Chapman*,¹¹² it was held that rape in general constitutes a humiliating, degrading as well as brutal invasion of the privacy and dignity of the victim.¹¹³ The Court further held that rape infringes women's fundamental human rights.¹¹⁴ Courts are therefore determined to protect the equality, dignity and freedom of all women and thus no mercy will be shown when these rights are invaded.¹¹⁵

The women affected by corrective rape suffer discrimination based merely on the fact they belong to a particular cultural community in addition to the discrimination they suffer as women and as lesbians.¹¹⁶

4 South Africa's response to victims of corrective rape

4.1 Legislative framework

Under South African criminal law, a person may be charged with an

108 Currie & De Waal (n 82 above) 281. Other jurisdictions include the United States, Canada, Hungary and India and the international instruments referred to are the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14, 4 November 1950, ETS 5, and the ICCPR.

109 *Makwanyane* case (n 104 above) para 326.

110 *Makwanyane* case para 327.

111 *DPP v Prins (Minister of Justice and Constitutional Development & two amici curiae intervening)* (369/12) [2012] 106 ZASCA para 1.

112 *S v Chapman* 1997 (3) SA 341 (A).

113 *Chapman* case (n 115 above) 344.

114 *Chapman* case 345.

115 *Chapman* case para 5.

116 This is due to the fact that the perpetrators tacitly claim to act in accordance with their constitutional right to culture as recognised by secs 30 and 31 of the Constitution. This is evident from the reasons and justifications given for corrective rape. As a consequence, there is a clear conflict between the constitutional rights of the perpetrators, used as a 'protective tool' to infringe upon a vast number of constitutional rights of the victims.

illegal act.¹¹⁷ For prosecution to be instituted, it must be shown that a law has been broken, either in terms of statutory law or the common law.¹¹⁸ The common law definition of rape was considered in the case of *Masiya* and was declared unconstitutional.¹¹⁹ This means that the crime of rape no longer is deemed to be a common law offence, but a statutory one. The legislative provisions available for prosecuting perpetrators of corrective rape can be found in the Criminal Law (Sexual Offences and Related Matters) Act (Sexual Offences Act)¹²⁰ and the Criminal Procedure Act (CPA).¹²¹

The Sexual Offences Act provides an amended definition of rape in section 3, which states that a person who unlawfully and intentionally commits an act of sexual penetration on another person without consent is guilty of the offence of rape. To this end, the CPA provides for the imposition of sentencing by a court for the commission of offences, which in this instance would be the crime of rape.

The general principles with regard to sentencing were set out in the *Rabie* case, where it was held that the punishment should fit the offender, the crime, it must be fair to society and the court must consider the surrounding circumstances of the case.¹²² However, the Criminal Law Amendment Act (Amendment Act) provides for the imposition of minimum sentences for a range of serious crimes.¹²³ These crimes are listed in the provisions of the CPA and include rape and murder.¹²⁴ According to the Criminal Law Amendment Act, a first-time offender must be sentenced to a prison term of not less than 15 years.¹²⁵ When imposing sentence, courts must consider and balance certain factors, first established in the 1969 case of *Legoa*,¹²⁶ namely, the nature and circumstances of the offence, the characteristics of the offender, and the impact of the crime on the community.¹²⁷

Further, it was explained by Cameron J that a criminal trial has two stages, the first being verdict and then sentence.¹²⁸ It was contended that the first stage concerns the guilt or innocence of the accused based on the facts relating to the elements of the offence with which

117 'Chapter 14: Criminal Law and Procedure' (2010) <http://section27.org.za/dedi47.cpt1.host-h.net/wp-content/uploads/2010/04/14Manual.pdf> (accessed 15 September 2012).

118 As above.

119 *Masiya v Director of Public Prosecutions Pretoria (The State) & Another* 2007 (5) SA 30 (CC) para 93. See also ch 2.2.2 for a discussion of this case.

120 Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

121 Criminal Procedure Act 51 of 1977 (CPA).

122 *S v Rabie* 1975 (4) SA 855 (A) 826(G).

123 Criminal Law Amendment Act 105 of 1997 sec 51(2).

124 CPA (n 124 above) Schedule 2, part II.

125 Amendment Act sec 52(a)(i).

126 *Legoa v S* 2002 (4) SA All SA 373 (SCA).

127 *S v Zinn* 1969 (2) SA 537 (A) 540G.

128 *Legoa* case (n 129 above) para 15.

the accused is charged.¹²⁹ The second stage concerns the question of an appropriate sentence where various mitigating as well as aggravating factors may play a role.¹³⁰ This is in accordance with the provisions of PEPUDA:¹³¹

If it is proved in the prosecution of any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence.

Thus, if prejudice or motive exists in the commission of an offence, it will only play a role in sentencing as an aggravating factor. A mitigating circumstance is youth, as juveniles are sentenced with more leniency than adults.¹³² This is attributed to the fact that they cannot be expected to act with the same measure of responsibility as adults, and their lack of necessary life experience as well as insight which lead them to be prone to thoughtless acts.¹³³

For the crime of rape, a mandatory sentence of at least 15 years' imprisonment is proposed by the Amendment Act, but there are various factors which have to be taken into account by the presiding officer when imposing such a sentence. It is now necessary to embark on a discussion surrounding the cases that went to trial in order to determine how the courts have incorporated these legislative provisions when sentencing the perpetrators of corrective rape.

4.2 Case law on corrective rape against black African lesbians

The two cases to be discussed are the only ones which were heard and resulted in convictions, despite the fact that there have been numerous cases of rape, assault and murder of lesbians.¹³⁴ Such convictions therefore are the exception.

4.2.1 *Eudy Similane* judgment¹³⁵

The case of Eudy Simelane, an open lesbian activist and soccer star, was heard first in the Springs Magistrate's Court by a magistrate, Mr J Mokoma. The prosecutor was Mr E Maloba.¹³⁶ Five men

¹²⁹ As above.

¹³⁰ As above.

¹³¹ Sec 28(1) PEPUDA.

¹³² PM Bekker *et al Criminal procedure handbook* (2005) 272.

¹³³ *S v Solani* 1987 (4) SA 203 (NC) para 220E, as cited in Bekker *et al* (n 136 above) 272.

¹³⁴ Mtetwa (n 21 above).

¹³⁵ This case was not reported and direct references could therefore not be made to the actual judgment. However, there was extensive media coverage on the matter and various interest groups followed the case, its progress as well as the trial religiously.

¹³⁶ P Gqola 'Eudy Simelane case update 7 Oct 08' (2008) <http://pumlagqola.wordpress.com/2008/10/07/eudy-simelane-case-update-7-oct-08/> (accessed 30 March 2011]

appeared in court from 5 May until 7 October 2008.¹³⁷ After 11 hearings, all charges against accused four, Tsepo Pitja, were withdrawn and he was free to go as there was no evidence which linked him to the crimes. He subsequently became a state witness.¹³⁸ His four co-accused were to appear at the Delmas Court in Mpumalanga from 11 to 13 February 2009 and were remanded until the conclusion of the trial. They faced charges of murder, two counts of robbery and 'other', possibly rape.¹³⁹ On the first day of the trial, the defence attorney for Thato Mphiti, accused four, requested a postponement and justified her request by alleging that the postponement would in fact benefit the state as she needed the additional time to consult with her client and to obtain certain documentation.¹⁴⁰ An objection was lodged to the application as there was a strong community interest, which was evidenced by the number of people who attended the trial proceedings.¹⁴¹ Mavundla J nevertheless held that the delay was not unreasonable and subsequently granted the postponement as it was in the interest of justice and the postponement was until the following day (12 February 2009).¹⁴²

Mphiti pleaded guilty to the count of robbery with aggravating circumstances but not guilty to the count of rape.¹⁴³ He did, however, plead guilty to assisting his co-accused who attempted to rape Eudy.¹⁴⁴ The co-accused conversely pleaded not guilty to the charge of robbery with aggravating circumstances.¹⁴⁵ A statement made by Mphiti was read by his defence attorney who outlined the events of the night Eudy was murdered, stating that he and his friends passed Eudy in the early hours of the morning when they decided to rob her.¹⁴⁶

When discovering that she did not carry any money, it was suggested that she be raped and all of them agreed.¹⁴⁷ At that point, Eudy had recognised one of them and in fear of being identified, he insisted that she be silenced and passed his knife to Mphiti who panicked and started stabbing her after which she was kicked into a stream.¹⁴⁸ According to the medical examiner, the wounds were

137 J Henderson 'About the Eudy Enoculate "Styles" Simelane murder case' <http://pda.jwg.org.za/content/view/111/82/> (accessed 30 March 2011)

138 Gqola (n 140 above).

139 As above.

140 D Nath & J Henderson 'The trial begins ... not' (2009) <http://www.jwg.org.za/content/view/114/82/> (accessed 30 July 2012).

141 As above.

142 As above.

143 J Henderson & D Nath 'Mphiti pleads guilty' (2009) <http://www.jwg.org.za/content/view/115/82/> (accessed 30 July 2012).

144 As above.

145 As above.

146 As above.

147 As above.

148 As above.

critical and she could not have survived without immediate medical attention.¹⁴⁹ After accepting Mphiti's plea, an application was made by the prosecutor to separate his trial from that of the other accused,¹⁵⁰ which application was granted, and their trial was to commence on 29 July 2009.¹⁵¹ The prosecutor, however, failed to raise questions relating to the possibility that prejudice based on the sexual orientation of Eudy was the motivation for the attack.¹⁵²

Mavundla J sentenced Mphiti on 13 February 2009.¹⁵³ He received 18 years' imprisonment on the count of murder, and 15 years on the count of robbery with aggravating circumstances of which 10 years were to run concurrently with the first sentence.¹⁵⁴ In terms of assisting the other accused with the attempted rape, he received a further 9 years, although it was held that the time already spent in custody should be deducted from the said 9 years, which brought Mphiti's total sentence to 31 years' imprisonment.¹⁵⁵ Factors given by Mavundla J which were considered in reaching a decision deviating from the mandatory life sentence were, amongst others, the youthfulness of the accused, the fact that Mphiti had been intoxicated at the time the crime was committed as well as his level of education, in addition to the fact that Mphiti suffered from 'fright/fear syndrome'.¹⁵⁶

The three remaining accused who faced charges of robbery with aggravating circumstances, murder and rape were heard in September 2009.¹⁵⁷ Magagula and Mahlangu were both acquitted for lack of evidence.¹⁵⁸ Mokoathleng J found Mvuba guilty of murder, rape and being an accomplice to rape.¹⁵⁹ Mvuba subsequently received a life sentence. He showed no remorse as he told a reporter: 'Ach, I'm not sorry at all.'¹⁶⁰

149 As above.

150 Khumbulani Magagula, Johannes Mahlangu and Themba Mvubu.

151 Henderson & Nath (n 147 above).

152 As above.

153 J Henderson 'Mphiti is sentenced' (2009) <http://www.jwg.org.za/content/view/116/82/> (accessed 30 July 2012).

154 As above.

155 As above.

156 According to the judge, this 'fright/fear syndrome' coupled with the influence of educational level 'impacted on Mphiti's ability to rationalise in a crisis situation', as cited in Henderson (n 157 above).

157 P Mtetwa 'Eudy Simelane murderer gets life imprisonment' (2009) <http://www.womensnet.org.za/news/eudy-simelane-murderer-gets-life-imprisonment> (accessed 30 March 2011).

158 As above.

159 As above.

160 B Bearak 'Mixed verdict in South African lesbian's murder trial' *New York Times* 22 September 2009 http://www.nytimes.com/2009/09/23/world/africa/23safrica.html?_r=2& (accessed 29 March 2011).

4.2.2 *Zoliswa Nkonyana* judgment

The *Zoliswa* case is not one dealing with corrective rape, but has nevertheless been the breakthrough which LGBTI rights groups had been waiting for. *Zoliswa* was a lesbian who was killed due to her sexual orientation.

Zoliswa's case was heard in the Khayelitsha Magistrate's Court in 2011.¹⁶¹ Four of the nine accused were convicted on 7 October 2011 and sentencing was set down for 1 February 2012.¹⁶² There were originally nine accused, but five were acquitted as the state did not have enough evidence against them.¹⁶³ The magistrate deemed it important to take into account that all the accused were under the age of 18 at the time the offence was committed in 2006 as the sentencing of youthful offenders are difficult to address due to the fact that there are many factors to be considered.¹⁶⁴ There were three criteria which the magistrate took into consideration: the seriousness and nature of the offence; the interests of the community and the family of the victims; as well as the personal circumstances of the accused.¹⁶⁵ The magistrate was of the view that sentencing should serve as a deterrent to the accused as well as to the community at large by sending a message that such crimes would not be tolerated and to encourage rehabilitation.¹⁶⁶

Several factors were considered by the Court before passing sentence. The first factor was the seriousness and nature of the offence. In considering this factor, due consideration was given to the case as proven by the state which dealt with the murder of a young woman whose life was taken away by virtue of her life choices and personal beliefs.¹⁶⁷ She posed no threat to the accused but yet they acted in a brutal and violent manner which cannot be condoned by the community, nor the court.¹⁶⁸ A representative of the Triangle Project made recommendations with regard to sentencing, that it should reflect the 'extremely brutal nature' of the crime, in addition to

161 Case RCB216/06.

162 J Arnott 'Sentencing of the *Zoliswa* case: Case number RCB216/06' (unreported). Information received from the director of the Triangle Project who attended the trial proceedings and formulated his own notes. This case is unreported and reliance is thus made on all relevant and important sources and documentation. E-mail received on 20 July 2012 - director@triangle.org.za 682. Accused: Lubabalo Ntlabathi, Sicelo Mase, Luyanda Londzi and Mbulelo Damba.

163 Sabelo Yakiso, Themba Dlephu, Mfundo Kulani, Zolile Kobese and Anele Gwele were acquitted, as mentioned in SAPA '2 acquitted in lesbian murder trial' (2011) <http://www.news24.com/SouthAfrica/News/2-acquitted-in-lesbian-murder-trial-20110907> (accessed 19 September 2012). See also T Adams '18 years won't bring our daughter back' (2012) <http://www.iol.co.za/capeargus/18-years-won-t-bring-our-daughter-back-1.1226070#.UAFZMVkyhdg> (accessed 19 September 2012).

164 *Zoliswa* case (n 166 above) 682.

165 *Zoliswa* case 682-683. These factors are no different to those established in *S v Zinn* 1969 (2) SA 537 (A) 540G.

166 *Zoliswa* case (n 166 above) 683.

167 *Zoliswa* case 683-684.

168 *Zoliswa* case 684.

acknowledging and specifically mentioning that the discrimination based on sexual orientation and gender should be an aggravating factor in sentencing.¹⁶⁹ During the trial no reference was made as to the motive for the killing of Zoliswa, but it was a necessary factor to consider in sentencing in the view of the Court.¹⁷⁰ It was held that the 'preceding events to the commission of the offence was a clear indicator as to what the motive was' which, according to the court, was held to be hatred.¹⁷¹ Such hatred stemmed from intolerance of her difference and thus the motive was considered as an aggravating factor in sentencing.¹⁷² The message that the murder of Zoliswa sent was one which blatantly communicated to lesbians that they are less than human and that their lives are expendable.¹⁷³

Secondly, the Court considered the community's and family's interests. It was clear to the Court that the community was outraged by the murder of Zoliswa as the courtroom was over-crowded in addition to the extensive media coverage and attention given to the matter by various interest groups who expressed their discontent.¹⁷⁴ A report was compiled by the Department of Social Justice regarding the circumstances of the family of the deceased which stated that she was an only child, resulting in an even greater loss to her family.¹⁷⁵ Further, a report was submitted by the Triangle Project which comprehensively set out the impact which her death had on her girlfriend who had witnessed her murder, as well as giving the Court insight into the problems the LGBTI community faces within their communities and thus shedding some light on the degree of intolerance they suffer as a consequence.¹⁷⁶

Lastly, the Court also considered the personal circumstances of the accused. The Court came to the conclusion that all four accused came from good homes with loving families and strong support systems, which meant that their families would also suffer a great loss once they were sentenced.¹⁷⁷ Their families also seemed to show a great degree of empathy for the family of the deceased, as opposed to the accused who were silent on the issue as they showed no remorse for what they had done.¹⁷⁸ The Court was thus of the opinion that life was about choices and that once a choice is made, the consequences

169 J Henderson & J Arnott 'Evidence for sentencing in the Zoliswa Nkonyana murder trial: Press statement by the Triangle Project' (2012) <http://feministssa.com/2012/01/31/evidence-for-sentencing-in-the-zoliswa-nkonyana-murder-trial/> (accessed 19 September 2012).

170 *Zoliswa* case (n 166 above) 684.

171 *Zoliswa* case 685.

172 As above.

173 Henderson & Arnott (n 173 above).

174 *Zoliswa* case (n 166 above) 685.

175 *Zoliswa* case 686.

176 As above.

177 *Zoliswa* case (n 166 above) 687.

178 As above.

have to be dealt with accordingly.¹⁷⁹ At the time of the commission of the offence, all four accused were under the age of 18, but this did not retract from the fact that they had to face the consequences of their actions.¹⁸⁰ All the accused had clean criminal records, but it was discovered that they had had clashes with the law, which were not considered in sentencing as there were no previous convictions.¹⁸¹ Further, there were many delays during the trial,¹⁸² mostly caused by the defence, and one could therefore not punish the accused for such delays, which is why the court considered it in their favour.¹⁸³

In sentencing, the magistrate was of the view that sentencing should not only be considered as a form of punishment, but rather as something which should instil a sense of retribution and rehabilitation in addition to serving as a deterrent.¹⁸⁴ Retribution, according to the Court, was not to be confused with revenge.¹⁸⁵ Zoliswa would never be returned to her family and the accused should pay the price for their actions in that regard in order to restore some sort of justice to her family as well as to the community at large.¹⁸⁶ In terms of rehabilitation, it was contended that in order for it to be effective, there should be a realisation of the wrongfulness of the actions; there should be acceptance of responsibility for the actions as well as a willingness to make right the wrongs caused.¹⁸⁷ In the view of the Court, acceptance of responsibility and acknowledgment of wrongfulness were key elements in mitigation of sentence, which seemed to be absent in this case as none of the accused showed any remorse and thus re-offending could not be excluded.¹⁸⁸ In so far as deterrence was concerned, the Court was of the view that it should not only be directed at the accused, but sentencing should also send a clear message to 'would-be' offenders that violent crime would not be tolerated by the courts.¹⁸⁹

After considering a potential mitigating factor, the Court moved on to discuss the aggravating factors and took cognisance of the fact that we live in a diverse society which requires a greater degree of tolerance.¹⁹⁰ When constitutional rights clash, it is up to the court to

179 As above.

180 *Zoliswa* case (n 166 above) 688.

181 As above.

182 *Zoliswa* case (n 166 above) 689. The accused pleaded to the charge on 27 August 2008. The conviction took place three years later on 7 October 2011 and sentencing only took place on 1 February 2012. The case of *Zoliswa* was therefore one of the longest-running in the country's history as it was postponed 50 times, as cited in *Thamm* (n 72 above).

183 *Zoliswa* case (n 166 above) 689.

184 *Zoliswa* case 690.

185 As above.

186 *Zoliswa* case (n 166 above) 691.

187 As above.

188 *Zoliswa* case (n 166 above) 691-692.

189 *Zoliswa* case 691.

190 *Zoliswa* case 692.

weigh up conflicting rights in order to reach a determination.¹⁹¹ The deceased exercised her right to live openly as a lesbian in her community, which was a clear and conscious choice that she made, a choice which the accused quite clearly did not agree with.¹⁹² Personal opinion and free choice are other constitutional rights which all persons are entitled to, but having entitlement to one's opinion and acting out based on that opinion in a brutal and public way thus expressing clear intolerance were not acceptable to the Court.¹⁹³ The Court held:¹⁹⁴

[T]he court has a duty to enforce the ideology that violent intolerance of difference, whether it be based on race, whether it be based on sex, whether it be based on religion, [whether it be based on sexual orientation],¹⁹⁵ it will not go unpunished and it will not go rewarded.

In light of all the factors which were taken into consideration, imprisonment was the only appropriate sentence in the view of the Court.¹⁹⁶ That the accused were all first-time offenders in addition to having the support of their families were considered. This was, however, weighed against the aggravating factors surrounding the case.¹⁹⁷ Sentencing was pronounced: 'a term of eighteen (18) years' imprisonment of which four (4) years is suspended for a period of five (5) years' on the condition that they were not convicted of murder during the period of suspension.¹⁹⁸

5 Analysis of South Africa's response

5.1 Law enforcement

When an offence is committed, it is investigated by law enforcement (the police). The aim of such an investigation is to collect evidence which will be presented in court as well as to record the incidents in order to create reliable statistics with the aim of establishing the true extent of the problem. Currently, corrective rape is not recognised as a separate crime category in South Africa, which is one of the reasons why reliable statistics are hard to come by as no distinction is made between rape and corrective rape. Thus, the incidents that are reported will merely be recorded as rape despite the fact that there are in fact distinct differences between these two crimes.

191 As above.

192 As above.

193 As above.

194 *Zoliswa* case (n 166 above) 692.

195 Our emphasis.

196 *Zoliswa* case 693.

197 *Zoliswa* case 695.

198 *Zoliswa* case 693.

In addition, it has been shown that the reason reliable statistics of corrective rape incidents are hard to come by is the fact that the majority of incidents are either unreported or misidentified in that the sexual orientation of the victims is not taken into account. In support of this, a study conducted by ActionAid showed that 66 per cent of women failed to report their attacks for the fear of not being taken seriously. Further, 25 per cent feared exposing their sexual orientation to the police as they were fearful that they would suffer added abuse.¹⁹⁹ These fears are justified as they emanate from the fact that when these women are raped, the perpetrators believe that they deserved it as they were shown how to be real women.²⁰⁰

When one takes into account that these incidents occur mainly in townships due to the cultural attitudes and views of the perpetrators, it is understandable that the victims are fearful to report these incidents as it is reasonable to expect that they might be subjected to further victimisation. It was also shown that the incidents which were reported were not followed up and thus could not be brought before the courts. This can be corroborated by the case studies which were discussed, as the perpetrators involved in the attack against Sizakele Sigases and Salome Massooa were initially detained but subsequently released. Similarly, Zukiswa Gaca was attacked on two occasions and accompanied the investigating officer to identify her attacker, but he was released. Moreover, the man who raped Millicent Gaika received a ridiculously low bail after which he fled and was never found again. These are the messages that the victims of corrective rape receive, serving as an additional deterrent to reporting such incidents as they fear they will not be taken seriously.

5.2 Legislature

The legislative provisions available and utilised to prosecute the perpetrators of corrective rape are aimed and directed at the crime of rape and provide guidelines along with mandatory sentencing periods. Corrective rape is, however, not the same as 'mere' rape in that it is committed based on prejudice and intolerance. It has been shown that motive only becomes relevant during sentencing. This was also evident in the *Zoliswa* judgment, where it was held that motive is not an element to be proven during criminal trials and it therefore very often leads to such trials being concluded without a motive ever being established. This is due to the fact that 'it never forms part of the body of evidence and often people are left dumbfounded as to why a particular crime is committed'.²⁰¹ It was subsequently held that motive was to be considered an aggravating factor in sentencing which means that the motive was not a factor which was considered or one which carried any weight in terms of conviction. If,

199 Martin *et al* (n 10 above) 13.

200 As above.

201 *Zoliswa* case (n 166 above) 684-685.

hypothetically speaking, the accused had been acquitted, the motive for her killing would never have been established.

The definition of the statutory offence of rape and provisions on mandatory sentencing are set out in legislation. However, no legislative definition or mandatory sentencing exists for corrective rape. This is supported by section 28 of PEPUDA, read together with section 3, which confirms that where unfair discrimination played a role in the commission of the offence, it should contribute to the imposition of a harsher sentence. It is noted by the authors that no specific mention is made of sexual orientation in the provisions of the Act, which can or may be attributed to a legislative oversight at the time of its promulgation. As mentioned before, section 3 clearly states that when interpreting the Act, one must do so to give effect to the Constitution and other measures which were designed to protect or advance persons disadvantaged by past as well as present unfair discrimination. It is thus clear that, even though sexual orientation was not specifically mentioned, it should be included as a ground of unfair discrimination.

In addition, South Africa's failure to fulfil its constitutional mandate in relation to victims of corrective rape also is due to the definition of corrective rape. If corrective rape were to be considered a hate crime and not merely as a crime of rape, then it would be easier to successfully prosecute perpetrators of this offence. The term 'hate crime' comes with differing perspectives and includes various definitions within and between countries, but most of the qualities within these definitions tend to overlap.²⁰² A hate crime is an act which constitutes a criminal offence and is motivated in whole or part by prejudice or hate.²⁰³ There are a range of crimes that could be considered 'hate crimes', such as damage to property, murder, arson, intimidation, assault and rape.²⁰⁴ Hate crimes also refer to²⁰⁵

actions against a person based on their race, ethnicity, sexual orientation, religion or political convictions or gender that intends to do harm or intimidate the person ...

Hate crimes thus generally are seen as acts of prejudice or message crimes and are mostly violent in nature.²⁰⁶ Classifying corrective rape merely as a criminal act ignores the inherent prejudice involved in the

202 B Harris 'Arranging prejudice: Exploring hate crime in post-apartheid South Africa' *Race and Citizenship in Transition Series*, 2004, <http://www.csvr.org.za/wits/papers/paprctp1.htm#series> (accessed 14 November 2011).

203 'Hate crimes in South Africa' background paper for the Hate Crimes Working Group 1.

204 As above.

205 'Hate crimes against gay and lesbian people in Gauteng: Prevalence, consequences and contributing factors', research Initiative of the Joint Working Group conducted by OUT LGBT Well-being in collaboration with the UNISA Centre for Applied Psychology 1.

206 Harris (n 208 above).

perpetration of the crime itself.²⁰⁷ Hate crimes by nature cause greater harm than ordinary crimes because they increase the vulnerability of the victims as they are unable to change the characteristic which made them a target.²⁰⁸ As a result it is of the utmost importance to recognise corrective rape as a hate crime as the victims are unable to change their sexual orientation.

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) defines hateful activities as all those which are based on ideas or theories of superiority of one race or group of one colour or ethnic origin, which justify or promote racial hatred and discrimination.²⁰⁹ These definitions both describe crimes that are motivated by prejudice and therefore the definition of a 'hate crime' could be described as 'motive-driven'.²¹⁰

For example, xenophobia swept across South Africa in 2008 and 2015 when foreign nationals were attacked in over 130 locations in various parts of the country.²¹¹ Many were killed, hundreds injured and over 100 000 displaced.²¹² This phenomenon is defined as an attack on foreign nationals which is seen as a violent crime, not only in South Africa but also abroad, as the Special Rapporteur²¹³ on the Human Rights of Migrants stated that 'indeed xenophobic violence is a global problem that has been extensively documented in many countries, including in South Africa'.²¹⁴ After these xenophobic attacks, calls were made to criminalise the attacks against foreigners as hate crimes.²¹⁵

The Special Rapporteur's report made important recommendations to South Africa of which many have been previously advanced by the South African Human Rights Commission, the Consortium for Refugees and Migrants in South Africa, the African Centre for Migration and Society, Lawyers for Human Rights as well as Human Rights First.²¹⁶ The Special Rapporteur called on authorities to²¹⁷

207 Consortium for Refugees and Migrants in South Africa (CORMSA) 'Hate crimes in South Africa – A background paper for the Hate Crimes Working Group. (2011) <http://www.cormsa.org.za/wp-content/uploads/2010/07/hate-crimes-working-group-background-paper.pdf> (accessed 19 December 2014).

208 *Hate crime laws: A practical guide* (2009) published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR) 20.

209 Art 4 CERD.

210 Harris (n 208 above).

211 P LeGendre 'UN expert highlights xenophobia in South Africa, calls for hate crime legislation' (2011) <http://www.humanrightsfirst.org/2011/06/03/u-n-expert-highlights-xenophobia-in-south-africa/> (accessed 7 April 2011).

212 As above.

213 Jorge Bustamante, Special Rapporteur on the Human Rights of Migrants.

214 LeGendre (n 218 above).

215 Mkhize *et al* (n 70 above) 17.

216 LeGendre (n 218 above).

217 As above.

[m]ake any act of violence against individuals or property on the basis of a person's race, nationality, religion, ethnicity, sexual orientation or gender identity ('hate crime') an aggravating circumstance.

Hate crimes, therefore, are essentially defined as an assault against all members of stigmatised as well as marginalised groups and communities, embedded in the structural and cultural context with which those groups interact.²¹⁸ The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) reported that hate crimes based on sexual orientation were only considered an aggravating factor in 17 countries, of which South Africa is not one.²¹⁹ This is alarming as South Africa has a history of gross human rights violations and should thus have greater protection in place to combat these very serious issues.

When considering the definition of hate crimes, the crux and decisive factor which set it apart from other ordinary crimes is the motive behind the commission of the offence. As was rightly pointed out, hate crimes can be defined as 'actions against a person based on their race, ethnicity, sexual orientation, religion or political convictions or gender that intends to do harm or intimidate the person'.²²⁰

Corrective rape quite clearly conforms to this definition as it is committed against black African lesbians based on their sexual orientation, which is intended to ultimately harm them and to send a message to other non-conforming lesbians in the hope that they will see the error of their ways and turn straight. This crime is motivated by prejudice, as the court in the *Zoliswa* judgment rightly pointed out the fact that the motive was based on the intolerance of her difference, the fact that she was a lesbian.

There are two conflicting schools of thought on how to deal with hate crimes in the criminal justice system, as some advocate for evidence of hate to be presented during the trial in order to prove it as a hate crime, whereas others contend that evidence relating to hate should only be led as an aggravating factor during sentencing.²²¹ Hatred may, however, only be discussed during trial proceedings if and when it has been classified as a crime category. Consequently, in

218 'An exploration of hate crime and homophobia in Pietermaritzburg, KwaZulu-Natal' research report commissioned by the Gay and Lesbian Network 13.

219 D Ottosson 'State-sponsored homophobia: A world survey of laws prohibiting same-sex activity between consenting adults' (2010) *ILGA Report* 48.

220 'Hate crimes against gay and lesbian people in Gauteng' (n 209 above) 1.

221 R Davis 'SA's gay hate crimes: An epidemic of violence less recognised' (2012) <http://dailymaverick.co.za/article/2012-06-27-sas-gay-hate-crimes-an-epidemic-of-violence-less-recognised> (accessed 30 July 2012). These approaches can also be looked at within the two international models of hate crime legislation, as noted by D Breen & J Nel 'South Africa – A home for all?' (2011) *SA Crime Quarterly* No 38: the 'hostility model' and the 'discriminatory selection model'. The hostility model regards crimes as crimes motivated by hatred or hostility based on factors such as race, sexual orientation or nationality. The discriminatory selection model takes into account the perpetrator's deliberate selection of a victim based on race and other protected characteristics that would constitute hate crime.

the South African justice system, it may only be brought up during sentencing to serve as an aggravating factor for sentencing. Therefore, in accordance with this understanding, the second approach was followed in the *Zoliswa* case when the four men were convicted in 2012 by Magistrate Whatten, who concluded that she had been murdered because she exercised her right to live openly as a lesbian and that hatred and intolerance which drove the crime were aggravating sentencing factors.²²² This was a breakthrough for LGBTI rights group Triangle Project as the judgment set an important precedent in the South African criminal justice system.²²³

The *Zoliswa* case was the first case in which evidence relating to hatred and prejudice was introduced in order to argue for a harsher sentence on the accused. It is clear from the *Zoliswa* judgment that motive is not an element of a crime, which is why it was held that motive was an aggravating factor which was considered in sentencing only. The case, therefore, was also illustrative of the two-stage approach as *per* Cameron J in the *Legoa* judgment.

Lastly, the manner in which the cases that landed before court were handled shows that there is a misrecognition of the conflict between the right to culture of the perpetrators and the right to equality of the victims. First and foremost, reflecting on the *Eudy* judgment, her sexual orientation was ruled out early by the court as a reason and motive for her murder.²²⁴ It was, however, contended by Phumi Mtetwa²²⁵ that people in the township knew Eudy as a soccer player in the community and they could tell from her appearance that she was 'butch'.²²⁶ She thus concluded by saying that people are killed because of who they are.²²⁷ According to Mbaru, a co-ordinator of IGLHRC's Africa Programme, the level of homophobia in the courtroom was appalling as Mokgothleng J objected to the use of the word 'lesbian' in his court.²²⁸ It is contended by IGLHRC that homophobia is the factor which prevented the judge from fully acknowledging the role of Eudy's sexual orientation as a motive for the crime.²²⁹ The partial conviction has thus sent a message that the brutal rape and murders of lesbians may continue with impunity, an antithesis to building a culture of good governance in South Africa.²³⁰ If the motive for her killing had been established, the case would have

222 Davis (n 229 above).

223 As above.

224 D Smith 'Life for man in rape and killing of lesbian South African footballer' (2009) <http://www.guardian.co.uk/world/2009/sep/22/eudy-simelane-gangrape-and-murder> (accessed 20 May 2012).

225 Executive Director of the Lesbian and Gay Equality Project (LGEP).

226 Smith (n 232 above).

227 As above.

228 S Tobias 'Scant justice in South African murder case; Courts must value lesbian lives!' (2009) <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/976.html> (accessed 30 July 2012).

229 As above.

230 As above.

been a breakthrough in terms of the continuous battle against corrective rape. Future perpetrators might have been deterred to some extent as it would have sent a message that crimes committed based on hate and intolerance would not be condoned.

The above discussion leads us to draw one very important inference: that the judiciary missed an opportunity to resolve the conflict between the right to culture and the right to equality in the context of corrective rape. This is supported by a Periodic Review of the Human Rights Council, in which the CEDAW Committee²³¹ expressed concern relating to harmful cultural practices.²³² South Africa was urged to implement a strategy to modify or eliminate such harmful practices and stereotypes which discriminate against women.²³³ It was also quite evident in the *Eudy* judgment that the judge was not attuned to the effects of prejudice or discrimination which motivated the offence and therefore the motivation for her attack carried no weight.

In addition, it has been proved that there is an inherent conflict between the right to culture of the perpetrators and the constitutionally-protected rights of the victims. The courts have also clearly set out how this conflict is to be resolved. It should thus be noted that in neither of the two judgments relating to corrective rape was this conflict specifically addressed or resolved. The importance of recognising this conflict lies in the fact that one needs to take into account that both the perpetrators and the victims are protected by the Bill of Rights and that one cannot disregard the importance of their rights.

This is also in line with Shue's general theory on the duties of the state with regard to its positive responsibilities for eradicating violence against women.²³⁴ His formulation consists of three parts, of which the first is the duty on the state not to violate the right being scrutinised which is, in this case, the right to culture.²³⁵ Second is the duty on the state to protect against the violation of the right and, last, a duty to aid those whose rights have been violated.²³⁶ To counteract these duties, it is important to note the general as well as internal limitations placed on the right to culture in terms of the Constitution itself.²³⁷ In support of this it was held in the dissenting judgment of

231 CEDAW (n 96 above).

232 Human Rights Council, Working Group on the Universal Periodic Review. 13th session, Geneva, Switzerland, 21 May-4 June 2012. Compilation prepared by the Office of the High Commission for Human Rights in accordance with para 5 of the annex to Human Rights Council Resolution 16/21, South Africa, UN Doc A/HRC/WG.6/13/ZAF/2 (23 March 2012) para 17.

233 As above.

234 H Combrinck 'Positive state duties to protect women from violence: Recent South African developments' (1998) 20 *Human Rights Quarterly* 668.

235 Combrinck (n 243 above), as cited by H Shue *Basic rights: Subsistence, affluence and US foreign policy* (1980) 52.

236 As above.

237 As discussed in sec 3.3 (see discussion on secs 30, 31 & 36 of the Constitution).

the *Bhe* case that, when the right to culture infringes on the rights of others, it should be developed to be in line with the Constitution. Moreover, because Shue proposes that every basic right assumes the three mentioned duties, those duties should then also be applied to the rights of the victims which have been violated. Hence, there is a duty on the state to avoid violating the rights in question, namely, the rights to equality, dignity, freedom as well as life. Further, there is a duty to protect the victims from the violation of their rights and they must aid those whose rights have been violated.

In addition, the Constitution has a built-in supremacy clause, stating that the Constitution is the supreme law of the Republic and, consequently, any law or conduct inconsistent with it is invalid.²³⁸ This section creates a duty to fulfil the rights as set out in the provisions of the Bill of Rights. The right to culture as well as the rights to equality, dignity, freedom and life are protected in the Bill of Rights. This gives rise to an inherent conflict. In the event that such a conflict arises, one must weigh up the conflicting interests of the parties having due regard to the internal as well as general limitations. Thus, the requirement to develop customary law to bring it in line with the Constitution was overlooked in the judgments discussed. As a consequence, the court erred when it failed to identify the inherent clash between these competing rights.

However, it was noted in the *Zoliswa* judgment that, although everyone is entitled to their opinion, one may not act based on such opinion in a brutal manner professing your intolerance of the opinion of another.²³⁹ The fact that the Court merely acknowledged the existence of a potential clash but failed to subsequently address it led to the issue remaining unanswered.

6 Conclusion

We discussed and analysed South Africa's legal response to victims of corrective rape in order to assess whether the country fulfils its constitutional mandate of protecting these victims. We showed that, in general, the South African justice system²⁴⁰ has failed the victims of corrective rape in more than one regard. This inference is drawn for a number of reasons. First, the number of corrective rapes do not correspond with the number of cases that have gone to court for prosecution, as shown above. There have only been two cases heard by the courts, both of which are unreported. Further, only one case can be properly analysed to ascertain how the court has interpreted the infringement and whether justice has been restored.

238 Sec 2 Constitution.

239 *Zoliswa* case (n 166 above) 692.

240 For purposes of this discussion, the justice system comprises of law enforcement, the legislature as well as the judiciary.

Second, the courts missed an opportunity to resolve the conflict between the right to culture and the right to equality in the context of corrective rape since there is an inherent conflict between these rights. For example, it was evident in the *Eudy* judgment that the judge was not attuned to the effects of prejudice or discrimination which motivated the offence leading to her death and, therefore, the motivation for her attack carried no weight.

Lastly and, most importantly, South Africa's failure to fulfil its constitutional mandate with regard to corrective rape also lies with the definition of corrective rape. The legislative provisions available and utilised to prosecute perpetrators of corrective rape are aimed and directed at the crime of rape and provide guidelines for mandatory sentencing periods accordingly. Corrective rape, however, is not the same as 'mere' rape in that it is committed because of prejudice and intolerance.

We therefore conclude by reiterating what others have observed: that in order to properly prosecute perpetrators of this offence, corrective rape should be considered a hate crime and not merely a crime of rape.

Evidence obtained through violating the right to freedom from torture and other cruel, inhuman or degrading treatment in South Africa

*Jamil Ddamulira Mujuzi**

Associate Professor of Law, Faculty of Law, University of the Western Cape,
South Africa

Summary

Although South African courts have expressly held that any evidence obtained through torture is always inadmissible, the author is unaware of a decision from a South African court to the effect that evidence obtained through cruel, inhuman and degrading treatment is, like evidence obtained through torture, inadmissible in all circumstances. In this article, the author first deals with the issue of evidence obtained through torture and thereafter relies on the practice of international and regional human rights bodies, such as the Committee against Torture, the Human Rights Committee, the UN Special Rapporteur on Torture, the UN Special Rapporteur on the Independence of Judges and Lawyers, the European Court of Human Rights and the African Commission on Human and Peoples' Rights, and some of the sections of the South African Constitution, to argue that South Africa has an international obligation to exclude any evidence obtained through cruel, inhuman and degrading treatment. In support of this argument, the author relies on the jurisprudence of the South African Supreme Court of Appeal on the nature of the right to freedom from torture and argues that the same approach could be applied to the right to freedom from cruel, inhuman and degrading treatment.

Key words: *evidence obtained; torture, cruel, inhuman; South Africa; admissibility; exclusionary rule*

* LLB (Makerere), LLM (Pretoria), LLM (Free State), LLD (Western Cape); djmujuzi@gmail.com. I am grateful to the anonymous reviewers for their comments. The usual caveats apply.

1 Introduction

Section 12(1)(d) of the Constitution of the Republic of South Africa¹ provides that everyone has the right 'not to be tortured in any way'. Section 12(1)(e) provides that everyone has a right 'not to be treated or punished in a cruel, inhuman or degrading way'. The rights under sections 12(1)(d) and (e) are non-derogable under the South African Constitution.² In *S v Mthembu*,³ the South African Supreme Court of Appeal (SCA) observed that, as in the case of torture, which is absolutely prohibited under international human rights law, 'our Constitution follows suit and extends the non-derogation principle to include cruel, inhuman and degrading treatment'.⁴ South Africa is also a state party to regional and international human rights instruments that prohibit torture, cruel, inhuman or degrading treatment or punishment.⁵ South Africa recently enacted legislation criminalising torture - the Prevention and Combating of Torture of Persons Act.⁶ This legislation which aims at, *inter alia*, giving effect to South Africa's obligations under the Convention against Torture (CAT), is silent on the issue of evidence obtained through torture.⁷ Section 35(5) of the South African Constitution provides:

Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

Section 35(5) allows a court to admit evidence obtained in violation of a right or rights in the Bill of Rights, provided that the admission of the evidence in question would not render the trial unfair or otherwise be detrimental to the administration of justice. There is a growing jurisprudence from South African courts on section 35(5) and it is beyond the ambit of this article to deal with that jurisprudence. This is so especially in light of the fact that this jurisprudence does not deal with South Africa's international obligation to exclude evidence obtained through cruel, inhuman and degrading treatment (CIDT).⁸ Although some of these authors discuss the issue of evidence obtained

1 Constitution of the Republic of South Africa, 1996.

2 See table of non-derogable rights in the Constitution.

3 2008 (2) SACR 407 (SCA).

4 *Mthembu* (n 3 above) para 31.

5 These include the African Charter on Human and Peoples' Rights (art 5); the International Covenant on Civil and Political Rights (art 7); and the Convention against Torture.

6 Prevention and Combating of Torture of Persons Act 13 of 2013.

7 For the process of how international law becomes part of South African case law, see *Glenister v President of the Republic of South Africa & Others* 2011 (3) SA 347 (CC), 374-375. See also paras 179-202 (judgment by Moseneke and Cameron JJ).

8 PJ Schwikkard & SE van der Merwe (eds) *Principles of evidence* (2008) 181-266; DT Zeffert & AP Paizes *The South African law of evidence* (2009) 711-775; A Bellengère *et al The law of evidence in South Africa: Basic principles* (2013) 234-245; I Currie & J de Waal *The Bill of Rights handbook* (2013) 269-289 (the authors deal with the rights in sec 12 of the Constitution).

through torture, the discussion is very brief and is devoid of reference to any international human rights instrument.⁹ South African courts have held that evidence obtained through torture is inadmissible. What is not clear is whether evidence obtained through CIDT is also inadmissible under all circumstances. The purpose of this article is to rely on the practice of the Committee against Torture (CAT Committee) to argue that, because of the fact that the circumstances that lead to torture are not different from those that lead to CIDT, courts are urged to hold that evidence obtained through CIDT is also inadmissible. The article first deals with the status of evidence obtained through torture to lay the ground for the argument that evidence obtained through CIDT should be inadmissible.

2 South Africa's international and regional obligation to exclude evidence obtained through torture

As mentioned earlier, South Africa is a state party to the CAT. Article 1(1) of the CAT defines torture to mean

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

This definition was relied on by South African courts before the Prevention and Combating of Torture of Persons Act was enacted.¹⁰ Section 3 of this Act substantially reproduces the definition of torture under article 1(1) of the CAT. However, unlike the CAT, the Prevention and Combating of Torture of Persons Act does not prohibit the admission of evidence obtained through torture. Article 15 of the CAT provides:

Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

It is clear that article 15 prohibits the admission of 'any statement' which has been made as a result of torture. There are three important points to note about article 15. One, it does not oblige South Africa to exclude a statement made as a result of CIDT. It is expressly limited to

⁹ Bellengère *et al* (n 8 above) 235; Schwikkard & Van der Merwe (n 8 above) 218; Zeffert & Paizes (n 8 above) 738 740 747 749 752. In all cases, the discussion is limited to the SCA judgment in *Mthembu* (n 3 above).

¹⁰ See *Mthembu* (n 3 above) para 30; *Kutumela v Minister of Safety and Security* [2008] ZAGPHC 430 (12 December 2008) para 86.

torture. This is attributable to the drafting history of article 15. Attempts by some countries to include CIDT under article 15 were unsuccessful.¹¹ A strict interpretation of article 15, therefore, means that South Africa does not have an obligation to exclude statements made as a result of CIDT. In referring to article 15 of the CAT, the Supreme Court of Appeal held in *Mthembu*:¹²

In regard to the admissibility of evidence obtained as result of torture, article 15 of the CAT cannot be clearer. It requires that '[e]ach state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. The absolute prohibition on the use of torture in both our law and in international law therefore demands that "any evidence" which is obtained as a result of torture must be excluded 'in any proceedings.'

The above finding by the SCA brings me to the second point that I would like to make about article 15 of the CAT. Article 15 refers to 'any statement'. Jurisprudence and practice from the CAT Committee shows that in cases where the Committee has dealt with article 15, the evidence in question was either a confession or a statement.¹³ However, the SCA held above that the absolute prohibition of torture in national and international law means that 'any evidence' obtained as a result of torture must be excluded. There are two important issues to note about this finding. First, the Court, although it refers to article 15 of the CAT, does not hold, and rightly so in my opinion, that it extends beyond statements obtained as a result of torture. The drafting history of article 15 clearly shows that the drafters consciously made a decision to limit it to statements obtained as a result of torture.¹⁴ Second, in order to ensure that the loophole in article 15 is cured, the SCA invokes, rather ingeniously, the argument that the prohibition on the use of torture is absolute in national and international law and, because of that prohibition, 'any evidence' obtained in violation of the right to freedom from torture 'must be excluded in "any proceedings"'. This same approach has been adopted by the Supreme Court of Zimbabwe in the case of *Mukoko v Attorney-General*.¹⁵ One should recall that the right to freedom from

11 Eg, in its first proposal Sweden had suggested that the Convention should also prohibit the admission of evidence obtained through CIDT. See M Nowak & E McArthur *The United Nations Convention against Torture: A commentary* (2008) 505-507.

12 *Mthembu* (n 3 above) para 32.

13 See generally Nowak & McArthur (n 11 above) 512-519.

14 Nowak & McArthur (n 11 above) 505-507.

15 [2012] JOL 29664 (ZS). In this case, the prosecution intended to use evidence obtained through torture and CIDT in the prosecution of the applicant. In holding that the evidence in question was inadmissible, the Court held, *inter alia*, that '[i]t is clear that the rationale for the exclusionary rule against the admission or use of information or evidence obtained from an accused person or any third party by infliction of torture, or inhuman or degrading treatment as contained in section 15(1) of the [Lancaster] Constitution, is founded on the absolute obligation imposed on the state. It is also founded on the revulsion which attaches to the

torture is not only an absolute right, but that the prohibition against torture has acquired the status of *jus cogens* in international law.¹⁶ The Court also emphasises the fact that evidence obtained through torture must be excluded in 'any proceedings'. This is broad enough to include, for example, extradition proceedings. The impact of the SCA's ruling in *Mthembu* means that even a pointing out based on a statement which was obtained as a result of torture is inadmissible.¹⁷ In *S v Tandwa & Others*¹⁸ the SCA, although it did not refer to article 15 of the CAT, quoted with approval a dissenting opinion of one of the judges of the SCA in an earlier decision to hold that¹⁹

the admission of derivative evidence obtained in circumstances involving some form of compulsion, or as a result of torture, 'however relevant and vital for ascertaining the truth, would be undeniably detrimental to the administration of justice'.

Like the SCA, the Constitutional Court also held:²⁰

Where, for example, derivative evidence is obtained as a result of torture there might be compelling reasons of public policy for holding such evidence to be inadmissible even if it can be proved independently of the accused. Otherwise, the ends might be allowed to justify the means. The admission of evidence in such circumstances could easily bring the administration of justice into disrepute and undermine the sanctity of the constitutional right which has been trampled upon.

The above decisions show that any evidence obtained through torture is inadmissible. It does not matter what the kind of evidence is. The CAT Committee's practice, especially with regard to periodic reports submitted by state parties, shows that the Committee has recommended that state parties should ensure that 'any statement' or

source of such information or evidence coupled with its offensiveness to civilised values and its degrading effect on the administration of justice. The rule applies even when the evidence is reliable and necessary to secure the conviction of an accused person facing serious charges. The reliability or probative value of the information or evidence is irrelevant because its admissibility is prohibited in absolute and peremptory terms. It is vital in a society governed by the rule of law that persons in the custody of public officials should not be subjected to ill-treatment of the level of severity prohibited by section 15(1) of the [Lancaster] Constitution.' See 36.

16 CAT Committee General Comment 2 (Implementation of article 2 by state parties) CAT/C/GC/2, 24 January 2008, para 1.

17 As was the case in this case.

18 2008 (1) SACR 613 (SCA).

19 *Tandwa* (n 18 above) para 19.

20 *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 para 150.

statements²¹ or confessions²² or 'evidence'²³ obtained as a result of torture should be inadmissible. The UN Special Rapporteur on Torture has also recommended that any evidence obtained as a result of

-
- 21 Concluding Observations of the Committee against Torture on the fourth periodic report of Israel, CAT/C/ISR/CO/4, 23 June 2009, para 25; Concluding Observations of the Committee against Torture on the fourth periodic report of Mexico, CAT/C/MEX/CO/4, 6 February 2007, para 22; Concluding Observations of the Committee against Torture on the third periodic report of Armenia, CAT/C/ARM/CO/3, 6 July 2012, para 16; Concluding Observations of the Committee against Torture on the combined fourth to sixth periodic reports of Paraguay, CAT/C/PRY/CO/4-6, 14 December 2011, para 20; Concluding Observations of the Committee against Torture on the fifth and sixth combined periodic report of Finland, CAT/C/FIN/CO/5-6, 29 June 2011, para 21; Concluding Observations of the Committee against Torture on the initial report of Chad, CAT/C/TCD/CO/1, 4 June 2009, para 29; Concluding observations of the Committee against Torture on the second periodic report of Tajikistan, CAT/C/TJK/CO/2, 21 January 2013, para 13; and Concluding observations of the Committee against Torture on the third periodic report of Senegal, CAT/C/SEN/CO/3, 17 January 2013, para 13.
- 22 Concluding Observations of the Committee against Torture on the second periodic report of Yemen, CAT/C/YME/CO/2/Rev 1, 25 May 2010, para 28; Concluding Observations of the Committee against Torture on the second periodic report of Jordan, CAT/C/JOR/CO/2, 25 May 2010, para 30; Concluding Observations of the Committee against Torture on the second periodic report of Cambodia, CAT/C/KHM/CO/2, 20 January 2011, para 28; Concluding Observations of the Committee against Torture on the initial periodic report of Djibouti, CAT/C/DJI/CO/1, 22 December 2011, para 20; Concluding Observations of the Committee against Torture on the third periodic report of Armenia, CAT/C/ARM/CO/3, 6 July 2012, para 16; Concluding Observations of the Committee against Torture on the second periodic report of the Philippines, CAT/C/PHL/CO/2, 29 May 2009, para 23; Concluding Observations of the Committee against Torture on the initial report of Ethiopia, CAT/C/ETH/CO/1, 20 January 2011, para 31; Concluding Observations of the Committee against Torture on the second periodic report of the Republic of Moldova, CAT/C/MDA/CO/2, 29 March 2010, para 21; Concluding Observations of the Committee against Torture on the fourth periodic report of Belarus, CAT/C/BLR/CO/2, 7 December 2011, para 18; Concluding Observations of the Committee against Torture on the initial report of Mauritania, CAT/C/MRT/CO/1, 18 June 2013, para 8(c); Concluding Observations of the Committee against Torture on the third periodic report of Senegal, CAT/C/SEN/CO/3, 17 January 2013, para 13; Concluding Observations of the Committee against Torture on the fifth periodic report of the Russian Federation, CAT/C/RUS/CO/5, 11 December 2012, para 10; and Concluding Observations of the Committee against Torture on the combined fifth and sixth periodic reports of Mexico, CAT/C/MEX/CO/5-6, 11 December 2012, para 15(a).
- 23 Concluding Observations of the Committee against Torture on the second periodic report of Lithuania, CAT/C/LTU/CO/2, 19 January 2009, para 18; Concluding Observations of the Committee against Torture on the second periodic report of the former Yugoslav Republic of Macedonia, CAT/C/MKD/CO/2, 21 May 2008, para 18 (the Committee also called upon the state party to ensure that any evidence obtained as a result of ill-treatment is inadmissible); Concluding Observations of the Committee against Torture on the third periodic report of Iceland, CAT/C/ISL/CO/3, 8 July 2008, para 13; Concluding Observations of the Committee against Torture on the second periodic report of Cambodia, CAT/C/KHM/CO/2, 20 January 2011, para 28; Concluding Observations of the Committee against Torture on the combined third and fourth periodic report of Sri Lanka, CAT/C/LAK/CO/3-4, 8 December 2011, para 11; Concluding Observations of the Committee against Torture on the initial report of Ethiopia, CAT/C/ETH/CO/1, 20 January 2011, para 31; Concluding Observations of the Committee against Torture on the fifth periodic report of Sweden, CAT/C/SWE/CO/5, 4 June 2008, para 22; Concluding Observations of the Committee against

torture be excluded.²⁴ The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has recommended that statements obtained as a result of torture not be admitted in evidence.²⁵ The Human Rights Committee has similarly recommended that evidence obtained through torture be inadmissible.²⁶ It is argued that all those situations have different implications in the South African law of evidence. In cases where a state is required to ensure that a statement made as a result of torture is inadmissible, strictly speaking, the obligation in question would require the state to exclude confessions, admissions and extra-curial statements. In the South African law of evidence, these are three different but related kinds of evidence.²⁷ In terms of this obligation, real evidence based on an inadmissible statement could be admitted. For example, the statement is excluded but a weapon discovered on the basis of the statement that was made as a result of torture is admissible. This is the practice in countries such as Uganda. Ugandan courts have always excluded confessions or admissions obtained as a result of torture.²⁸ However, in Uganda 'evidence obtained through information obtained by torture is admissible and the police have been keen to exploit this loophole'.²⁹ In light of the above jurisprudence from the South Africa courts, this interpretation of article 15 of the CAT is not acceptable in South Africa.

-
- Torture on the combined fourth to sixth periodic reports of Paraguay, CAT/C/PRY/CO/4-6, 14 December 2011, para 20; Concluding Observations of the Committee against Torture on the initial report of Turkmenistan, CAT/C/TKM/CO/1, 15 June 2011, para 20; and Concluding Observations of the Committee against Torture on the fifth periodic report of New Zealand, CAT/C/NZL/CO/5, 4 June 2009, para 15;
- 24 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez, Mission to Tunisia, A/HRC/19/61/Add.1, 2 February 2012, para 102(d); and Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E Méndez, Mission to Ghana, A/HRC/25/60/Add.1, 5 March 2014, para IV(B)(c).
- 25 Report on the visit of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras, CAT/OP/HND/1, 10 February 2010, para 150.
- 26 Concluding Observations of the Human Rights Committee on the second periodic report of Tajikistan, CCPR/C/TJK/CO/2, 22 August 2013, para 14.
- 27 See, eg, *Litako & Others v S* [2014] 3 All SA 138 (SCA). In this case, the Supreme Court of Appeal discusses the differences between confessions, admissions and extra-curial statements. For a discussion of this case, see JD Mujuzi 'The admissibility of an extra-curial admission by an accused as hearsay evidence against a co-accused in South Africa: *Litako & Others v S* reconsidering *S v Ndhlovu & Others*' (2015) 19 *The International Journal of Evidence and Proof* 3-10.
- 28 See the Republic of Uganda Report to the African Commission on Human and Peoples' Rights (May 2006) para 36.1.
- 29 As above. Sec 14(1) of the Ugandan Prohibition and Prevention of Torture Act 2012, which was assented to by the Ugandan President in July 2012, prohibits the admission of any information, confession or admission obtained from a person as a result of torture. For a detailed discussion of this Act, see JD Mujuzi 'Issues to grapple with in implementing the Ugandan Prohibition and Prevention of Torture Act' (2012) 1 *International Human Rights Law Review* 382-394.

The second issue relates to the CAT Committee's observation that state parties should ensure that confessions made as a result of torture are inadmissible. As mentioned earlier, in the South African law of evidence there is a clear distinction between a confession, on the one hand, and an admission, on the other. This distinction has been emphasised recently by the SCA.³⁰ A strict interpretation of this approach would mean that an admission and real evidence or any fact discovered as a result of torture would be admissible. As in the first situation above, jurisprudence from South African courts shows that this would also be untenable in South Africa. The last approach, and one which is supported by jurisprudence from South African courts, is the requirement to exclude any evidence obtained as a result of torture. This would require the exclusion of statements, admissions, confessions, real evidence and any fact discovered as a result of torture. This is a broader and more progressive application of article 15. Admittedly, article 15 is expressly limited to statements, but it would be an affront on the accused's right to a fair trial to admit any evidence obtained as a result of torture. Admitting evidence obtained as a result of torture would also encourage law enforcement officers to use torture easily as a method of interrogation.³¹ The issue of the manner in which the CAT Committee and other UN human rights bodies have dealt with the admissibility of evidence obtained as a result of CIDT is dealt with in the next section.

As at the United Nations (UN) level, at the African regional human rights level South Africa also has an obligation not to admit evidence obtained as a result of torture. As mentioned earlier, article 5 of the African Charter on Human and Peoples' Rights (African Charter) protects the right to freedom from torture. In *Egyptian Initiative for Personal Rights and Interights v Egypt I*,³² the African Commission on Human and Peoples' Rights (African Commission) found that the victim's trial had been unfair because they had been convicted, *inter*

30 See *Litako* (n 27 above).

31 In *Mukoko* (n 15 above), the Supreme Court of Zimbabwe held that '[t]he rationale for the exclusionary rule is the protection of any person suspected of a crime who is in the custody of a public officer from torturous, or inhumane or debasing invasions of his or her dignity and physical integrity. Its object is to ensure that criminal prosecutions which are a direct consequence of the pre-trial illegality violative of fundamental rights of an accused person to freedom from torture, inhuman and degrading treatment are not used to give legitimacy to such conduct. The rule has nothing to do with the fair determination of the guilt or innocence of the accused person. Where there is independent evidence which has been obtained lawfully and on which reasonable suspicion of the accused person having committed the criminal offence with which he or she is charged is founded, an order of permanent stay of a criminal prosecution is not justified. The rule represents a device designed to deter disregard for constitutional prohibitions and give substance to constitutionally-protected fundamental rights. The exclusionary rule as a remedy for the enforcement of the protection of fundamental rights under the Constitution is not intended to immunise an accused person from criminal prosecution for any action he or she is reasonably suspected of having committed which is provable at the trial by independent evidence lawfully obtained.' See 34.

32 (2011) AHRLR 42 (ACHPR 2001).

alia, on the basis of confessions obtained as a result of torture. The African Commission held, *inter alia*, that³³

[i]n interpreting article 7 of the African Charter, the African Commission has stated that 'any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing'. ... [T]his Commission has held that 'any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion'.

The African Commission added that³⁴

[t]hese principles correspond with other international human rights norms, addressed in relation to torture and ill-treatment, under which evidence and confessions obtained through torture or cruel, inhuman and degrading treatment, cannot be used in judicial proceedings apart from for the purpose of prosecuting the act of torture or ill-treatment itself.

The African Commission further stated that³⁵

[o]nce a victim raises doubt as to whether particular evidence has been procured by torture or ill-treatment, the evidence in question should not be admissible, unless the state is able to show that there is no risk of torture or ill-treatment. Moreover, where a confession is obtained in the absence of certain procedural guarantees against such abuse, for example during incommunicado detention, it should not be admitted as evidence.

The African Commission concluded:³⁶

The victims in this case all raised allegations of torture and ill-treatment. These allegations are at least consistent with the circumstances of their case, such as the incommunicado nature of their detention and the reports of the FMA which, at a minimum, indicate a risk of ill-treatment. Despite these concerns, the 'confessions' were admitted as evidence and appear to have formed at least part of the basis of their convictions and the imposition of the death penalty. The reliance on such evidence violates article 7 of the Charter.

The question is to what extent the above decision of the African Commission strengthens the position of the exclusion of evidence obtained as a result of torture. Below are some of the observations that one could make about the above finding. One, for a confession or any other evidence to be excluded, it is not a requirement that the victim has been tortured. All that is needed is that coercion or duress was used. This is in line with South African law to the effect that, for a confession to be admissible in evidence, it should have been made freely and voluntarily and without undue influence.³⁷ The African Commission also holds that evidence obtained through torture or CIDT cannot be used in judicial proceedings. This reasoning is broader than the stipulation under article 15 of the CAT which, as we have

33 *Egyptian Initiative* (n 32 above) para 212 (footnotes omitted).

34 *Egyptian Initiative* para 213.

35 *Egyptian Initiative* para 218.

36 *Egyptian Initiative* para 219.

37 See sec 217 of the Criminal Procedure Act.

seen above, is limited to evidence obtained through torture. This issue will be dealt with in detail below. The third point is that, where a victim alleges that a confession was obtained as a result of torture, coercion or duress, the state has the burden to prove that the confession in question was obtained freely, voluntarily and without undue influence. This is the same position as in South African law.³⁸ Finally, the African Commission's finding seems to suggest that for a confession or evidence that was obtained as a result of torture, coercion or duress to be inadmissible, the torture, coercion or duress should have been inflicted or directed against the accused. It is argued that such an interpretation would make room for law enforcement officers to torture third parties for the purpose of acquiring evidence to use against the accused. As indicated earlier, in *Mthembu* the SCA held that article 15 of the CAT is applicable to evidence that is obtained from the accused and third parties. Like the South African SCA, the Zimbabwean Supreme Court held, in the case of *Mukoko v Attorney-General*, that evidence or information obtained from the accused or a third party through torture is inadmissible.³⁹ The above discussion demonstrates that, at the national, regional and international levels, evidence obtained through torture is inadmissible. Although some South African authors and the Constitutional Court have cautioned against laying down a hard and fast rule on excluding evidence obtained through violating any right in the Bill of Rights,⁴⁰ it is submitted that there is no doubt that a rule exists in international law and in South African law that evidence obtained through torture must be excluded. Below our attention shifts to the question of evidence obtained through CIDT.

3 Evidence obtained through cruel, inhuman or degrading treatment and the case for its absolute exclusion

It was mentioned earlier that article 15 of the CAT does not require state parties to exclude evidence obtained as a result of CIDT. Leading torture scholars have expressed different views on whether states have an obligation under article 15 to exclude evidence obtained as a result of CIDT. Some have argued that states have such an obligation and others have argued that they do not.⁴¹ The question that we have to answer is whether South Africa has an obligation in national and international law to exclude evidence obtained as a result of CIDT. It

38 Eg, in *S v Mkhize* 2011 (1) SACR 554 (KZD) para 33, it was held that '[i]t is a trite principle of our law that the onus is on the state to prove, beyond a reasonable doubt, that the confession was made freely and voluntarily, and without any undue influence, by the accused whilst in his sound and sober senses'.

39 *Mukoko* (n 15 above) 35.

40 Zeffert & Paizes (n 8 above) 740.

41 Nowak & McArthur (n 11 above) 534-536.

will be argued that South Africa has that obligation. In support of my argument I will rely on South African law and the emerging practice from international human rights bodies or mechanisms. However, before I embark on that discussion, it is critical to say a few things about cruel, inhuman and degrading treatment or punishment.

Unlike torture, CIDT is not defined under the CAT. This is attributable to the drafting history of the Convention. Nowak and McArthur observe that '[d]uring the drafting of article 16, it ... soon became clear that a proper definition of the term cruel, inhuman or degrading treatment or punishment was impossible to achieve'.⁴² Different approaches have been suggested as the criterion that should be used to distinguish torture from CIDT. Nowak and McArthur argue that⁴³

the decisive criterion for distinguishing torture from cruel and inhuman treatment is not the intensity of the pain or suffering inflicted but the *purpose* of the conduct, the *intention* of the perpetrator, and the *powerlessness* of the victim.

They add that '*[d]egrading treatment or punishment can be defined as the infliction of pain or suffering, whether physical or mental, which aims at humiliating the victim*'.⁴⁴ On the other hand, the CAT Committee has stated that '*[i]n comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes*'.⁴⁵ The Committee stated that⁴⁶

[t]he obligation to prevent torture in article 2 is wide-ranging. The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter 'ill-treatment') under article 16, paragraph 1, are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture. Article 16, identifying the means of prevention of ill-treatment, emphasizes '*in particular*' the measures outlined in articles 10 to 13, but does not limit effective prevention to these articles, as the Committee has explained, for example, with respect to compensation in article 14. In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure.

In a South African context, it is important to draw a distinction between torture, on the one hand, and CIDT, on the other. This is because of the fact that courts have expressly held that any evidence obtained through torture must be excluded. Of course, the inquiry to

42 Nowak & McArthur 540.

43 Nowak & McArthur 558 (emphasis in original).

44 As above.

45 CAT Committee General Comment 2 (n 16 above) para 10.

46 CAT Committee General Comment 2 para 3.

exclude that evidence has to be conducted in light of section 35(5) of the Constitution. It is submitted that there is only one possible outcome of the inquiry under section 35(5) of the Constitution when the court is dealing with evidence obtained through torture: that evidence must be excluded. In other words, once a court finds that torture was used, it has no alternative but to exclude the evidence. In the case of *Tandwa*, the SCA held that evidence obtained through any form of 'compulsion' is inadmissible. Another meaning for compulsion is force, and force always includes physical power or the threat of physical power. In other words, the person in custody, although not tortured, knows that if he or she does not make a confession or give evidence, he or she will be forced physically to do so. The SCA makes it very clear in *Tandwa*:⁴⁷

Though 'hard and fast rules' should not be readily propounded, admitting real evidence procured by torture, assault, beatings and other forms of coercion violates the accused's fair trial right at its core, and stains the administration of justice. It renders the accused's trial unfair because it introduces into the process of proof against him evidence obtained by means that violate basic civilised injunctions against assault and compulsion. And it impairs the administration of justice more widely because its admission brings the entire system into disrepute, by associating it with barbarous and unacceptable conduct.

It is critical at this point to also recall the distinction between two kinds of evidence: a confession or an admission and derivative evidence, that is, real evidence or any form of evidence discovered as a result of a confession. As mentioned earlier, in terms of section 217(1) of the Criminal Procedure Act,⁴⁸ for a confession to be valid it has to have been made freely and voluntarily, the confessor must have been in his or her sound and sober senses and he or she must not have been unduly influenced. At common law, an admission must also be made freely and voluntarily for it to be admissible.⁴⁹ Against that background, a confession made as a result of CIDT is inadmissible on the basis of section 217. However, the inquiry does not stop there. Section 218 of the Criminal Procedure Act provides:

- (1) Evidence may be admitted at criminal proceedings of any fact otherwise admissible in evidence, notwithstanding that the witness who gives evidence of such fact, discovered such fact, or obtained knowledge of such fact only in consequence of information given by an accused appearing at such proceedings in any confession or statement which by law is not admissible in evidence against such accused at such proceedings, and notwithstanding that the fact was discovered or came to the knowledge of such witness against the wish or will of such accused.
- (2) Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by

47 *Tandwa* (n 18 above) para 120.

48 Criminal Procedure Act 51 of 1977.

49 See generally *Litako* (n 27 above).

such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.

In the case of *Matlou & Another v S*, the SCA held:⁵⁰

Undoubtedly, there is a direct clash between s 218(2) of the [CPA] and s 35(1)(a); (b); and (c) read with s 35(5) of the Constitution. It is this conflict which we are required to resolve in this appeal. The answer to this somewhat intractable legal conundrum lies in s 35(5) of the Constitution which provides: 'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

The above ruling by the SCA shows that the mere fact that a confession has been held inadmissible on the basis that it was obtained in violation of the accused's right does not mean that any fact or pointing out derived from that confession, in itself, is inadmissible. The question that a court would have to answer is whether the admission of the evidence in question would render the trial unfair or otherwise be detrimental to the administration of justice. In the case of torture, the confession and the derivative evidence would have to be inadmissible. However, the position is unclear with regard to a confession obtained as a result of violating the accused's right to freedom from CIDT. The author has not come across any case in which a South African court held that any evidence obtained as a result of violating the accused or a third party's right to freedom from CIDT is inadmissible. This means that, for example, a suspect could be detained under dehumanising conditions to compel him to disclose or point out where he hid the weapon he used in the commission of an offence. Because of the fact that the conditions of his detention cannot be classified as torture, nothing bars a court to invoke section 35(5) to admit the weapon in question as evidence. It should be recalled that the Constitutional Court has expressly held that '[w]hile it is not easy to distinguish between the three concepts "cruel", "inhuman" and "degrading", the impairment of human dignity, in some form and to some degree, must be involved in all three'.⁵¹ South African courts have given the following as some of the examples of treatment that amounts to cruel, inhuman or degrading treatment: degrading punishments;⁵² excessive punishments;⁵³

50 [2010] 4 All SA 244 (SCA) para 22.

51 *S v Dodo* 2001 (3) SA 382 (CC) para 35.

52 *S v Saayman* 2008 (1) SACR 393 (E), where the accused was convicted of fraud and the magistrate ordered, *inter alia*, that she should stand for 15 minutes every day 'in the foyer of the court carrying a placard bearing her name, the fact of her conviction, and an apology to certain of the victims of the frauds'. On appeal it was held that that punishment violated sec 12(1)(e) of the Constitution.

53 In *S v Fhetani* 2007 (2) SACR 590 (SCA) it was held that a 'grossly disproportionate sentence does not only violate the accused person's right to a fair trial but also his or her right not to be punished in a cruel, inhuman or degrading manner' (para 6); *S v Makena* 2011 (2) SACR 294 (GNP) para 13, where the court held that

asking witnesses irrelevant and uncomfortable questions;⁵⁴ the manner in which the deceased was murdered;⁵⁵ the setting of police dogs to suspected illegal immigrants;⁵⁶ and corporal punishment.⁵⁷ As mentioned earlier, the purpose of this article is to argue that South African courts should invoke international human rights law practice to treat evidence obtained through CIDT in the same way as evidence obtained through torture. In order to support my argument, I make the points below.

Section 39(1)(b) obliges South African courts to consider international law in interpreting the Bill of Rights. Courts have indeed referred to international law, both binding and non-binding on South Africa, in interpreting the Bill of Rights.⁵⁸ The starting point is therefore the position of international law on the question of the admissibility of evidence obtained as a result of CIDT. The 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵⁹ provides under article 12 that

[a]ny statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment may not be invoked as evidence against the person concerned or against any other person in any proceedings.

'[w]hat has been said about rehabilitation and reformation applies to the period of the appellant's rehabilitation, viewed from the appropriateness or otherwise of the imprisonment for 50 years. It is my considered view, based on the sentences emanating from the Supreme Court of Appeal, that effective sentences exceeding 25 years' imprisonment are not confirmed lightly. Again, the basis for this may be the emphasis on reformation and rehabilitation, based, *inter alia*, on the constitutional precept that punishment should not be cruel or be deemed to be such. This statement is made with the full knowledge and appreciation of the gravity and devastating effects that the loss of the victim's life has inevitably inflicted on his family, society and the country.' See also *S v Nkosi & Others* 2003 (1) SACR 91 (SCA) para 9; *S v Niemand* 2001 (2) SACR 654 (CC).

54 *S v Mbhele* 2008 (1) SACR 123 (N) para 6.

55 *S v Vermeulen* 2004 (2) SACR 174 (SCA) para 33, where the court held that '[b]efore the deceased died he was not only physically assaulted but also emotionally traumatised. While he lay injured, the appellant and his brother carried on a discussion about first killing him and then burying him under the carcass of a cow. He was then moved to the cornfield. Once there, some discussion took place to the effect that he should not be shot because that would attract attention. A grave was dug for him while he was still alive. Ultimately, he was struck with a pick axe and buried in the most undignified way possible - for doing no more than collecting firewood. In my view, the aggravating circumstances of this case far outweigh all the other factors, when balanced against one another. The killing was cruel, inhuman and degrading and no self-respecting society can tolerate deeds of this nature.'

56 *S v Smith* 2003 (2) SACR 135 (SCA) para 11.

57 See eg *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

58 See, generally, E de Wet 'The "friendly but cautious" reception of international law in the jurisprudence of the South African Constitutional Court: Some critical remarks' (2004-2005) 28 *Fordham International Law Journal* 1529-1565.

59 GA Res 3452(XXX) of 9 December 1975.

Practice from international human rights mechanisms also appears to be moving towards the exclusion of evidence obtained through CIDT. While commenting on Austria's periodic report, the Human Rights Committee, the body overseeing the implementation of the International Covenant on Civil and Political Rights (ICCPR), welcomed 'the introduction of an express prohibition of evidence obtained by means of torture or cruel, inhuman, or degrading treatment, or other unlawful interrogation methods'.⁶⁰ The Human Rights Committee also recommended that the United States should 'refrain from relying on evidence obtained by treatment incompatible with article 7' of the ICCPR.⁶¹ Article 7 of the ICCPR provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. This clearly means that the Human Rights Committee has made it very clear that evidence obtained through CIDT should be inadmissible. It is argued that this evidence is not limited to confessions but to all evidence. Like the Human Rights Committee, the CAT Committee welcomed legislative steps in Austria on 'the prohibition of evidence obtained by means of torture or cruel, inhuman, or degrading treatment, or other unlawful interrogation methods'.⁶² The CAT Committee has called on Gabon to 'amend its legislation in order to make it clear that confessions, statements and other evidence obtained through torture or ill-treatment may not be invoked as evidence in legal proceedings'.⁶³ The Committee made a similar recommendation to Rwanda.⁶⁴ The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism urged the United States of America to ensure that 'evidence obtained by any form of torture or cruel, inhuman or degrading treatment [is not] admitted in [any] proceedings'.⁶⁵ The UN Special Rapporteur on the Independence of Judges and Lawyers urged the government of Tajikistan to prioritise the fact that⁶⁶

60 Concluding Observations of the Human Rights Committee on Austria's fourth periodic report, CCPR/C/AUT/CO/4, 30 October 2007 para 5(a).

61 Concluding Observations of the Human Rights Committee on the second and third periodic reports of the United States of America, CCPR/C/USA/CO/3/Rev 1, 18 December 2006, para 14.

62 Concluding Observations of the Committee against Torture on the fourth and fifth combined periodic reports of Austria, CAT/C/AUT/CO/4-5, 20 May 2010, para 5(a)(i).

63 Concluding Observations of the Committee against Torture on the initial report of Gabon, CAT/C/GAB/CO/1, 17 January 2013, para 24.

64 Concluding Observations of the Committee against Torture on the initial report of Rwanda, CAT/C/RWA/CO/1, 26 June 2012, para 23.

65 Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin, Mission to the United States of America, A/HRC/6/17/Add.3, 22 November 2007, para 60.

66 Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, Mission to Tajikistan, E/CN.4/2006/52/Add.4, 30 December 2005, para 91.

[a]dequate legal amendments should be introduced to ensure that confessions and other evidence obtained through torture or cruel, inhuman or degrading treatment or duress should under no circumstances be admissible in trials.

As mentioned earlier, the African Commission expressly held in *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*⁶⁷ that evidence obtained through CIDT was inadmissible. It is argued that, from an international human rights perspective, there is merit in the argument that South African courts should expressly hold that any evidence obtained as a result of CIDT is inadmissible. There are numerous decisions in which the European Court of Human Rights has found that evidence obtained through torture or duress is inadmissible.⁶⁸ In *Jallow v German*,⁶⁹ the Court, although it left open the 'the general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair',⁷⁰ it added that⁷¹

[i]t cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.

The Court concluded that it 'finds that the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair'⁷² because it had, *inter alia*, been obtained in violation of the applicant's right to freedom from inhuman and degrading treatment contrary to article 3 of the Convention.⁷³ Therefore, there is evidence that there are cases where the European Court of Human Rights would find evidence obtained through CIDT inadmissible. However, because of the fact that the Court leaves open the question of whether such evidence should be excluded, this leaves room to some courts to admit such evidence. It is argued that the best approach is that adopted by the African Commission and the practice of the UN human rights bodies above that such evidence should be excluded.

The second point to be made is that, like the right to freedom from torture, the right to freedom from CIDT is also an absolute and non-

67 *Egyptian Initiative* (n 32 above).

68 See, eg, *Baran and Hun v Turkey* Application 30685/05 (20 May 2010) para 72. See also *Desde v Turkey* Application 23909/03 (1 February 2011); *Fidanci v Turkey* Application 17730/07 (17 January 2012); *Özcan Çolak v Turkey* Application 30235/03 (6 October 2009) para 49; *Harutyunyan v Armenia* Application 36549/03 (28 June 2007).

69 *Jallow v German* Application 54810/00 (11 July 2006).

70 *Jallow v German* (n 69 above) para 107.

71 *Jallow v German* para 106.

72 *Jallow v German* para 108.

73 *Jallow v German* para 82. See also *Ümit Gül v Turkey* Application 7880/02 (26 September 2009).

derogable right under the South African Constitution and in international law.⁷⁴ As mentioned earlier, in *Mthembu*, the SCA held that⁷⁵

[t]he absolute prohibition on the use of torture in both our law and in international law therefore demands that 'any evidence' which is obtained as a result of torture must be excluded 'in any proceedings'.

The CAT Committee emphasised that, like the obligation to prevent torture, the obligation to prevent CIDT is also non-derogable.⁷⁶ This means, *inter alia*, that if courts admit evidence which has been obtained through CIDT, they indirectly cast doubt on the absolute and non-derogable nature of the right to freedom from CIDT. South African courts have held that some forms of punishment amount to CIDT and are therefore unconstitutional.⁷⁷ If a form of punishment that amounts to CIDT is unconstitutional and, therefore, courts are absolutely prohibited from imposing it, one would expect the courts to follow the same logic when it comes to evidence obtained through CIDT. This should be understood against the background that admitting evidence obtained through CIDT could lead to encouraging law enforcement officers to engage in such acts with the inherent danger that they could cross the boundary and end up torturing their victims. As mentioned earlier, the CAT Committee stated:⁷⁸

In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment.

One of the measures required to prevent torture is the inadmissibility of any evidence obtained as a result of torture. The exclusion of any evidence obtained through CIDT would ultimately strongly contribute to the fight of torture.

It should also be noted that article 16(1) of the CAT provides:

Each state party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

74 Art 4 ICCPR.

75 *Mthembu* (n 3 above) para 32.

76 CAT Committee General Comment 2 (n 16 above) para 6.

77 This has been the case with respect to the death penalty, life imprisonment without the possibility of release and corporal punishment. See, generally, JD Mujuzi 'Punishment in the eyes of the Constitutional Court of South Africa: The relationship between punishment and the rights of an offender in the sentencing of primary caregivers of children' (2011) 24 *South African Journal of Criminal Justice* 164-177.

78 CAT Committee General Comment 2 (n 16 above) para 3.

Admitting evidence obtained through CIDT would be contrary to South Africa's obligation under article 16(1) of the CAT. Furthermore, if a person has been treated in a cruel, inhuman or degrading way for the purpose of obtaining evidence from him or her, such evidence should be inadmissible because, as the SCA held in *Mthembu*.⁷⁹

Public policy ... sets itself firmly against admitting evidence obtained in deliberate or flagrant violation of the Constitution. If, on the other hand, the conduct of the police is reasonable and justifiable, the evidence is less likely to be excluded – even if obtained through an infringement of the Constitution.

It is difficult, if not impossible, to think of a situation where a violation of the right to freedom from CIDT for the purpose of obtaining evidence would be reasonable and justifiable. It should be remembered that the SCA does not state that the conduct has to be reasonable or justifiable. The conduct in question must be reasonable and justifiable for the possibility to admit evidence obtained in violation of the Constitution to arise.

Section 39(1)(c) of the Constitution provides that '[w]hen interpreting the Bill of Rights a court, tribunal or forum ... may consider foreign law'. South African courts have indeed considered foreign law in interpreting the Bill of Rights.⁸⁰ It is against this background that it is submitted that South African courts may find jurisprudence emanating from other countries, especially African countries, on the legal status of evidence obtained through CIDT persuasive.⁸¹ Jurisprudence emanating from some African countries is to the effect that evidence obtained through CIDT should be treated

79 *Mthembu* (n 3 above) para 26.

80 Eg, in *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) para 52, the Constitutional Court held that '[i]t is helpful to consider foreign law when dealing with a right recognised in the Bill of Rights'.

81 However, the South African Constitutional Court referred to sec 39(1)(c) and held that '[f]oreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues that confront us in this matter. At the same time, it is important to appreciate that foreign case law will not always provide a safe guide for the interpretation of our Constitution. When developing our jurisprudence in matters that involve constitutional rights ... we must exercise particular caution in referring to foreign jurisprudence.' See *President of the Republic of South Africa & Others v M & G Media Ltd* 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) para 16. In *H v Fetal Assessment Centre* 2015 (2) BCLR 127 (CC); 2015 (2) SA 193 (CC) para 31, the Court held that '[f]oreign law has been used by this Court both in the interpretation of legislation and in the development of the common law. Without attempting to be comprehensive, its use may be summarised thus: (a) Foreign law is a useful aid in approaching constitutional problems in South African jurisprudence. South African courts may, but are under no obligation to, have regard to it. (b) In having regard to foreign law, courts must be cognisant both of the historical context out of which our Constitution was born and our present social, political and economic context. (c) The similarities and differences between the constitutional dispensation in other jurisdictions and our Constitution must be evaluated. Jurisprudence from countries not under a system of constitutional supremacy and jurisdictions with very different constitutions will not be as valuable as the jurisprudence of countries

as evidence obtained through torture and must be excluded. For example, section 15(1) of the Lancaster Constitution of Zimbabwe provided that '[n]o person shall be subjected to torture or to inhuman or degrading punishment or other such treatment'. The same prohibition has been enshrined in article 53 of the 2013 Constitution of Zimbabwe.⁸² However, unlike the Lancaster Constitution, the 2013 Constitution includes a provision which regulates the admissibility of evidence obtained through human rights violations.⁸³ In *Mukoko*,⁸⁴ which was decided on the basis of the Lancaster Constitution, the Supreme Court of Zimbabwe, in granting the applicant's application for a permanent stay of prosecution on the ground that the evidence that was to be adduced at her trial had been obtained through torture and CIDT, referred to jurisprudence from different jurisdictions, including South Africa, and to article 15 of the CAT and held, *inter alia*:⁸⁵

The obligation on the state, through its agents, not to admit or use in criminal proceedings, information or evidence obtained from an accused person or any third party by infliction of torture, inhuman or degrading treatment is not explicitly set out by a separate provision in the Constitution. It would be contrary to the object and purpose of the prohibition under section 15(1) of the Constitution to allow admission or use of such information or evidence in any legal proceedings. A proper interpretation of section 15(1) of the Constitution which takes into account the purpose and broadness of the language underlying the importance of the fundamental value protected, compels the Court to conclude that the obligation on the state not to admit or use information or evidence obtained from an accused person or any third party by infliction of torture, or inhuman or degrading treatment in any legal proceedings attaches to the prohibition of such treatment by section 15(1) of the Constitution. The obligation is inherent in the general terms of the section. It enjoys with the general prohibition the same qualities of being absolute and non-derogable. The condemnation is more aptly categorised as a constitutional principle than as a rule of evidence.

founded on a system of constitutional supremacy and with a constitution similar to ours. (d) Any doctrines, precedents and arguments in the foreign jurisprudence must be viewed through the prism of the Bill of Rights and our constitutional values.'

82 Art 53 of the 2013 Constitution of Zimbabwe provides that '[n]o person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment'.

83 See sec 70(3) which provides that '[i]n any criminal trial, evidence that has been obtained in a manner that violates any provision of this chapter must be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest'.

84 *Mukoko* (n 15 above).

85 *Mukoko* 32-33.

Although courts in other African countries, such as Lesotho,⁸⁶ Swaziland,⁸⁷ Namibia,⁸⁸ Tanzania,⁸⁹ Malawi,⁹⁰ Zambia⁹¹ and Kenya,⁹² have held that evidence obtained through torture is inadmissible, the author is not aware of any other court, apart from the Zimbabwean Supreme Court, which has held that evidence obtained through CIDT should be treated as evidence obtained through torture. It is submitted that if South Africa follows the international trend and also the example of the Supreme Court of Zimbabwe, the protection of human rights, and in particular the right to a fair trial, will be strengthened.

Section 39(2) of the South African Constitution provides that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. In *Mthembu* the SCA held:⁹³

In the pre-constitutional era, applying the law of evidence as applied by the English courts, the courts generally admitted all evidence, irrespective of how obtained, if relevant. The only qualification was that 'the judge always (had) a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused'.

The SCA refers to case law to support its view that, even before the constitutional era, some judges held that evidence which had been obtained from the accused involuntarily had to be excluded.⁹⁴ South African courts have invoked section 39(2) of the Constitution to develop common law which deals with, *inter alia*, the right to a fair trial. This has been the case, for example, with regard to the offender's right to be heard before a court imposes a sentence on him or her and the offender's right to be heard before an appeal court increases his or her sentence.⁹⁵ It is submitted that nothing prevents courts from developing common law by holding that evidence obtained through CIDT is inadmissible. It should be remembered that in developing common law, courts should always remember South Africa's international obligations. As the Constitutional Court held in *Government of the Republic of Zimbabwe v Fick and Others*,⁹⁶ '[w]hen courts are required to develop the common law ... they must

86 *R v Mpobane* (CRI/T/1/94) [1999] LSCA 26 (25 March 1999).

87 *R v Dladla & Others* (168/1998) [1998] SZHC 2 (1 January 1998).

88 *S v Malumo* (CC 32/2001) [2010] NAHC 20 (1 March 2010).

89 *Mkika v Republic* (Criminal Appeal 47 of 2001) [2003] TZCA 2 (1 August 2003).

90 *Palitu & Others v Republic* [2001] MWHC 43 (19 September 2001).

91 *People v B* (1980) ZR 219 (HC) 234.

92 See JD Mujuzi 'The Constitution in practice: An appraisal of the Kenyan case law on the right to a fair trial' (2008) 2 *Malawi Law Journal* 135-157.

93 *Mthembu* (n 3 above) para 22.

94 *Mthembu* para 23.

95 See JD Mujuzi 'Developing common law to expand the meaning of the right to a fair trial in South Africa: The accused's right to be heard before the court imposes the sentence' (2013) 42 *Common Law World Review* 137-150.

96 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC).

remember that their “obligation to consider international law when interpreting the Bill of Rights is of pivotal importance”.⁹⁷

4 Conclusion

Section 35(5) of the South African Constitution empowers a court to admit evidence obtained in a manner that violates any right in the Bill of Rights, provided that the admission of the evidence would not render the trial unfair or otherwise be detrimental to the administration of justice. South African courts have over time developed rich jurisprudence on section 35(5).⁹⁸ Courts have held that any evidence obtained through torture is inadmissible. This is because of the absolute prohibition on torture and the fact that the admission of such evidence would always render the trial unfair and be detrimental to the administration of justice. Courts have not come out to expressly hold that evidence obtained through CIDT is, like the evidence obtained through torture, inadmissible and should be excluded under all circumstances. Relying on the practice of international human rights mechanisms, such as the CAT Committee, the Human Rights Committee, the UN Special Rapporteur on Torture, the UN Special Rapporteur on the Independence of Judges and Lawyers and the African Commission, the author has argued that South Africa has an international obligation to exclude evidence obtained through CIDT. The author has also relied on the jurisprudence of the SCA to argue that there is room for a strong case to be made for the exclusion, under all circumstances, of any evidence obtained through CIDT. The author has also demonstrated that the Supreme Court of Zimbabwe held that evidence obtained through CIDT should be treated as evidence obtained through torture and should be excluded.

⁹⁷ *Government of the Republic of Zimbabwe v Fick & Others* (n 96 above) para 66.

⁹⁸ *Zeffert et al* (n 8 above) 711-775.

A rights-based approach to environmental protection: The Zimbabwean experience

*Tinashe Madebwe**

Lecturer of law, Department of Public Law, Midlands State University, Gweru, Zimbabwe

Summary

Stemming from the common law, international law and statute, Zimbabwean law has always recognised the prominent role that environmental rights should play in the environmental regulatory framework. In theory, this was based on recognition of the fact that the provision of such rights, and their full enjoyment by citizens, would allow Zimbabweans the opportunity to live in a clean and healthy environment. In addition, through exercising these rights, citizens could directly enforce environmental laws. In practice, however, it appears that deficiencies in the environmental regulatory framework at the institutional level precluded Zimbabweans from fully exercising or enjoying their environmental rights. It was against this backdrop that Zimbabwe in 2013 enacted a new Constitution which entrenched environmental rights in the Declaration of Rights. This was a welcome development which aligned Zimbabwean law with developments across various other jurisdictions which have accorded environmental rights constitutional importance. Importantly, and in light of the seeming deficiencies in the environmental law regulatory framework at the institutional level, which manifested in Zimbabweans not fully exercising, or enjoying, their environmental rights prior to the inception of the Constitution, this article explores whether the inclusion of environmental rights in Zimbabwe's Constitution has been accompanied by sufficient efforts to put in place institutional measures to ensure that citizens exercise and enjoy their rights.

Key words: *environmental rights; education; litigation; institutional measures*

* LLB LLM (Rhodes), PhD (Strathclyde); [tinzel4@yahoo.com](mailto:tinzal4@yahoo.com)

1 Introduction

The value of a rights-based approach to pursuing environmental protection has often inspired debate and disagreement for at least three reasons.¹ First, the argument has been made that a rights-based approach is problematic to the extent that rights are, most commonly, bestowed upon humans, with humans having the right of action when their rights are infringed. The difficulty this poses is that environmental harm can occur which does not affect humans.² Alternatively, harm might occur which affects humans. However, such harm may be unknown to them, or it may not directly affect them in a manner they appreciate. As such, they may simply not be moved to act in protection of the environment on the basis of their rights.³ Furthermore, it has also been argued that this approach is of limited use for the protection of aspects of the environment, such as particular species which are of 'no present and potential interest to humankind'.⁴

Second, while it is apparent that procedural rights, such as access to information, access to justice and participatory rights, allow rights to be used to prevent environmental harm from occurring, it has often been argued that the rights-based approach cannot yield the

-
- 1 D Shelton 'Human rights, environmental rights and the right to the environment' (1991) 28 *Stanford Journal of International Law* 103; G Handl 'Human rights and the protection of the environment: A mildly revisionist view' in AC Trindade (ed) *Human rights, sustainable development and the environment* (1992) 117; AE Boyle & MR Anderson (eds) *Human rights approaches to environmental protection* (1996) ch 2-4; F Francioni 'International human rights in an environmental horizon' (2010) 21 *European Journal of International Law* 41 44 54-55; AE Boyle 'Human rights or environmental rights? A reassessment' (2007) 1-2 http://www.law.ed.ac.uk/includes/remote_people_profile/remote_staff_profile?sq_content_src=%2BXJspWth0dHAIMOElMkYIMkZ3d3cyLmxhdy5lZC5hYy51ayUyRmZpbGVfZG93bmxyYWQlMkZwdWVjaWNhdGlvbnMlMkYwXzEyMjFfaHVtYW5yaWdodHNvcmludmlyb25tZW50YWxyaWdodHNhcmVhc3Nlcy5wZGYmYWxsPTE%3D (accessed 29 May 2015).
 - 2 See the enlightening discussion on anthropocentrism and ecocentrism, albeit with reference to the principle of intergenerational equity in D Tladi 'Of course for humans: A contextual defence of intergenerational equity' (2002) 9 *South African Journal of Environmental Law and Policy* 177 182-185. See also LA Feris & D Tladi 'Environmental rights' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 249 252, who note that 'ecocentrists reject anthropocentrism (and by necessity any human rights approach) as flawed, because under such approaches the environment is protected, not because it has intrinsic value, but only for the sake of man'.
 - 3 AS Timoshenko 'Ecological security: Global change paradigm' (1990) 1 *Colorado Journal of International Environmental Law and Policy* 127-131; M Dixon *Textbook on international law* (2003) 466; E Louka *International environmental law: Fairness, effectiveness and world order* (2006) 16-17; Boyle (n 1 above) 1-3; D Bodansky *et al* 'International environmental law: Mapping the field' in D Bodansky *et al* *The Oxford handbook of international environmental law* (2007) 15-16; P Birnie *et al* *International law and the environment* (2009) 7.
 - 4 D Tladi 'Strong sustainable development, weak sustainable development and the earth charter: Towards a more nuanced framework of analysis' (2004) 11 *South African Journal of Environmental Law and Policy* 22-24. See also Tladi (n 2 above) 182-185.

sort of environmental protection necessary to protect the environment because it predominantly is backward-looking and reactive rather than preventative, a more preferable approach.⁵ The rationale here seems to stem from the fact that, for preventative action to be taken by the public using their rights, a concerned public typically needs to be proactive in guarding against environmental harm. Unfortunately, experience has shown that, in the absence of a catastrophic event, the public are simply not as diligent as they could be with respect to environmental protection.⁶ Consequently, rights are most typically exercised once offending activities have been initiated or concluded.

Third, and perhaps most importantly for present purposes, a rights-based approach works best where rights holders have the capacity to exercise rights and enjoy the benefits these rights bestow on them. Such capacity can assume the form of citizens being educated on their rights and how to exercise them. Indeed, in some cases, effective education might even motivate citizens to familiarise themselves with the state of the environment in which they live and, thus, rely on their procedural rights to access information which may put them in a position to undertake action which might pre-empt the occurrence of environmental harm. However, it is also important to consider that, even where rights holders may be educated on their environmental rights, bringing, or threatening to bring, litigation as part of exercising rights can be expensive.⁷ As such, it has long been recognised that the value of a rights-based approach is also dependent on rights holders having the capacity to act in protection of their rights through having sufficient resources to bring and sustain litigation in the protection of these rights.

Despite all this, there is some agreement that a rights-based approach is a useful complement to any environmental law regulatory framework. In a complementary role to traditional regulatory measures, this approach can empower the public to enforce laws through bringing, or threatening to bring, litigation and this may even serve a deterrent function.⁸ Importantly, however, where such approach is adopted, realising the value it can bring to a state's

5 Feris & Tladi (n 2 above) 251; T Crossen 'Multilateral environmental agreements and the compliance continuum' (2004) 16 *The Georgetown International Environmental Law Review* 11; M Mason 'Citizenship entitlements beyond borders? Identifying mechanisms of access and redress for affected publics in international environmental law' (2006) 12 *Global Governance* 283 288.

6 BK Bucholtz 'Coase and the control of transboundary pollution: The sale of hydroelectricity under the United States-Canada free trade agreement of 1988' (1991) 18 *Boston College Environmental Affairs Law Review* 279; G Handl 'Environmental security and global change: The challenge to international law' (1990) 1 *Yearbook of International Environmental Law* 3 4; CD Stone 'Defending the global commons' in P Sands *Greening international law* (1993) 34.

7 C McGrath 'Flying foxes, dams and whales: Using federal environmental laws in the public interest' (2008) 25 *Environmental and Planning Law Journal* 324.

8 McGrath (n 7 above) 335-340; AE Boyle 'Human rights and the environment: Where next?' (2012) 23 *The European Journal of International Law* 613-614.

regulatory framework is dependent upon the state putting in place institutional measures to ensure that the public are educated on the existence of environmental rights and the manner in which to exercise them so that they may derive the benefits these rights bestow. In addition, realising the value of a turn to rights is also dependent on a state putting in place institutional measures to assist litigants, and potential litigants, in bringing rights-based matters to court.

This dynamic between the mere provision of environmental rights in a state's legal framework and the provision of institutional measures to educate citizens on the existence of these rights and to capacitate them to rely on litigation, or the threat thereof, so that they may exercise their environmental rights and enjoy the benefits they bestow, has recently become particularly interesting in the Zimbabwean context, for two reasons.

First, Zimbabwean law has traditionally recognised the important role that environmental rights play as a complement to environmental protection regulatory efforts. It was hardly surprising, therefore, that in 2013 environmental rights found their way into section 73 of the 2013 Zimbabwean Constitution's Declaration of Rights.⁹

Second, despite Zimbabwean law's long-standing recognition of the role that environmental rights play in regulating environmental protection efforts, Zimbabweans have, for the longest time, acted in a manner which suggests that they may either be unaware of the existence of such environmental rights, or be unable to fully exercise them for their benefit. To illustrate, there has been very little rights-based litigation brought to the courts. Separately, despite the positive obligation environmental rights place on the state to secure a clean environment for citizens, in Zimbabwe, as in various other developing states, the state has prioritised the pursuit of development often to the detriment of the pursuit of environmental protection objectives. Importantly, such choices on the part of the state have met with limited resistance from citizens, through exercising their rights to protect the environment on their own behalf, or through calling on the state to honour its positive obligation to ensure that citizens live in a clean environment. This suggests that there is a certain passivity on the part of Zimbabwean citizens with respect to exercising their environmental rights.

Certainly, the passivity that Zimbabweans have shown with respect to exercising their environmental rights to secure a clean environment on their own behalf, or through insisting on the state honouring its positive obligation to ensure that they live in a clean environment, could be due to citizens being willing to subjugate environmental protection objectives so that economic development may be pursued. However, the substantial dearth of rights-based litigation, or rights-based challenges to the state's policy choices, suggests that the more

9 Constitution of Zimbabwe Amendment (20) Act 2013.

likely reason for citizens' passivity in this regard is that they are unaware of the existence of environmental rights. Even where they may be aware of these rights, they may lack the financial capacity to bring rights-based actions in protection of their environmental rights or the environment generally. As such, it is reasonable to arrive at the conclusion that, while Zimbabwean law has recognised the important role that environmental rights play in the environmental regulatory framework, in practice little has been done by the state at the institutional level to secure citizens' actual exercise and enjoyment of environmental rights and the benefits they bestow.

Considering that there has been the welcome turn to entrenching environmental rights in the Declaration of Rights of the Constitution, it has become increasingly important to assess, as this article does, the value that these rights will bring to the environmental regulatory framework in light of the past, and negative experience with such rights. In pursuance of this objective, the article is presented in two parts. First, in light of environmental rights having always formed part of Zimbabwean law, but were not fully exercised, the article commences with a discussion of prominent sources of environmental rights prior to the 2013 Constitution. As part of this discussion, I will analyse why it is that citizens did not seemingly exercise these rights and, as such, enjoy the benefits that these rights bestowed upon them. Following from this, and in the second section, I explore the extent to which measures have been put in place to facilitate the exercise of environmental rights in the 2013 Constitution, bearing in mind the history of environmental rights in Zimbabwean law.

2 Environmental rights prior to the Constitution

It is interesting to note that there has always been a dearth of environmental law cases in Zimbabwe. Based on the preceding discussion, a preliminary assessment would suggest that this is likely due to a lack of education on environmental rights, how to exercise them and, as such, how to enjoy the benefits they bestowed. The dearth of cases may also have been attributable to a lack of capacity on the part of citizens to bring rights-based litigation. Importantly, however, the absence of such cases does not discount the fact that, in tracing the development of Zimbabwean law from a chronological perspective, it is quite apparent that a rights-based approach to environmental protection has always formed part of Zimbabwean

law.¹⁰ Indeed, environmental rights have been provided for in three distinct ways over the course of the country's legal history.

2.1 Common law

Zimbabwe embraced Roman-Dutch law as its basic law since it attained independence. This was explicitly provided for in the 1979 Constitution which, in section 89, provided that '[t]he law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891'.¹¹ Importantly, this has meant that environmental rights have always existed as part of the common law of nuisance, and of delict.

Thus, rooted in the law of delict, Zimbabwean law has always recognised that where an act of pollution has caused personal injury or damage to someone's property, the victim can use the delictual remedy of Aquilian action.¹² Further, the law recognises a general duty of care, akin to the good neighbourliness (*sic tuo utere*) principle in international law.¹³ In terms of this duty, a person would be regarded as having breached this duty, and thus a right, where that person failed to foresee and guard against harm which the reasonable person would have foreseen and guarded against.¹⁴ Importantly, the law of delict established the existence of environmental rights to the extent that citizens could reasonably expect to live in a clean environment. Where the negligent acts of another party, rooted in a failure to honour the duty of care, compromised this and led to damages occurring, the harmed party had a right of action to pursue redress.

Similarly, environmental rights could be inferred to exist from the law of nuisance. To this end, a private nuisance was taken to occur

10 Chronology is important to tracing the development of the law here. On the one hand, it will form the basis on which to assess the impact the Constitution is likely to have. On the other, the emphasis on chronological development accounts for the ensuing discussion being structured in a common law, international law, and then statute law way, rather than the more traditional, and established, international law, statute, common law progression.

11 Schedule to the Zimbabwe Constitution Order 1979 (SI 1979/1600 of the United Kingdom). The 2013 Constitution does not carry a similar provision. However, it does make reference to 'the common law' in various provisions. It is reasonable therefore to assume that this is the same common law which had been in effect since independence, and the 1979 Constitution.

12 The application of this is quite like that in South African law. See M Kidd *Environmental law* (2008) 133-134.

13 On the Zimbabwean law of delict, generally, see G Feltoe *A guide to the Zimbabwean law of delict* (2006). On the good neighbourliness principle, see Principles 2, 18, and 19 of the Rio Declaration on Environment and Development, A/CONF.151/26; HA Strydom 'The legal principles relating to climate change' <http://www.eolss.net/sample-chapters/c14/E1-36-10-00.pdf> (accessed 29 May 2015). Also see S Sucharitkul 'The principles of good-neighbourliness in international law' (1996) <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1559&context=pubs> (accessed 29 May 2015).

14 Feltoe (n 13 above) 26.

when a neighbour interfered with an owner's use and enjoyment of his or her land.¹⁵ This body of the common law allowed for action to be brought against a party who caused a nuisance which resulted in patrimonial loss, or in the instance of a continuing nuisance.¹⁶ Importantly, the law of nuisance established the right to a clean environment, and one which was not harmful to health and well-being, to the extent that it created a right of action for a party whose right had been infringed to pursue redress.

There were various advantages which attached to the recognition of these common law-based rights as part of the environmental regulatory framework. Most notably, there was little need to educate the public extensively on the existence of such rights at the institutional level. Instead, the delictual basis of the rights meant that citizens were likely aware of the right of action created where they suffered harm, as part of their existing knowledge of the law of delict and nuisance. Such knowledge would typically be motivated by financial self-interest, as citizens would be aware of the fact that violations of their rights would lead to the payment of compensation where they could establish that their rights had been infringed. The promise of compensation also meant that citizens were motivated to act in protection of their rights and, by extension, the environment, whenever environmentally deleterious activities which caused them harm occurred.¹⁷ Closely aligned with this, the threat of rights-based actions, and the possibility of paying compensation to rights holders, were effective deterrents to those acting in a potentially-harmful manner. For instance, the fact that citizens could act in protection of the environment placed a measurable positive obligation on the state to ensure that citizens enjoyed the right to live in a clean environment.

Despite these advantages, however, the deficiency with such an approach, one which attaches to rights-based actions generally, was that such an approach typically depended on citizens' capacity to pursue redress based on these rights.¹⁸ In the Zimbabwean context, the prohibitive costs attached to pursuing litigation meant that this was not an avenue which many citizens could exploit.¹⁹ To compound matters, there was little done at the institutional level to

15 A similar position to the one in South Africa; see Kidd (n 12 above) 130-133.

16 Kidd (n 12 above) 76.

17 See, however, Kidd (n 12 above) 134.

18 On willing and able plaintiffs, see BJ Preston 'Environmental public interest litigation: conditions for success' (2013) http://www.leg.lawlink.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011721754/preston_environmental%20public%20interest%20litigation.pdf (accessed 29 May 2015).

19 See T Murombo 'Balancing interests through framework legislation in Zimbabwe' in M Faure & W du Plessis (eds) *The balancing of interests in environmental law in Africa* (2011) 557-576. Also, it is worth noting that Zimbabwe is a typical example of a jurisdiction in which environmental offences are regarded as *mala prohibita* (prohibited acts, often by statute) and not *mala in se* (criminal acts, often seen as morally reprehensible). For a discussion of the two, see S Bell & D McGillivray

assist litigants bringing such rights-based claims. Possibly this was because, being rooted in the common law, such actions were seen as private law matters. As such, there was an expectation on the part of the state that, where rights were infringed, harmed citizens would pursue individual redress. In turn, once such compensation was secured, the state would not direct the harmed party with respect to how to use the compensation award. Thus, it was conceivable that once compensation awards were secured, they would not go toward restoring the environment to its former state for the public benefit. In this context, there was limited state motivation to assist litigants in meeting the costs of such litigation in order for them to bring actions which could reasonably be regarded as being for citizens' personal gain.

2.2 International law

Zimbabwe ratified the African Charter on Human and Peoples' Rights (African Charter) in 1986.²⁰ Article 24 of the Charter, to which the country remains party, provides that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'. In addition, article 25 of the Charter provides:

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Of note, Zimbabwe has always been a dualist state.²¹ As such, ratification of the African Charter had to be accompanied by the enactment of enabling legislation giving effect to the Charter, or rights in the Charter.²² In theory, once this was done, it would lead to the imposition of an expansive positive obligation on the state to

Environmental law (2008) 259. In addition, Zimbabweans are generally not litigious people. Add to that the costs attached to bringing cases and the result was that no cases were brought to the courts in which these environmental rights were exercised.

20 Organisation of African Unity (OAU) African Charter on Human and Peoples' Rights ('Banjul Charter') 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) <http://www.refworld.org/docid/3ae6b3630.html> (accessed 29 May 2015), reprinted in C Heyns & M Killander *Compendium of key human rights documents of the African Union* (2013) 29.

21 This tradition was maintained in sec 34 of the 2013 Constitution which provides that '[t]he state must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law'.

22 See eg the 2nd Report by the country to the Commission detailing legislative measures taken by the state to ensure compliance with provisions in the Charter, http://www.achpr.org/files/sessions/21st/state-reports/2nd,3rd-1992-1996/state-rep23_zimbabwe_1996_eng.pdf (accessed 29 May 2015).

ensure that citizens lived in a clean environment.²³ This would be a significant progression in two respects. First, in terms of article 24 of the African Charter, domestication would place the state under an obligation to secure a clean environment for citizens. Second, domestication of article 25 of the African Charter would also make it reasonable to expect the state to put in place measures to educate the citizenry on the implications of the rights in the Charter and, possibly, institutional measures to assist citizens bringing environmental rights-based litigation in getting to court.

Importantly, little was done to domesticate environmental rights provided for in the African Charter.²⁴ Added to this, little was done to educate the citizenry on the value of environmental rights contained in the Charter. If anything, the state played a role in diminishing the public's perception of environmental rights through consistently renegeing on its duty to secure a clean environment for citizens. This was seemingly based on the fact that 'what constituted a decent environment was, and remains, a value judgment, on which reasonable people differed'.²⁵ As such, the state used this 'loophole' as the basis for arguing that, based on various considerations, it was more reasonable to prioritise socio-economic development goals to better the nation's circumstances than to secure a clean environment for citizens. There was also little done to assist litigants in bringing environmental rights-based claims before the court.

Presumably, there were at least two reasons to account for all this. First, the failure to effectively educate the public may have been rooted in the fact that such a drive to educate the public was seen as unnecessary considering that the African Charter carried rights which were widely known as part of the existing national Constitution and, in some instances, these rights had acquired an *erga omnes* quality.²⁶ Second, the fact that the environmental rights in the African Charter are peoples' rights and, as such, would most commonly be exercised against the state, meant that the state would have been reluctant to educate citizens on the rights as this would empower them to bring

23 Specific actions required of states in fulfilment of art 24 include 'ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'. See Boyle (n 1 above) 3-5; Francioni (n 1 above) 52.

24 See, to this end, the 1st and 2nd Reports by the country to the Commission detailing activities to give effect to the Charter, which made no reference to efforts to give effect to art 24 of the Charter. For the 1st Report, see http://www.achpr.org/files/sessions/12th/state-reports/1st-1986-1991/staterep1_zimbabwe_1992_eng.pdf. (accessed 29 May 2015). For the 2nd Report, see http://www.achpr.org/files/sessions/21st/state-reports/2nd,3rd-1992-1996/staterep23_zimbabwe_1996_eng.pdf. (accessed 29 May 2015).

25 Boyle (n 8 above) 626-627.

26 As above.

actions against it. The state would have been equally reluctant to financially assist litigants who would possibly bring litigation against it.

Regardless, the important point to note is that this culminated in a situation in which an unaware public hardly acted to force the state to honour its positive obligations. In addition, it is not difficult to see how, in this context, the state did not feel compelled to put in place institutional measures to assist litigants in bringing rights-based litigation to court when their rights were infringed.

2.3 Statute

Perhaps the fundamental starting point when considering the provision of environmental rights in Zimbabwean statute law is to note that, prior to the 2013 Constitution, Zimbabwe already had a Constitution which carried various fundamental rights.²⁷ Importantly, while this is not an avenue that Zimbabweans utilised in the pre-2013 constitutional era, it is reasonable to contend that there was statutory provision for environmental rights in the 1979 Constitution through the provision of a comprehensive Declaration of Rights in chapter III, to the extent that the Declaration incorporated a right to life in section 12.

This contention is rooted in the observation that, in other jurisdictions, a similar right to life has been interpreted expansively, so as to recognise environmental rights.²⁸ The logic applied has been that, in some instances, the full enjoyment of the right to life is dependent upon rights holders living in a clean environment which does not pose a threat to their right to life.²⁹ As such, the right to life creates a positive obligation on the state and other citizens not to expose rights holders to an environment which is potentially harmful to their enjoyment of this right.³⁰ A similar approach has been taken to interpreting other rights, such as the rights to health, privacy and property, as has been done in other jurisdictions.³¹

Quite separately to this, however, more explicit recognition of environmental rights as part of Zimbabwean statute law was achieved with the coming into effect of the Environmental Management Act in 2007.³² The Act remains the leading statutory instrument on Zimbabwean environmental law and laws dealing with natural

27 Schedule to the Zimbabwe Constitution Order 1979 (SI 1979/1600 of the United Kingdom).

28 See Feris & Tladi (n 2 above) 251, who note that at international law, it may be the case that specific environmental rights are not recognised. However, the potential for protecting the environment under already-existing and recognised rights, such as the rights to life, health and dignity has been recognised. Also see Feris & Tladi (n 2 above) 256.

29 *Öneryildiz v Turkey* (2004) ECtHR 20.

30 Boyle (n 1 above) 5.

31 Francioni (n 1 above) 43-44; *Maya Indigenous Community of the Toledo District v Belize* IAHCR (2004) Doc 5 Rev 1.

32 Environmental Management Act [Chapter 20:27].

resources. To this end, section 3(2) of the Act provides that '[i]f any other law is in conflict or inconsistent with this Act, this Act shall prevail'.³³ Importantly for present purposes, section 4(1)(a) of the Act provides that '[e]very person shall have a right to a clean environment that is not harmful to health'. In addition, section 4(1)(b) of the Act provides:

Every person shall have a right to –

....

- (b) access to environmental information, and protect the environment for the benefit of present and future generations and to participate in the implementation of the promulgation of reasonable legislative policy and other measures that –
 - (i) prevent pollution and environmental degradation; and
 - (ii) secure ecologically sustainable management and use of natural resources while promoting justifiable economic and social development.

This aligned Zimbabwean law with various international conventions.

Despite this, and as had been the case following Zimbabwe's ratification of the African Charter, little was done to capacitate citizens to exercise the rights enshrined in section 4 of the Environmental Management Act. To this end, there were no educational drives intended to enlighten citizens on how to exercise their rights so that they could derive the benefits these rights bestowed on them. In addition, little was done to put in place measures to financially assist litigants in bringing, or threatening to bring, litigation in protection of their rights. It is hardly surprising that there were no cases brought to the courts based on these rights. Indeed, making a similar point, Murombo noted that there was provision for participatory rights in Zimbabwean law. However:³⁴

Several constraints limit the exercise of these rights to those few who have the means to participate and the knowledge to follow legislative and planning processes. Hollow provisions on access to information are pointless in a society with low literacy rates and with other laws that make access to information near impossible. Similarly, access to courts when legal fees are beyond the reach of many and the processes mystified in archaic legalisms becomes a meaningless right.

33 The entry into force of the 2013 Constitution which, in sec 2, provides that it 'is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency', has established the 2013 Constitution as a superior law generally. However, the Environmental Management Act remains the leading law with respect to environmental protection and laws dealing with natural resources. See Murombo (n 19 above) 567.

34 Murombo (n 19 above) 576.

3 Environmental rights after the Constitution

The preceding discussion highlights that, stemming from the common law, international law and statute, Zimbabwean law has always recognised the prominent role that environmental rights should play in the environmental regulatory framework. Despite this, an absence of adequate institutional measures to educate citizens on these rights and to assist litigants in bringing rights-based claims to court culminated in a situation in which citizens hardly exercised or enjoyed the benefits such rights bestowed. The cumulative effect of this was that, while environmental rights formed a visible part of the environmental regulatory framework, they were hardly used as a complement to other regulatory efforts.

It is against this backdrop that, in 2013, the country enacted a new Constitution which entrenched environmental rights in section 73 of the Declaration of Rights. Section 73(1)(a) provides that 'every person has the right to an environment that is not harmful to their health or well-being', and section 73(1)(b) that

[e]very person has the right to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting economic and social development.

In addition to this, section 62 of the Constitution grants every citizen the right of access to information. To complement this, section 85 of the Constitution provides access to court for any individual whose rights are infringed. Read with section 73, these rights ensure that necessary substantive and procedural rights for enjoying the right to a clean environment are available to all citizens.³⁵

Entrenching environmental rights in the Constitution in this manner is a notable development to the extent that it suffices as recognition of the prominent role that such rights play as part of the environmental regulatory framework. Despite this, it is clear by now that, if such rights are to serve as a useful complement to environmental protection efforts, they should be accompanied by institutional measures to educate citizens on the rights and the extent to which they can exercise them and enjoy the benefits these rights bestow. In addition, there is a need for institutional measures to assist litigants in bearing the costs of litigation.

35 See Feris & Tladi (n 2 above) 263, who note that 'environmental laws should provide not only for the substantive aspects of environmental protection, but also for related procedural safeguards such as standing, access to information and just administrative action'.

3.1 Education

Educating the public on environmental rights is particularly important because it is often the case that violators, and potential violators, of these rights are very knowledgeable about the content of these rights. As such, educating the public on these rights becomes an important way of empowering them to exercise them against potential, and actual, violators.³⁶ Importantly, as McGrath appositely notes, albeit with reference to public interest litigation, education is important because:³⁷

Knowledge ... is crucial for effective ... litigation to protect the environment. The environmental legal system is often complex, convoluted and illogically structured with multiple legislative schemes and government administrators. Complex issues of law and fact commonly arise with which ordinary members of the community are unfamiliar.

Against this backdrop, it becomes apparent that one of the major failures under the pre-2013 Constitution, the Zimbabwean environmental rights regulatory framework, which compromised citizens' exercise and enjoyment of their environmental rights, was the fact that citizens were not effectively educated on the existence of such rights. In addition, little was done to educate citizens on the importance attaching to environmental rights through concerted efforts by the state to meet its positive obligation to ensure citizens lived in a clean environment.³⁸ This was true despite the fact that various sources of environmental rights consistently recognised the existence of a positive obligation on the state to ensure that citizens lived in a clean and healthy environment. For instance, there has always been a positive obligation on the state not to interfere with citizens' enjoyment of their rights to live in a clean environment inferred from fundamental rights such as the right to life.³⁹ In addition, it was accepted in terms of the common law that an injured party could take the state to task where their rights were threatened or infringed by state action. A similar positive obligation to ensure that citizens lived in a clean environment suitable for their development was also apparent from article 24 of the African Charter, which Zimbabwe ratified in 1986.⁴⁰ Separately, the existence of this positive obligation could be inferred from the environmental right as enshrined in section 4 of Zimbabwe's Environmental Management Act.

Importantly, a lack of education on the role that environmental rights played in allowing citizens to act to protect the environment on their own behalf when the state did not do so, and the state

36 S Leckie & A Gallagher *Economic, social and cultural rights: A legal resource guide* (2006).

37 McGrath (n 7 above) 334.

38 Boyle (n 8 above) 626-627.

39 Boyle (n 1 above) 5; Francioni (n 1 above) 43-44.

40 Boyle (n 1 above) 3-5; Francioni (n 1 above) 52.

frequently renege on its positive obligation to secure a clean environment for citizens in terms of these rights, culminated in a situation in which environmentally-deleterious activities were simply not taken by the public as violations of environmental rights. The impact of this was twofold. First, citizens did not see violations of environmental rights as meriting the commencement of rights-based actions in the protection of their environmental rights. Second, citizens' passivity with respect to exercising environmental rights and the consequent lack of public participation with respect to environmental protection created a situation in which the state did not feel compelled to put in place measures to secure a clean environment for citizens.

In light of this history, it was reasonable to expect that, following the entrenchment of environmental rights in section 73 of the Constitution, a concerted effort would have been made to educate citizens on the existence of these rights so that they would understand them and how to use them. Certainly, it merits consideration that the manner in which Zimbabwe transitioned to a new constitutional dispensation meant that the existence of an environmental right, in theory at least, received extensively more publicity than it had before. This was largely due to the fact that the acceptance of the Constitution into law was based on a 'yes' vote in a referendum held in 2013.⁴¹ Importantly, in the build-up to the referendum, most Zimbabweans got familiar with various aspects of the Constitution and, in particular, the Declaration of Rights. In addition, it is also worth noting that following this process, a directive on the state to educate citizens on the Constitution through different avenues was included in section 7 of the Constitution.⁴² In addition, a Human Rights Commission was created and tasked with, *inter alia*, the promotion of awareness of and respect for human rights and freedoms at all levels of society, the promotion of the protection, development and attainment of human rights, and conducting research into issues relating to human rights and freedoms and social justice.⁴³

Of note, however, anecdotal evidence suggests that, while the collection of fundamental rights enjoyed extensive publicity during the referendum process, little was done to educate citizens on how to use these rights and make them work for them. Indeed, it can reasonably be argued that, presently, the public seem to be as knowledgeable about environmental rights now as they were prior to the coming into effect of the Constitution. This is despite the fact that it was quite clear, in light of Zimbabwe's history, that the education of

41 The Referendum was held on 16 and 17 March 2013.

42 Avenues include (a) translation of the document into all officially-recognised languages and wide dissemination; (b) teaching of the Constitution across all levels; and (c) encouragement of all persons and organisations to disseminate awareness and knowledge of the Constitution throughout society.

43 See sec 243 of the 2013 Constitution.

citizens on the importance of environmental rights needed to be enhanced and, as such, needed to be an issue that received attention in the Constitution. Similarly, while the turn to a Human Rights Commission is laudable, the Commission is tasked with supporting and promoting all human rights. This is plausible in theory, but the Zimbabwean experience suggests that it is likely that the focus of the Commission will be drawn to the more traditionally-established rights, such as the right to life, privacy, expression and perhaps minority rights, which have increasingly become a prominent feature of rights discourse in Zimbabwe. There is unlikely to be much attention paid to environmental rights. Indeed, it is telling that while the functions of the Commission are couched in broad and general terms, the Commission is specifically directed to 'visit and inspect prisons, places of detention, refugee camps' and 'places where mentally-disordered or intellectually handicapped persons are detained'.⁴⁴

A more preferable approach therefore, would have seen guidance drawn from the Indian approach, where article 48A of the country's Constitution provides that '[t]he state shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country'.⁴⁵ Instead, what has emerged is a generic and qualified obligation on the state to take 'reasonable legislative and other measures, within the limits of the resources available to it, to achieve progressive realisation of the rights' in section 73 of the Constitution. Such a qualified and generic clause is simply not enough considering that, in the Zimbabwean context, significantly more needs to be done by way of directing the legislature to craft legislation and measures to ensure citizens enjoyed their rights. In addition, the obligation on the state enshrined in section 73 is too remote, considering that the state has traditionally reneged on its positive obligation to secure a clean environment for citizens. As such, it is unlikely that the qualified positive obligation on the state to secure a clean environment for citizens in section 73 will yield any real behavioural change on the part of the state. A more likely scenario is that the state will rely on the disclaimer in section 73 as justification for reneging on its positive obligations to secure a clean environment for citizens. In light of this, a markedly more assertive obligation on the state to prevent ecological degradation and promote conservation needed to be drafted into the Constitution, following the Indian example. As it stands, it is quite likely that citizens remain inclined to perceive environmentally-deleterious activities as statutorily prohibited acts rather than morally-reprehensible criminal acts.

3.2 Litigant support

One of the central qualities of a rights-based approach to enforcement, be it in environmental protection or with respect to

⁴⁴ See sec 243(k) of the Constitution.

⁴⁵ Boyle (n 1 above) 8.

citizens' enjoyment of other rights, is that it is predominantly based on a proactive party bringing, or threatening to bring, litigation against an offending party.⁴⁶ Importantly, with respect to environmental rights, this often means that whether such rights are exercised or enjoyed and used as a complement to other enforcement efforts, often depends on parties who suffer harm, or wish to act in protection of the environment from a public interest basis, having the capacity to bring, or threaten to bring, environmental rights-based litigation. However, the difficulty that such an approach poses to citizens' actual exercise or enjoyment of environmental rights is that litigation is an expensive affair. Without the financial resources to bring litigation, it is difficult to bring, or threaten to bring, environmental rights-based litigation. In order to counteract this, it becomes important at the institutional level to ensure that measures are in place to assist litigants to meet the costs of litigation and, in this way, preclude economic barriers limiting the exercise and enjoyment of their environmental rights.

Certainly, under the new Zimbabwean constitutional dispensation, there has been an apparent effort made to try and ensure that litigants gain access to court.⁴⁷ Most notably, this has been attempted through a turn to a broad approach to *locus standi*. To this end, section 85(1) of the Constitution provides access to court to persons acting in their own interests, on behalf of another person, as a group or class, in the public interest, and as an association acting in the interests of its members, alleging that any fundamental right in the Declaration of Rights has been infringed or is likely to be infringed.

Broadening *locus standi* in this manner is a laudable development considering that such a move has traditionally been shown to aid litigants in meeting litigation costs across various jurisdictions.⁴⁸ This is because broadening *locus standi* allows deep-pocketed litigants, who are not necessarily the direct victims of some harmful act, to bring environmental rights-based litigation in protection of the environment.⁴⁹ In addition, such deep-pocketed individuals now have room to financially assist those wishing to bring public interest litigation based on environmental rights.

It is worth noting, however, that broadening the pool of potential litigants does not necessarily mean deep-pocketed individuals will begin to bring environmental rights-based claims. This is particularly true of Zimbabwe where, even prior to the ongoing economic crisis, there have not been instances in which such deep-pocketed individuals have brought public interest litigation, or leant their

46 See, however, Boyle (n 1 above) 1-3.

47 Timoshenko (n 3 above) 127; Boyle (n 1 above) 10; A Hurrell & B Kingsbury *The international politics of the environment* (1992) 3; JL Dunoff 'From green to global: Toward the transformation of international environmental law' (1995) 19 *Harvard Environmental Law Review* 282-283.

48 McGrath (n 7 above) 335-340.

49 Preston (n 18 above) 8-13; McGrath (n 7 above) 325-331.

support to such litigation. In addition, broadening *locus standi* does little to assist the individual rights holder who wishes to pursue environmental rights-based litigation. In light of this, it becomes particularly important to consider that, beyond broadening the pool of potential litigants, little has been done at the institutional level to ensure that litigants receive financial support in bringing environmental rights-based claims to courts. As such, many of the deficiencies which attached to litigant support prior to the transition to constitutional environmental rights remain.

Certainly, with respect to the provision of fundamental rights in constitutions, most constitutions are best described as framework legislation. This is a reference to the fact that declarations of rights in constitutions typically contain basic fundamental rights provisions with the expectation that the legislature will subsequently craft more comprehensive legislation which gives effect to rights contained in the constitution.⁵⁰ It may have been unreasonable, therefore, to have expected the Zimbabwean Constitution to make provision for litigant support in the Declaration of Rights. However, it was certainly not unreasonable to expect the drafters to include in the Constitution provisions asserting an obligation on the state or the legislature to put in place measures to ensure that citizens exercised their rights where they so wished and, as such, would enjoy the benefits these rights bestowed.⁵¹ Indeed, in light of the experience with environmental rights in Zimbabwean law, such a provision was necessary even if this obligation would have been qualified by the usual disclaimer based on the availability of resources.

This is certainly not a far-fetched proposal, considering that there was already an environmental law framework in place, established by the Environmental Management Act, which carried provisions that established funds for environmental protection and management. For instance, section 48 of the Environmental Management Act makes provision for an Environmental Fund which has already been established. To date, functions of the Fund have been limited to such endeavours as the standardisation of environmental management, financing the extension of environmental management services to

50 McGrath (n 7 above) 349-353.

51 Here, it is useful to bear in mind that the goal of most constitutions, codified, written or unwritten, is to attain constitutionalism. See H Barnett *Constitutional and administrative law* (2003) 9; M Ryan *Unlocking constitutional and administrative law* (2007) 13; AW Bradley & KD Ewing *Constitutional and administrative law* (2007) 4-5. As such, there is no prescribed template for the form a Constitution should take. All that matters is that it facilitates the attainment of constitutionalism. This is arguably the reason why written constitutions assume different forms with provisions varying based on what the pursuit of constitutionalism requires in a particular jurisdiction. In light of this, and considering the context in which environmental rights were being included in the Constitution, it was reasonable to expect a more assertive obligation on the legislature to put in place measures to ensure that citizens exercised their rights where they so wished and, as such, would enjoy the benefits these rights bestowed.

under-serviced areas, and facilitating, for the benefit of Zimbabwe, the transfer of environmental management services technology from foreign providers of such technology.⁵² It would not have been unreasonable, therefore, to extend the functions of the Fund to assisting litigants in bringing cases to court.

Such a proposal is also not far-fetched when one considers that the directive on the legislature to craft legislation to assist citizens in bringing rights-based litigation could have been the basis for the turn to laws containing measures to facilitate the abatement or removal of prohibitive costs, as has occurred in other jurisdictions.⁵³ For instance, in Scotland, the step was taken to ensure that individuals or environmental pressure groups bringing environmental cases against public bodies would be able to apply for a protective expenses order, limiting their liability for the other side's costs to £5 000. In addition, a cap has also been placed on public bodies' liability for the applicant's expenses.⁵⁴

These are all realisable institutional measures which could have been adopted into Zimbabwean law at the time of formulating and drafting the 2013 Constitution through the inclusion of a provision directing the legislature to enact legislation facilitating citizens' enjoyment of their environmental rights in section 73 or in section 85. That none of this was done means that there remains the possibility of litigants bearing the costs of litigation on their own. Indeed, as it stands, the possibility remains that citizens' full exercise or enjoyment of environmental rights enshrined in the Constitution will be restricted based on cost-related reasons.

4 Conclusion

Zimbabwean law has historically recognised the important role that environmental rights play within the environmental law regulatory framework. Despite this, there have been very limited efforts at the institutional level to ensure that citizens actually exercised and enjoyed their rights. If anything, institutional deficiencies and inadequacies culminated in Zimbabweans being unable to fully exercise or enjoy the benefits bestowed by their environmental rights.

Against this backdrop, the inclusion of environmental rights in section 73 of the 2013 Constitution stands as a momentous achievement. It is not often that environmental rights are accorded

52 See secs 52(a) - (j) of the Environmental Management Act.

53 McGrath (n 7 above) 335-340.

54 Scotland's Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013.

constitutional importance.⁵⁵ As such, including environmental rights in the Declaration of Rights of the Constitution affirms the country's recognition of the important role that environmental rights play in any environmental regulatory framework.

Importantly, while such a development merits some celebration, the Zimbabwean history with environmental rights has shown it to be true that, while the important role that environmental rights play in the regulatory framework has been recognised, there has been less emphasis placed on putting in place institutional measures to ensure that citizens actually exercise and enjoy these environmental rights. Importantly, under the pre-2013 environmental regulatory framework, the absence of these institutional measures as a complement to environmental rights compromised citizens' exercise or enjoyment of these environmental rights. It was reasonable to expect, therefore, based on this history, that with the coming into effect of constitutional environmental rights, a concerted effort would be made to ensure that the environmental rights in the Constitution would be complemented by adequate institutional measures to ensure citizens actually exercise and enjoy their environmental rights.

In conclusion, and based on an analysis of the present rights-based approach adopted as a complement to the Zimbabwean environmental regulatory framework, the preceding discussion has highlighted that, while the inclusion of the rights in the Constitution is a laudable development, the same institutional inadequacies which compromised citizens' exercise and enjoyment of their environmental rights prior to the Constitution remain. Certainly, there is still time to address these institutional inadequacies and facilitate citizens' exercise and enjoyment of their rights. However, such efforts would need to be measured and intricate. Considering that this could all have been addressed during the constitution-making process, the fact that this was not done stands as a significant and missed opportunity to address those institutional inadequacies which culminated in barriers to citizens' enjoyment of their environmental rights.

55 Boyle (n 8 above) 627; Boyle (n 1 above) 7; D Shelton 'A background paper for the World Health Organisation' 22 (2002) http://www.who.int/hhr/information/en/Series_1%20%20Human_Rights_Health_Environmental%20Protection_Shelton.pdf (accessed 29 May 2015).

Cultural rights versus human rights: A critical analysis of the *trokosi* practice in Ghana and the role of civil society

Joseph Yaw Asomah*

Department of Sociology, University of Manitoba, Canada

Summary

In this article, I examine critically the culture versus human rights debate, and the crucial role and tactics of civil society organisations, drawing on insights from transnational advocacy networking, in the struggle to extend human rights to vulnerable people with reference to the trokosi practice in Ghana. This trokosi system turns virgin girls into slaves of the gods to atone for crimes committed by their family members. Theoretically, universal human rights must take precedence over any demand for cultural rights. In practice, however, the actual enforcement of human rights laws that conflict with other cultural values and practices can be more messy and complex than it is often conceptualised. Essentially, universal human rights accommodate, recognise and promote cultural rights; however, the latter ends at a point where its observance is likely to result in the violation of the fundamental human rights of others. I conclude that, although the call for cultural pluralism and the need to celebrate and respect the diversity of cultures sound legitimate, this demand cannot be allowed to trump the minimum package of the fundamental human rights that protect human dignity, wellbeing and integrity within the context of human rights protocols that state parties already have ratified. Yet, for this to materialise, stronger civil society organisations with a solid broad-based networking capacity and tenacity of purpose are crucial. This article helps to extend our current knowledge of human rights struggles and the implications these have for the furtherance of universal human rights.

Key words: *universal human rights; cultural relativism; trokosi; civil society; transnational advocacy networking; Ghana*

* BA (Ghana); asomahj@myumanitoba.ca

1 Introduction

In December 1948, the ratification of the Universal Declaration of Human Rights (Universal Declaration) became a reality. In general, this human rights framework reflects a broader consensus and a monumental commitment of the international community to observe and guarantee a minimum package of fundamental human rights that must be enjoyed by everyone on the sole ground of being human. The central thrust of universal human rights is to protect human dignity and integrity from all manner of actions and practices – such as slavery, torture, oppression, tyranny, genocide – that are not only de-humanising, but also threatening to the survival and wellbeing of individuals, groups and humanity as a whole. Since its ratification, the universal human rights framework has provided the world with a powerful discourse and framework that legitimise struggles against violations of the fundamental human rights – political and civil rights, economic, social and cultural rights.¹

In spite of the existence of this powerful framework, human rights violations continue to be witnessed in many forms and are of varying intensity. In particular, the rights of children, women and girls continue to be disproportionately violated with impunity. Evidence suggests that children spared war may still be vulnerable as they are confronted with extremely limited access to education, health care, welfare and food. Consequently, vulnerable young girls are subject to sex trade, sexual violence and abuse. There are over one million child prostitutes across the globe. It is estimated that there are 20 000 under-age prostitutes in Thailand, 575 000 in India, and 500 000 in Brazil.² Additionally, female mutilation and forced marriages at a young age continue to confront young girls. These occurrences culminate in shattering their future dreams of pursuing gainful careers. Clearly, the existence of the several international legal instruments guaranteeing the rights and protection of children appears to have had little utility in practice for many (women, girls and children), especially in developing countries, as their rights continue to be violated.³

While there are many factors accounting for this phenomenon, such as the struggle over economic resources, one of the most pressing issues affecting the rights of women and girls, in developing countries in particular, is the demand for cultural rights that conflict with the ethos of the universal human rights. Women's rights are often, but not exclusively, violated on cultural grounds. In the

1 MR Ishay *The history of human rights laws: From ancient times to the globalisation era* (2008).

2 Ishay (n 1 above) 302.

3 Y E Turk & P Bandana 'Linking research, policy and action: A look at the work of the Special Rapporteur on Violence against Women' (2012) 60 *Current Sociology* 142-160.

dominant patriarchal cultural context, universal human rights are labelled as a project of 'Western imperialism'. In effect, culture can be invoked to assert human rights and, at the same time, it can be deployed to rationalise the violation of the rights of others. A case in point is the *tokosi* system in Ghana. This is a cultural and religious practice that is observed not only in Ghana, but also in Benin and Nigeria. It is a practice where the vestal virgin girls are taken to shrines to serve the gods permanently as a form of 'reparation for crimes' committed by their family members.⁴ It is estimated that there are over 5 000 victims of this cultural practice in Ghana alone, and 29 000 to 35 000 in the other remaining countries.⁵ These victims are 'generally overworked', overly subjected to sexual intercourse, and 'usually in poor health' due to the absence of medical facilities at the shrines.⁶

While the existing body of literature has enhanced our overall understanding of the *tokosi* system, a critical analysis of this traditional practice in the context of the culture versus human rights debate, with reference to the ethics of cultural preservation, is underexplored. Additionally, an analysis of the involvement of civil society and the tactics it deploys to ensure a balance between a cultural preservation and a respect for human rights has not been undertaken. The article intends to fill these research gaps, using the *tokosi* system in Ghana as a case study. This type of case study may, in turn, help to broaden our current understanding of this highly-contested terrain, the culture versus human rights debate, to inform human rights practice, observance, and advocacy. More specifically, the article addresses the following questions: Should universal human rights be rejected on the basis of cultural rights (or preservation) in reference to the *tokosi* system in Ghana? What role does civil society play in Ghana with regard to the *tokosi* system to free the victims? What tactics do civil society organisations in Ghana employ in their struggle to liberate the victims of the *tokosi* practice in Ghana, and what are the implications for human rights struggles?

2 Universal human rights and cultural relativism

The *tokosi* system is best analysed in the context of universal human rights and cultural relativism. Cultural relativism implies a respect for cultural differences and, therefore, calls for sensitivity to cultures other than one's own. It also draws attention to cultural pluralism, and the

4 EA Archampong 'Reconciliation of women's rights and cultural practices: Polygamy in Ghana' (2010) 36 *Commonwealth Law Bulletin* 325.

5 SC Aird 'Ghana's slaves to the gods' <http://www.wcl.american.edu/hrbrief/v7i1/ghana.htm> (accessed 31 March 2014).

6 NA Bastine 'The role of the media in protecting women's and children's rights in democratic Ghana: Lensing the *tokosi* system in Ghana' (2012) 1 *Africa Media and Democracy Journal* 1.

need to celebrate and respect this diversity of cultures.⁷ In the context of a human rights framework, proponents of cultural relativism argue that local cultures are capable of ensuring human dignity. In essence, the pro-cultural-relativist camp contends that the observance of universal human rights is 'intrusive and disruptive' to the deeply-held traditional mechanisms for the protection of lives, liberties, freedoms and security of people.⁸ This presupposes that human rights can be culturally specific. However, the assumption undergirding this argument appears to be flawed. The blatant violation of the human rights of people, particularly in the case of women and children in the global south, as evidenced by female sexual mutilation, the *trokosi* system,⁹ and so forth, weakens this claim. In this light, granting the demand for culturally-based human rights can to some extent be equated to the legitimisation of human rights abuses. As long as there must be a space for the expression of cultural uniqueness and identity, there must equally be a space for a minimum standard of guarantees to avoid the exercise of arbitrary discretionary powers, which tends to create room for abuse as a result of limited commonly-enforceable standards. If all cultures equally ensure the protection of the universal rights of people, then the existence of the universal human rights framework logically should not be a subject of controversy, given that it presupposes an existence of a shared objective of promoting human dignity. This shared vision should then be a unifying force, rather than a divisive one.

The second argument for cultural relativism is that it is ethically wrong and morally unjust to have a universal package of moral or legal standards that guarantees human freedoms and protection, because of the plurality and the context-specific nature of moral values and aspirations embedded in different cultures.¹⁰ This suggests that no particular set of moral codes is superior to another. For this reason, the universal human rights project is depicted as a 'cultural imperialism' from the west. Mutua,¹¹ thus, argues that the universal human rights project is an attack on the very cultural fabric of the states regarded as inferior compared to Western standards. Thus, the human rights project is an orchestrated attempt, not only to 'civilise' the 'other', but also to ensure the wholesale embracement and practice of the liberal-multiparty democracy and capitalism that advance Western interests. Mutua is right to some extent, because it is erroneously assumed that the enjoyment of universal human rights

7 RA Wilson *Human rights, culture and context: Anthropological perspectives* (1997).

8 D Ayton-Shenker 'The challenge of human rights and cultural diversity' (1995) 2, <http://www.un.org/rights/dpi1627e.htm> (accessed 30 March 2014).

9 RK Ameh 'Reconciling human rights and traditional practices: The anti-trokosi campaign in Ghana' (2004) 19 *Canadian Journal of Law and Society* 51-72.

10 Ayton-Shenker (n 8 above).

11 M Mutua 'Savages, victims, and saviours: The metaphor of human rights' (2001) 42 *Harvard International Law Journal* 201-245.

follows – almost automatically – upon the adoption of capitalism and multi-party liberal democracy.

Similarly, Mégret suggests that the pursuit of universal human rights is almost synonymous with the furtherance of political liberalism, such as the rule of law, good governance, and market capitalism.¹² Therefore, there is a greater emphasis on cultural and political rights without equal emphasis on economic and social rights, such as the right to education, to health, to decent housing and to an adequate standard of living. In this regard, human rights may be viewed as an extension of the civilising mission that underpinned colonialism. Both Mégret and Mutua seem to argue that the human rights project is a smokescreen for a subtle strategy that expands Western imperialism and liberalism to advance Western interests. To some extent, their point is understandable because the embracement of Western culture, Western-style democracy, and capitalism is largely touted as a prerequisite for the enjoyment of human rights. This is not necessarily the case, as Mégret and Mutua convincingly demonstrate.

However, the characterisation of the human rights project as an imposition of Western-originated ideology and philosophy to serve solely Western interests tends to distort the reality of human rights abuses, and the utility of human rights projects in general. In particular, it downplays the gross violations of the rights of women and girls in many parts of the world, and the need to arrest the situation. In essence, universal human rights do not constitute a particular 'cultural standard', but 'rather one legal standard', which reflects a collective consensus of the international community, although law to some extent often reflects cultural values. Consequently, human rights cannot solely be ascribed to any particular religion or cultural orientation.¹³ The origin of human rights should not even matter so much if, indeed, they serve and advance the common good of humanity.

The demand for cultural preservation disproportionately hampers women's struggle for the full enjoyment of universal human rights. As Erturk argues, '[w]omen's human rights discourse and movements have become entangled within a culture-versus-rights dualism'.¹⁴ This suggests that the demand for cultural rights may also constitute a smokescreen for serving the interests of patriarchal culture, a male-dominated society that ensures the subordination and the oppression of women and girls. In addition, cultural relativism also overlooks the possibility for cultural dynamism as an essential characteristic of culture. This tendency is likely to stifle local cultures of the opportunities for needed social transformation. The quest for cultural

12 F Mégret 'Where does the critique of international human rights stand? An exploration in 18 vignettes' (2010) Faculty of Law, McGill University.

13 Ayton-Shenker (n 8 above) 2-3.

14 Y Erturk 'Culture versus rights dualism: A myth or a reality?' (2012) para 1 <http://www.opendemocracy.net/5050/yakin-erturk/culture-versus-rights-dualism-myth-or-reality> (accessed 20 March 2014).

preservation should be assessed solely on the basis of its usefulness, not in the name of the wholesale preservation of cultural identity and traditions when, in fact, doing so would result in the erosion of the dignity, liberty, security and freedoms of others. This is underpinned by what Jeffers refers to as the 'ethics of cultural preservation'.¹⁵

From the lens of the universal human rights framework, cultural relativism should not be the foundation for the ongoing violation of the fundamental human rights of people.¹⁶ Universal human rights accommodate, recognise and promote cultural rights such as the 'protection of cultural heritage and the freedom of thought, conscience and religion'.¹⁷ Nonetheless, this recognition of cultural rights ends at a point where the observance of cultural or religious practices is likely to result in the violation of the rights of others. International law outlaws the exercising of one's rights at the expense of the rights of others. Universal human rights are symbolic of the general will and commitment of the international community to respect and protect human dignity, which carries greater legitimacy, primacy and urgency than any cultural interest. In effect, human rights reflect a broader consensus with regard to human dignity than any particular culture. By implication, human rights should not be rejected on the sole basis of cultural norms, practices and values.

Granting the demand for culturally-based observance of human rights would potentially undermine and conflict with the spirit of the universal human rights framework. Culturally-specific human rights will, most likely, result in the creation of arbitrary discretions on the part of states. This in turn will create a vacuum for the weak enforcement of human rights laws as a result of differences in cultural norms and values, some of which are in stark conflict with the human rights framework. This possibility for abuse is clearly articulated by Ayton-Shenker, arguing:¹⁸

If cultural tradition alone governs state compliance with international standards, then widespread disregard, abuse and violation of human rights would be given legitimacy.

The reasons for the potential abuses are not far-fetched if culturally-based human rights were strictly the norm. First, some states will have an excuse for shirking their international human rights obligations on the ground of cultural relativism. Further, cultural ideals that conflict with human rights would be given primacy.

It is worth mentioning that I do not discount the importance of cultural relativism nor cultural rights in absolute terms in matters

15 C Jeffers 'The ethics and politics of cultural preservation' (2014) Workshop, University of Manitoba.

16 Erturk (n 14 above).

17 Ayton-Shenker (n 8 above); Deinayurveda.net 'Universal human rights and cultural relativism' (2011) <http://www.deinayurveda.net/wordpress/2011/04/saving-the-bedouin-heritage-and-biodiversity/> (accessed 21 October 2014).

18 Ayton-Shenker (n 8 above) para 9; Deinayurveda.net (n 17 above).

relative to universal human rights. In fact, on the contrary, cultural relativism is particularly relevant in striking a balance between any claim to cultural rights and universal human rights. For instance, new emerging issues being framed as human rights discourses, such as same-sex marriages, are particularly worrying and contentious based on the differences in cultural values and orientations across the globe. Thankfully, cases brought before the European Court of Human Rights, where the complainants essentially pleaded with the Court to grant same-sex marriage as a human right, have not been upheld; article 12 of the European Convention on Human Rights that deals with marriage guarantees only marriage rights, or the right to marry, in conformity with national laws.¹⁹ This ruling demonstrates that universal human rights laws accommodate positive cultural values and heritage based on the respective national legal framework. The Court's decision reinforces the relevance of respecting cultural rights and cultural relativism within the bounds of national laws in general, and in the African context in particular, to help guarantee the sanctity of positive African cultural and religious beliefs, traditions and practices that are threatened by these new human rights movements. What this article suggests, however, is that in situations where states have ratified protocols on specific human rights issues, such as the right to human dignity, education, health and to choose a marriage partner, as enshrined, for instance, in the respective national constitutions, the African Charter on Human and Peoples' Rights (African Charter) and the Protocol to the African Charter on the Rights of Women (African Women's Protocol), any claim to cultural rights to the contrary should not be granted.

3 African Charter on Human and Peoples' Rights

Generally, African countries have re-affirmed their recognition of, and commitment to, promoting and safeguarding human rights in Africa; as exemplified in the African Charter,²⁰ the African Charter on the Rights and Welfare of the Child (African Children's Charter)²¹ and the African Women's Protocol.²² The Women's Protocol notes that articles

19 S Doughty 'Gay marriage is not a "human right": European ruling torpedoed coalition stance' (2012) <http://www.dailymail.co.uk/news/article-2117920/Gay-marriage-human-right-European-ruling-torpedoes-Coalition-stance.html> (accessed 13 June 2015); T Rokins 'Same-sex marriage and human rights' 27 March 2013 http://www.huffingtonpost.co.uk/tom-rokins/samesex-marriage-and-huma_b_2549924.html (accessed 13 June 2015).

20 African Charter on Human and Peoples' Rights (1981) http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (accessed 10 June 2015).

21 African Charter on the Rights and Welfare of the Child (1990) http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf (accessed 10 June 2015).

22 Protocol to The African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) http://www.achpr.org/files/instruments/womenprotocol/achpr_instr_proto_women_eng.pdf (accessed 10 June 2015).

60 and 61 of the African Charter do recognise regional and international human rights instruments and African practices compatible with international norms regarding human and peoples' rights.

Specifically, on the issue of harmful cultural practices, article 5 of the African Women's Protocol states that '[s]tate parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards'. Harmful practices, according to the Protocol, are defined as 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity'.²³ Based on this definition, I contend that the *trokosi* practice is clearly one of such harmful practices; therefore its continued observance is in contravention of this provision. The African Women's Protocol, therefore, demands of the signatories (the state parties) to take concrete steps, such as the enactment and enforcement of legislative instruments that prohibit this practice, to enforce this provision.

Additionally, the African Children's Charter recognises in its Preamble that²⁴

the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.

The Charter further states that the child – any person under the age of 18 – shall have the right to education and health services based on articles 11 and 14 respectively, while articles 15 and 16 of the Charter articulate protection against child labour, on the one hand, and child abuse and torture, on the other. In particular, article 21 of the Charter proffers protection against harmful social and cultural practices. The article states:

State parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

Invariably, the continuous adherence to the *trokosi* practice is in clear violation of these provisions. In fact, the African Charter accommodates positive African cultural values, morals, heritage, practices and customs that are not prejudicial to the health, life, and dignity of the African peoples, as articulated, for instance, in article 11(1)(c) of the African Children's Charter.²⁵ Hence, I contend that a

23 Art 1(g) African Women's Protocol.

24 Art 1 African Children's Charter; PR Ghandi *International human rights documents* (2006) 443.

25 Art 11(1)(c) African Children's Charter.

cultural practice, such as the *tokosi* practice, which is inconsistent with the African Charter and any international norms on human rights which this Charter recognises, should not be tolerated.

To help safeguard and promote the African Charter, the African Commission on Human and Peoples' Rights (African Commission) was established pursuant to article 30 of the African Charter.²⁶ Further, based on article 45, the African Commission is mandated, among others, to investigate concerns relative to the promotion of human and peoples' rights in Africa, to prescribe remedial measures, and to co-operate with other African and international institutions involved in the promotion of human and peoples' rights.²⁷ Similarly, the African Committee on the Rights and Welfare of the Child (African Children's Committee) is mandated to ensure that state parties safeguard and advance the fundamental rights and welfare of the African child, grounded in article 32 of the African Children's Charter.²⁸ This demonstrates, at least theoretically, that signatories to the African Charter acknowledge the need to protect and advance the ideals of fundamental human rights, including the rights and welfare of the child. Nevertheless, the challenge is with enforcement in terms of taking practical steps to give effect to these general human rights protocols.

In sum, my discussion of universal human rights is within the context of human rights that the nation states already have ratified, presumably having taken into consideration their context-specific cultural rights. In this regard, my contention is that any claim to the exercise of any cultural right, as exemplified in the *tokosi* scenario, that is inconsistent with the furtherance of the fundamental human rights to which a particular state, in this case Ghana, is already a signatory, should not be entertained. In fact, failure to do this on the part of the state has the potential of opening up a floodgate of similar claims to cultural rights to preserve and strengthen harmful practices that are prejudicial to the health, dignity, freedom and security of innocent people, as symbolised in the case of the virgin girls who are being punished for crimes they never committed.

4 The *tokosi* system in Ghana

The *tokosi* system is an African traditional religious practice that exists in Ghana, Benin, Togo, and the Yorubaland in Nigeria. In Ghana, this cultural practice has been observed for several centuries among the Ewes of Tongu and Anlo in the Volta region, and the Dangmes of the

26 Art 30 African Charter.

27 Art 45 African Charter.

28 Art 32 African Children's Charter.

greater Accra region.²⁹ *Trokosi* means 'the slaves of the gods'.³⁰ Young virgin girls, usually between the ages of six and eight years, are sacrificed to the gods, as a form of reparation for the crimes committed by their relatives.³¹ For instance, Abla Kotor's family sent her, at the age of six, to the Awlo-Korti Shrine in Tefle (Volta region, Ghana) to atone for a crime which her father had committed (her father had raped his own niece). As Aird argues:³²

Abla must now live and work for the local ... priests ... where she faces mental, physical, and sexual abuse, in hopes that by so doing, the gods will not bring vengeance upon the Kotor's family as retribution for the father's crime ... Denied access to education, prohibited from leaving, banished from family home ... Abla is just one of thousands of girls and women enslaved in this manner.

Abla's case sums up the nature of the *trokosi* practice that is based on the religious belief that crimes such as murder, incest, stealing and adultery are punishable by sending a virgin girl to the shrine of the gods.³³ In effect, failure to do so is believed to trigger calamities – such as death, diseases and economic hardship – by the gods on the families involved. The period of enslavement for the slave girls is a never-ending penance. Consequently, upon the death of a *trokosi*, the offending family is required to send another virgin girl to replace her. The priests, who are the custodians of the shrines of the gods, begin to have sexual intercourse with the girls as soon as they become teenagers.³⁴ Further, the responsibility of caring for the children, the products of these sexual relationships, falls on the slave girls. In one instance, one priest fathered more than 400 children in his 37 years of priesthood.³⁵

In general, Akpabli-Honu and Agbanu³⁶ observe that four distinct categories of children are associated with the *troxovi* shrine in the Volta region of Ghana. They investigated primarily the freedom (if any) of these categories and concluded that the freedom of the *trokosis*, the primary focus of this article, has been curtailed on

29 Bastine (n 6 above).

30 AB Boaten 'The *trokosi* system in Ghana: Discrimination against women and children' in A Rwomire (ed) *The African women and children: Crisis and response* (2001) 91.

31 As above.

32 Aird (n 5 above) 1.

33 Bastine (n 6 above).

34 British Broadcasting Corporation 'Ghana's trapped slaves' http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/1158115.stm (accessed 20 March 2014).

35 Boaten (n 30 above) 94.

36 K Akpabli-Honu & HK Agbanu 'Types and statuses of children of Troxovi shrines' (2014) 2 *International Journal of Humanities and Social Studies* 308-317.

account of ritualistic reparation, confirming other studies³⁷ that these victims are actually not free to live normal lives. Conversely, although the *troviwo*, one of the four categories that refer to the children born out of the chief priest's sexual relations with the *trokosis*, may benefit from formal education, as noted by Akpabli-Honu and Agbanu, most of them do not, the reason being that the chief priest, the proxy of the deity, often tends to have many children and this makes it practically impossible for him to sponsor all of them in school. To illustrate, Morklis³⁸ reported that one chief priest in Tongu (Ghana) fathered 522 children with 76 wives and an unspecified number of concubines; Kugogbe³⁹ reports similar findings. This situation is largely preventable if the *trokosi* victims were not in bondage that leads to 'forced' sexual relations with the chief priests, culminating in the birth of many children. Against this backdrop, International Needs Ghana (ING) has set up schools in the Tongu traditional area to help provide formal education for these children, as reported by Akpabli-Honu and Agbanu.⁴⁰

As noted earlier, the *trokosi* system is not recognised as a crime but rather a justice system that requires that a virgin girl be offered to serve and appease the gods for a crime (such as murder) committed by a family member.⁴¹ In this context, the practice of the *trokosi* justice system is believed to serve as a deterrence to ensure the prevention of crime in the *trokosi* jurisdiction, by way of warning people who intend committing a crime that they stand the risk of sacrificing their virgins to atone for such crime. What is problematic, though, with this assertion is that the wrongdoers get away with the crime they have committed, while the innocent virgin girls are punished and dehumanised as permanent slaves to the gods. This cultural practice reflects gender discrimination and serves the sole interest of the patriarchy. In this dominant patriarchal cultural context, the males are the authoritative figures, decision makers and custodians of the traditional practices; women often tend to have no say in traditional society, and this has facilitated the gross discrimination against them by their male superiors.⁴²

The adherents of African traditional religion argue that the *trokosi* practice does not constitute any human rights violations. They maintain that universal human rights are 'foreign, imported values

37 Aird (n 5 above) 1; Amev (n 9 above); Bastine (n 6 above); DY Dzansi & P Biga 'Trokosi - Slave of a fetish: An empirical study' (2014) 12 *Stud Tribes Tribals* 1-8 [http://www.krepublishers.com/02-Journals/T%20&%20T/T%20&%20T-12-0-000-14-Web/T%20&%20T-12-1-000-14-ABST-PDF/S-T&T-12-1-001-14-336-Dzansi-D-Y/S-T&T-12-1-001-336-Dzansi-D-Y-Tx\[1\].pdf](http://www.krepublishers.com/02-Journals/T%20&%20T/T%20&%20T-12-0-000-14-Web/T%20&%20T-12-1-000-14-ABST-PDF/S-T&T-12-1-001-14-336-Dzansi-D-Y/S-T&T-12-1-001-336-Dzansi-D-Y-Tx[1].pdf) (accessed 10 June 2015).

38 AEO Morkli 'The tradition behind the *trokosi* system' in Avt Ac V (ed) (1995) 2 *Progressive Utilisation Magazine* 2-5.

39 SK Kufogbe 'National study on the *trokosi* practice in Ghana' (2008), research report presented to International Needs, Accra, Ghana.

40 Akpabli-Honu & Agbanu (n 36 above).

41 As above.

42 As above.

that contradict African traditional values'.⁴³ They further contend that the *trokosi* system is a key component of the African traditional religion and culture, which is endorsed by the Ghanaian Constitution - through the provision on the freedom of religion as enshrined in article 21(1).⁴⁴ For this reason, any attack on the *trokosi* is invariably an attack on freedom of religion and worship and, for that matter, is unconstitutional. At the same time, they fail to recognise the rights of the victims of the *trokosi* system as guaranteed by the same Constitution that they draw on to assert their right to freedom of religion. Article 12(2) of the 1992 Constitution of Ghana affirms the fundamental human rights and freedoms of every citizen. This provision demands that people must not exercise their rights and freedoms in a way that leads to the violation or infringement of the rights and freedoms of others, as illustrated by the *trokosi* practice.⁴⁵

The violation of the universal human rights of the victims, as a result of the *trokosi* practice, takes many forms, such as enslavement, sexual exploitation and forced (child) labour.⁴⁶ Articles 16(1) and 16(2) of the Constitution of Ghana stipulate that no person shall be held as a slave or be subject to servitude. Additionally, article 26(2) of the 1992 Ghanaian Constitution outlaws any customary practice that de-humanises or endangers the physical and mental wellbeing of any citizen.⁴⁷ Accordingly, the *trokosi* practice violates these constitutional provisions that prohibit any form of slavery. Further, the *trokosi* practice places the victims at 'high risk of contracting sexually-transmitted diseases (STDS), such as HIV/AIDS', because the priests who sleep with them have many sexual partners.⁴⁸ Moreover, article 28(4) of the 1992 Constitution states that '[n]o child shall be deprived by any other person of medical treatment, education, or any other social or economic benefit by religion or other beliefs'.⁴⁹ The *trokosi* practice, therefore, denies victims access to education and medical treatment, and this further constitutes a violation of the Ghanaian Constitution. It also contravenes the United Nations Convention on the Rights of the Child, which provides for the right of the child to education and medical treatment.⁵⁰ In 1998 Ghana amended a

43 Ameh (n 9 above) 54.

44 United Nations Population Fund Ghana 'Liberating slaves and changing minds: Starting at grassroots' https://www.unfpa.org/endingviolence/html/pdf/chapter_ghana.pdf (accessed 20 March 2014); The government of Ghana '1992 Constitution of the Republic of Ghana' <http://www.ghana.gov.gh/index.php/constitution/395-1992-constitution-of-the-republic-of-ghana> (accessed 1 September 2014).

45 United Nations Population Fund Ghana (n 47 above).

46 Ameh (n 9 above).

47 Government of Ghana (n 44 above).

48 Bastine (n 6 above) 27.

49 Government of Ghana (n 44 above).

50 Boaten (n 30 above).

section of its Criminal Code to criminalise all 'customary or ritual servitude', which targets the *trokosi* practice in particular.⁵¹

Admittedly, there are varying estimates of victims of the practice. For instance, Agodzo and Morkli report 20 000;⁵² Dovlo and Kufogbe report 4 462;⁵³ while Nukunya and Kwafo put the estimate at 9 000.⁵⁴ ING's estimate is about 5 000 women and children, as reported by Kufogbe,⁵⁵ and Kufogbe reports that the Democracy and Human Rights Reports of the US State Department put the estimate at 100.⁵⁶ While these estimates may be inaccurate, the fact that this practice has not been abolished completely, despite the passage of a *trokosi* law criminalising it in Ghana, is clearly not in contention, making it concerning as indicated by the 2015 report of the African Children's Committee.⁵⁷

In sum, the fact that the *trokosi* practice is in contravention of the universal human rights of the victims and the Constitution of Ghana is not in dispute. The Constitution of Ghana, the African Charter, and particularly the African Children's Charter, the African Women's Protocol and international human rights laws and conventions require that universal human rights should take precedence over cultural rights to preserve the *trokosi* practice in this regard. This transition, however, does not take place automatically; otherwise the *trokosi* system would long have been a thing of the past in Ghana. This suggests the need for a stronger activism of civil society to exert pressure on states and society at large to respect, protect and guarantee the fundamental human rights of the vulnerable.

5 Conceptual overview of civil society

A growing body of research has documented the indispensable role of civil society in human rights struggles.⁵⁸ In effect, civil society deals

51 Amev (n 9 above).

52 D Agodzo 'Liberty comes to *trokosi* captives' (1996) 1 *Truth and Life* 20-21; Morkli (n 38 above).

53 E Dovlo & SK Kufogbe 'Baseline study of female ritual bondage in Ghana' (1997) unpublished research report, Accra, Ghana.

54 GK Nukunya & SK Kwafo 'Report on the *trokosi* system in South Eastern Ghana' (1998) unpublished research report, Accra, Ghana.

55 Kufogbe (n 39 above) 1.

56 Kufogbe 2.

57 African Children's Committee 'Committee on the Rights of the Child examines the report of Ghana' (2015) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15987&LangID=E> (accessed 10 June 2015).

58 OV Vieira & AS Dupree 'Reflections on civil society and human rights' (2004) 1 *Sur International Journal of Human Rights* 47-65; K Tsuitui & CM Wotipka 'Global civil society and international human rights' (2004) 83 *Social Forces* 587-620; MJ Magliano 'Civil society and the governability of migrations on the South American political agenda: The refuge in human rights' (2011) 20 *Espacio Abierto* 5-23; R Kunnemann, & S Monsalve Suarez 'International human rights and governing land grabbing: A view from global civil society' (2013) 10 *Globalisations* 123-139.

with the creation of the necessary 'conditions for validating and realising human rights', such as the promotion of rights discourse.⁵⁹ It 'amplifies the voices of particular interests' and constitutes a 'natural advocate for devalued invisible groups' through publicising injustice, and 'protecting private spaces from the state and market incursions'.⁶⁰ Civil society also intervenes and collaborates with legal and political systems to ensure social justice and progressive transformation.⁶¹

For the purposes of this article, I define civil society as any organisation that is not run by government, although it may receive funding from the state to enable it to function or run effectively. In this case, civil society includes non-governmental organisations (NGOs). I draw on the transnational advocacy network discussion of Keck and Sikkink, given that it is useful for analysing work done by NGOs at the national level.⁶² NGOs, domestically and internationally, constitute the nucleus of civil society and 'most advocacy networks, usually initiating actions and pressuring more powerful actors to take positions'.⁶³ They help bring new ideas on board, timely generate and provide information and 'lobby for policy changes'.

In recent years, international networking has increasingly become a strategy that NGOs rely on to connect with like-minded counterparts in order to share information, skills, strategies, and resources for advancing their common interests. Networking is particularly useful for the 'less powerful Third World actors' as it 'provides access, leverage and information', as well as funding, which otherwise would be almost impossible to obtain if the local NGOs were working on their own.⁶⁴ The unprecedented pace of globalisation has facilitated this networking through increased opportunities for domestic, regional and transnational contacts through cheaper air travel, new electronic and communication technologies – including the internet and the global web – that accelerate information flows within and among the local, the regional and the global levels.

NGOs creatively craft messages that significantly and positively transform public understanding of an issue to enable and guide relevant political action. This 'construction of cognitive frames' is central to the political strategies of the transnational networks that also adopt a number of tactics, including information politics, symbolic politics, leverage politics, and accountability politics.⁶⁵ Information politics is the capacity to convey 'politically usable information quickly and credibly' to anywhere that it is most likely to

59 Vieira & Dupree (n 61 above) 57.

60 Vieira & Dupree 56.

61 Vieira & Dupree 57; Ishay (n 1 above).

62 ME Keck & K Sikkink *Transnational advocacy network in international and regional politics* (1999).

63 Keck & Sikkink (n 65 above) 92.

64 As above.

65 Keck & Sikkink (n 65 above) 95.

have the greatest effect.⁶⁶ Fundamentally, it is about the ability to frame an issue to take on a new sense of urgency in a credible and legitimate manner that irresistibly and convincingly speaks to the major actors involved in a way that stimulates the greatest concerted action for redress. Leverage politics, basically, entails the capacity of NGOs to bring on board powerful actors who are more likely to influence a situation, while accountability politics essentially exert pressure on powerful actors to act on the promises and principles that they have officially ratified.

These insights from transnational advocacy network by Keck and Sikkink are particularly useful in examining the role and tactics used in the work performed in Ghana, which is at the national level, with respect to the struggle to free *tokosi* victims. This transnational advocacy network sheds light on the workings of the NGO called International Needs Ghana (ING) in its efforts to liberate the victims of the *tokosi* practice in Ghana. The operations of the ING in this liberation struggle will help contextualise the crucial role of civil society organisations, and the tactics it deploys in holding states accountable to respect, protect and guarantee, universal human rights, as required by international human rights law.

6 Struggles for the abolishment of the *tokosi* system in Ghana

The first attempt that focused on the abolition of the *tokosi* system occurred in 1923, when Daniel Nyagbledsi wrote two letters on different occasions to the Governor of the then Gold Coast (now Ghana), which was under British rule at the time.⁶⁷ He demanded the abolishment of the *tokosi* system. The Governor directed the Secretary of Native Affairs to investigate the issue. The District Commissioner, who was tasked to investigate this issue, concluded that the practice did not constitute a crime as long as the people involved continued to pay their levy to the Colonial Administration.

In another development, the Fetish Slaves Liberation Movement (FESLM), headed by Mark Wisdom, a minister of a local church, waged a war to end the *tokosi* system in the 1970s and 1980s. FESLM was the first to use the modern Ghanaian media to draw public attention to the *tokosi* system; and it took a Christian-based and radical approach – taking the gospel directly to the shrines, with a view to delivering the *tokosi* priests from evil spirits, and freeing the *tokosis* for Christ.⁶⁸ This approach was perceived as disrespectful and culturally insensitive, which sparked strong opposition from the adherents of the African traditional religion, a group committed to

66 As above.

67 Ameh (n 9 above).

68 As above.

promoting and preserving the African traditional religion and culture. In addition, Missions International (MI), a Christian NGO based in Canada, initiated and spearheaded a fresh battle (although the exact date when MI started this campaign in Ghana is not clear) to end the slavery experiences of *trokosi* victims. It is, however, evident that MI was also unsuccessful, because it followed a similar path to FESLM led by Mark Wisdom.

However, what made the biggest difference is the role played by ING.⁶⁹ ING was launched in 1984 as a member of the global Christian organisation, International Needs (IN). The overall objective of the organisation is to help Christians serve God and to contribute to the development of their communities through the alleviation of poverty, hunger, disease, illiteracy, idolatry, and primitive beliefs and practices. ING is part of International Needs in Canada, Australia, New Zealand, the United States and Britain, which financially support the Ghanaian branch that is run and staffed by Ghanaians.

In 1990, ING released a report about the existence of the *trokosi* practice. This report brought the world's attention to the *trokosi* system, and it did so with a new sense of urgency that globalised the campaign by drawing on its global networks. The practice then became a topic of national and international discussion, when it was proven that *trokosi* constituted modern slavery. As Greene argues, '[t]he priests sexually and physically controlled the girls, restricted their movements and failed to compensate them for their labour'.⁷⁰ This recognition of *trokosi* as a form of slavery sparked a long battle for the freedom for these slave wives of the gods.

ING spearheaded the strongest ever anti-*trokosi* campaign in the 1990s. It collaborated with a host of organisations, such as the Commission on Human Rights and Administrative Justice (CHRAG), the Ghana National Commission on Children (GNCC), the Ghana Law Reform Commission (GLRC), the National Council on Women and Development (NCWD), the National Commission on Culture (NGC), the National Council on Civic Education (NGCE), the Federation of Women Lawyers (FIDA), Equality Now, Anti-Slavery International, and United Nations agencies, including United Nations Population Fund, Ghana.⁷¹ Through the high networking and lobbying capability of ING through its powerful and influential global networks, the government of Ghana amended a section of its Criminal Code in 1998. This amendment criminalised all forms of 'customary or ritual servitude', including the *trokosi* system.⁷²

Further, ING engaged in massive negotiations with all the shrines in Dangme that led to the first-ever mass release of 40 *trokosis*, the slaves

69 As above; Bastine (n 6 above).

70 SE Greene 'Modern *trokosi* and the 1807 abolition in Ghana: Connecting past and present' (2009) 66 *The William and Mary Quarterly* 959-974.

71 United Nations Population Fund Ghana (n 47 above).

72 Ameh (n 9 above).

of the gods, in July 1996. By December 2001, a total of 2 800 (59 per cent) of the known 4 714 *trokosis* had been released in collaboration with other NGOs.⁷³ In addition to their lobbying and networking ability, another distinctive feature of ING in their struggle towards emancipation of the *trokosis* was its dialogical and sensitive approach to the issue. ING approached the traditional leaders and shrine priests in a culturally-accepted manner, such as presenting drinks and gifts, and drinking water from their calabash, as their custom demands. This created an atmosphere of trust that paved the way for ING to be granted an audience that allowed for a dialogue. Unlike its predecessors, such as FESLM and Mission International, ING emphasised cultural sensitivity and abolished its original religious mission of taking the gospel to the shrines to save both the *trokosis* and shrine priests. Instead, it adopted a number of approaches, such as 'village to village lectures, seminars and focus group interactions with shrine owners, practitioners, and opinion leaders in practicing communities'.⁷⁴ Through those platforms, it emphasised the rights of the *trokosis*, such as freedom from sexual exploitation, freedom from forced labour, freedom to choose a marriage partner, the right to human dignity, the right to education and the right to health care, in a mutually respectful and trustful manner. ING demonstrates that a change from within the practising communities is more sustainable, through the education and the involvement of practising communities, than a change imposed from the outside.

ING also employs local people, who speak the same language and understand the culture and customs of the communities engaged in the *trokosi* practice, in the struggle for emancipation of the *trokosis*. Further, the ability of ING to connect with both local and like-minded international organisations played a major role in galvanising a concerted effort that pressurised the government of Ghana to criminalise the *trokosi* practice in 1998.⁷⁵ Moreover, a coalition of several NGOs, the media and government departments and establishments also supported this human rights struggle of Daniel Nyagbledsi, FESLM and Mission International. ING demonstrates that human rights struggles that are broad-based and well-connected can achieve results. It is about getting 'politically usable information' timely to where it is more likely to have the greatest effect.

After the liberation of the *trokosis*, ING ran rehabilitative programmes for the victims. These programmes focused on dealing with the psychological damage caused to victims as a result of their captivity, helping the *trokosis* integrate into their communities, and helping them acquire formal education and vocational skills to be able to live independently. After these programmes, a follow-up was done to ensure that the victims are able to integrate into their communities.

73 Ameh 62.

74 Ameh 63.

75 Bastine (n 6 above); Ameh (n 9 above).

While rehabilitating the victims, ING continues to engage with the priests, community leaders, chiefs and the people as a whole to deepen awareness regarding human rights issues to prevent any possible future relapses into the *trokosi* practice.⁷⁶

Despite these achievements, and the existence of many national and international laws and conventions – such as the Law Prohibiting Ritual Servitude, the Criminal Code, (Amendment) Act of 1998, (Act 544), the Criminal Offences Act, 1960, (Act 29), the Children’s Act of 1988, and 1989 Convention on the Right of the Child – the *trokosi* system still has not disappeared completely. Generally, the laws have not been strictly enforced by the state, as there is no evidence of any arrest of the shrine priests or prosecution of any involved in the practice. The government of Ghana has offloaded its obligation to NGOs who work to eliminate the practice. In response to a question on the enforcement of the *trokosi* law by parliament in 2000, the Minister of Social Welfare suggested that education could be more effective than mere enforcement of the law.⁷⁷ He also conceded that the NGOs were doing most of the work, given that they are more competent in handling the *trokosi* issue.

The Ghanaian government’s reluctance regarding the enforcement of the *trokosi* law is not surprising. Evidence suggests that states are reluctant to advance human rights ideals.⁷⁸ In reality, the state is both a custodian and a violator of human rights, and it is in this context that Ishay, for instance, calls for a stronger civil society to press for the realisation of human rights.⁷⁹ Even when there is a political commitment to act, it is often difficult to influence the socio-cultural foundations of cultural and religious practices that conflict with universal human rights. This can further be compounded by the hostile and unco-operative stance of some bureaucrats and public officials who may frustrate government policies and laws to stamp out these practices, as observed by An-Na’im.⁸⁰ Thus, changing religious and customary laws to reflect international human rights laws does not necessarily guarantee the full implementation and realisation of the objectives of such laws, as exemplified by the *trokosi* system in Ghana. Often, such transformation, however, has to be pressed for peacefully, particularly by civil society.

Regarding the numbers of current non-liberated *trokosi* victims, it is extremely difficult to state the precise figure, as the practice might have gone underground, perhaps due to the passage of the *trokosi* law that prohibits it in Ghana. Despite the difficulty in estimating the figure, some scholars suggest that the number of non-liberated *trokosi*

76 Ameh (n 9 above).

77 As above.

78 Ishay (n 1 above).

79 As above.

80 AH An-Na’im ‘State responsibility under international human rights law to change religious and customary laws’ in R Cook (ed) *Human rights of women: National and international perspectives* (1992).

victims may still be high,⁸¹ while others suggest that the practice seems to be on the decline.⁸² The fact that this traditional practice has not been eradicated does not suggest that ING, the most active anti-*trokosi* movement, has failed completely in its campaign to address the issue. In fact, on the contrary, ING has achieved significant success in comparison to similar anti-*trokosi* movements, as discussed. For instance, Dzansi & Biga⁸³ report that all their interviewees who were former *trokosi* victims mentioned ING as the driving force behind their liberation, while Amev⁸⁴ reports the ground-breaking achievements of ING compared to other anti-*trokosi* movements. In light of the fact that the *trokosi* practice has not died down completely, despite the remarkable efforts of ING, suggests that working to get rid of a harmful cultural practice that is entrenched deeply and valued widely among the practising communities demands long-term commitment and investment.

7 Conclusion

Although there are varying accounts of the actual number or the estimates of the *trokosis*, as reported by Akpabli-Honu and Agbanu,⁸⁵ these inconsistencies or contestations, however, do not make the truth about the continuous practice and the human rights concerns of the *trokosi* system go away. The fact that this traditional practice is still in existence, despite the enactment of the *trokosi* law that prohibits it in Ghana, is concerning, as noted recently by the African Children's Committee.⁸⁶ This means that innocent virgin girls may still be subject to this practice should any member of their families commit a crime that warrants such sacrifices to the gods. For this reason, there is a need for continuous and sustained co-ordinated interventions to eradicate it.

The demand for the preservation of the *trokosi* practice, in the name of cultural relativism and freedom of religion, violates the basic human rights of the victims, as exemplified within the framework of the Constitution of Ghana, the African Charter, the African Women's Protocol, the African Children's Charter and recognised universal human rights laws and conventions which the state parties, including Ghana, have ratified. Essentially, it is in this context that it is contended that, although the call for cultural pluralism and the need to celebrate and respect the diversity of cultures sound legitimate, these demands should not be allowed to trump the minimum package of human rights which state parties have ratified to protect

81 Aird (n 5 above).

82 Dzansi & Biga (n 37 above).

83 As above.

84 Ameh (n 9 above).

85 Akpabli-Honu & Agbanu (n 36 above).

86 African Children's Committee (n 57 above).

human dignity and the wellbeing and integrity of the citizenry. Also, culture is dynamic and should ideally be open to new possibilities for social transformation; conceivably, culture can be preserved if doing so will not necessarily lead to the infringement of the basic fundamental human rights of others, as the *trokosi* practice clearly illustrates.

By helping to liberate most of the *trokosi* victims, compared to other anti-*trokosi* movements, ING has demonstrated that the role of civil society is indispensable in the struggle for human rights among marginalised and vulnerable people. This is critical as the nation state, itself, is both a guardian and violator of human rights in many respects, including the lack of a strong political will to enforce human rights laws, often based on political expediency, particularly in countries like Ghana. Civil society needs to be strong and have tenacity of purpose and culturally-acceptable and sensitive strategies to address major fundamental human rights concerns, including harmful cultural practices. Also, human rights struggles demand an appropriate and creative blend of tactics, including information politics, leverage politics, symbolic politics and accountability politics, as reflected in the operations of ING. Further, the role of the parent International Needs and its affiliates added a unique dimension to the struggle by way of financial assistance, material support and networking. This suggests that a lot of resources, skills and commitments are needed if we are to succeed in extending universal human rights to vulnerable people across the globe.

Individuals, groups and organisations committed to eradicating harmful cultural practices can learn a number of lessons from the operations of ING. First, there is a need to demonstrate a strong cultural sensitivity, particularly in terms of approaching the powers that be in practising communities, as emblematised in ING's offering of gifts and drinks and their willingness to drink water from the calabash, as the custom demands, to build excellent rapport, mutual trust and respect to pave the way for meaningful critical dialogue to begin. Second, the development of a strong networking capacity to bring on board all parties that have a stake in the practice and whose ideas, power and influence can impact positively on the outcomes of the movement cannot be overlooked. Third, there must be ongoing education to create public awareness about the repercussions and human rights concerns of the harmful cultural practices in question, in particular educating, dialoguing and negotiating with the custodians, such as community leaders, priests and chiefs, on the human rights implications of these cultural practices to preclude future violations. Fourth, the use of local people to spearhead the movement to capitalise on their insider's knowledge and to localise the movement to dispel notions of cultural imperialism is worthwhile. The policy of parent International Needs that allows local people to spearhead the human rights struggle and run the organisation in Ghana highlights the fact that the local people have the answer to their problems. This suggests that a bottom-up approach is often more effective than a

top-down one. Fifth, designing appropriate interventions, such as providing seed capital and employment skills, to facilitate an effective integration of the liberated *tokosi* victims into society, is particularly important to enable them to live independently. Sixth, learning from the mistakes of similar movements is useful to design workable strategies to confront the problem. Lastly, there is a need for the continuous monitoring and evaluation of the approaches of the movement to take corrective measures when necessary.

Apart from these lessons drawn from the operations of ING, it is recommended that ING and similar movements in Africa step up their engagement with relevant human rights institutions, especially the African Children's Committee, to hold the signatories to the African Charter to account in enforcing human rights norms. Finally, state parties to the African Charter ought to take practical measures to enforce these provisions. As strict prosecution of the adherents of harmful cultural practices can drive it underground, efforts should be made to engage with practising communities, especially the chief priests, in building a broad-based consensus on the best way forward to address the problem holistically.

It is also worth noting that the overall intent of the *tokosi* practice is positive in the broader context of social and crime control in serving as a deterrent to future offenders that they stand the risk of sacrificing their beloved virgin girls to the gods. Conversely, the problem, however, is with the mechanisms in place to achieve this intent that take the form of lifetime imprisonment of innocent virgin girls who have not committed the crimes for which they have been imprisoned; in any case, the perpetrators could be held directly responsible for their actions. These innocent virgin girls should be given the chance to live normal lives; they should not be subject to punishment for crimes that they never committed in person. Finally, in light of the inconsistencies of the estimates of the *tokosis*, further empirical studies are suggested to put the records straight and to offer pragmatic policy prescriptions to help stamp out this practice.

Lessons from Ghana and Kenya on why presidential election petitions usually fail

Miriam Azu*
Lawyer

Summary

Most presidential election disputes have been unsuccessful. Although the petitioners almost invariably have adduced evidence of non-compliance with electoral laws, so far the judiciary has hardly been persuaded that the alleged infractions against electoral laws have had any adverse impact on the validity of disputed presidential election results. The article examines the burden and standard of proof which must be discharged in presidential election disputes, and then, based on relevant national case law, it discusses the circumstances under which the courts would invalidate presidential elections results. It concludes with the observation that, although the Raila Odinga case confirms the reluctance of judges to overturn election results, the narrow win in the Nana Akufo-Addo case suggests that the era of unsuccessful presidential election petitions may be drawing to a close.

Key words: elections; voting; biometrics; petition; electorate

* BL (Ghana), LLB (KNUST), LLM (Human Rights and Democratisation in Africa) (Pretoria); LLM (Columbia, NY); mimmieazu@gmail.com. This article is based on a dissertation submitted to the University of Pretoria in partial fulfilment of the requirements of the degree LLM (Human Rights and Democratisation in Africa).

1 Introduction

Judicial challenges to presidential election results are hardly ever successful. In Africa, Ghana,¹ Kenya,² Nigeria,³ Sierra Leone,⁴ Uganda,⁵ Zambia⁶ and Zimbabwe⁷ are among the countries where petitions filed against the results of various presidential elections have failed. Perhaps the only success story in Africa has been the Gbagbo/Ouattara case of Côte d'Ivoire, which is distinguishable also because it was not a judicial challenge. Rather, acting upon its powers under article 94 of the 2000 Constitution of the Republic of Côte d'Ivoire, the Constitutional Council proclaimed Mr Laurent Gbagbo, instead of Mr Alassane Ouattara, the winner of the 2010 presidential elections.⁸ It would appear that, in the long history of judicial challenges to presidential election results, it is only in the Ukraine that a presidential election petition has been successful.⁹

In all the instances where presidential election petitions have been unsuccessful, although the petitioners alleged non-compliance with electoral laws and adduced evidence in support, the courts declined to invalidate the election results on the basis that the alleged irregularities were not substantial enough to affect the validity of the results. This, therefore, raises questions about the threshold of proof applicable in presidential election disputes and how it is discharged.

It is worth noting at the outset what is beyond the scope of this article. The article does not discuss the normative values that underpin democracy. Accordingly, it does not discuss human rights concepts such as the right to participate in the political process (including the rights to vote and/or be voted for) as guaranteed in international,

1 *Nana Addo Dankwa Akufo-Addo & 2 Others v John Dramani Mahama & 2 Others* (Writ J1/6/2013).

2 *Orengo v Moi & 12 Others* (Election Petition 8 of 1993); *Mwau v Electoral Commission of Kenya & 2 Others* (Petition 22 of 1993); *Kibaki v Moi & 2 Others* (No 3) (2008) 2 KLR (ep) 351; *Moi v Matiba & 2 Others* (2008) 1 Klr (ep) 622; *Raila Odinga v The Independent Electoral and Boundaries Commission & 3 Others* (2013) eKLR.

3 *Buhari v Obasanjo* (2005) 13 NWLR 1; *Muhammadu Buhari v Independent National Electoral Commission & 4 Others* (SC 51/2008); *Abubakar v Yar'Adua* (2008) 1 SC 77.

4 *Sierra Leone People's Party v National Electoral Commission & Another* (SC 4/2012).

5 *Besigye v Electoral Commission, Yoweri Museveni* (2007) UGSC 24; *Besigye Kiiza v Museveni Yoweri Kaguta, Electoral Commission* (2001) UGSC 3.

6 *Lewanika & Others v Chiluba* (1999) 1 LRC 138; *Anderson Kambela Mazoka & 2 Others v Levy Patrick Mwanawasa & 2 Others* (SCZ/EP/01/02/03/2002).

7 *Morgan Tsvangirai v Robert Mugabe & 3 Others* (Case CCZ71/2013).

8 Human Rights Watch 'A long way from reconciliation: Abusive military crackdown in response to security threats in Côte d'Ivoire' (November 2012) 14 <http://www.hrw.org/sites/default/files/reports/cotedivoire1112webwcover.pdf> (accessed 30 August 2013).

9 For an account of why the Ukrainian Supreme Court annulled the results of the 2004 presidential elections, see '2004: Yushchenko wins Ukraine election re-run' 27 December 2004 http://news.bbc.co.uk/onthisday/hi/dates/stories/december/27/newsid_4408000/4408386.stm (accessed 30 September 2013).

regional, sub-regional and national human rights instruments. Similarly, it does not make use of the jurisprudence, if any, of supra-national human rights bodies interpreting the rights referred to above.

Instead, the article does three things. First, it examines the evidentiary rules, especially the burden of proof and standard of proof, which must be discharged in presidential election disputes. Second, based on relevant national case law, it discusses the circumstances under which the courts would invalidate presidential elections results. Finally, it concludes with a commentary on some extra-legal matters that may appear to occasionally influence judges when they are confronted with the resolution of presidential election disputes. The issues raised in the article are discussed using the *Raila Odinga*¹⁰ and *Nana Akufo-Addo*¹¹ cases. These cases are the two most recent presidential election disputes in Africa to have been decided on their merits. It is appropriate at this point to provide a brief account of the facts and findings of both cases.

2 *Raila Odinga*

On 9 March 2013, the Chairperson of Kenya's Electoral Management Body (EMB), Mr Issack Hassan, announced Mr Uhuru Kenyatta as the winner of the 2013 presidential race. It was the first time in Kenya's history that biometric voting technology was used. According to Mr Hassan, Mr Kenyatta polled 6 173 433 out of a total of 12 338 667 votes, representing 50,07 per cent of all votes cast. His closest contender, Mr Raila Odinga, garnered 5 340 546 votes, representing 43,31 per cent of votes cast. Consequently, pursuant to article 138(4) of the 2010 Constitution of the Republic of Kenya (2010 Constitution), Mr Hassan declared Mr Kenyatta as the President-elect of Kenya. This automatically made Mr Kenyatta's running mate, Mr William Ruto, the Deputy President-elect.

Following the announcement, three separate petitions were filed at the Supreme Court of Kenya challenging the validity of Mr Kenyatta's election. The first petition, which was filed by three persons against the EMB and its Chairperson as the respondents, alleged that the inclusion of rejected votes in the final tallying of the results had the prejudicial effect of increasing the percentage votes of Mr Kenyatta and decreasing that of the petitioners. They asserted that this was an irregularity in contravention of articles 36(b) and 138(c) of the 2010 Constitution and rule 77(1) of the Elections (General) Regulations, 2012.

The second petition was filed by two people against the EMB, its Chairperson, Mr Kenyatta and Mr Ruto. In calling upon the Supreme Court to annul the results, this petition alleged that for the following

10 *Raila Odinga* (n 2 above).

11 n 1 above.

reasons, the elections were not conducted substantially in accordance with the 2010 Constitution and Kenya's electoral laws: first, that the EMB had failed to establish and maintain an accurate voter register; second, that the credibility of the electoral system was compromised due to the failure of the electronic management system to electronically transmit the results; and third, that in addition to the failure of the EMB and its officials to tally and verify results at the polling stations as mandated by law, they excluded designated party agents from the National Tallying Centre in contravention of the law.

The third petition was filed by Mr Odinga against the EMB, its Chairperson, Mr Kenyatta and Mr Ruto. First, it averred that the EMB had failed to develop and maintain a credible voter register and, therefore, there was a material difference between the total number of registered voters announced during the declaration of the results and the figure in the voter register that had been circulated to political parties before the elections. Secondly, the failure of the electronic voting technology systems to electronically transmit the results was fatal to the whole exercise. Finally, the elections were fraught with several instances of over-voting, errors in the manual tally of results and the declaration of results using irregular declaration forms, that is, forms that had not been signed by the relevant agents of the EMB.

The Supreme Court consolidated the cases on 25 March 2013, and designated Mr Odinga as the first petitioner. The second petitioners were jointly made the second petitioner and the first petitioners were jointly referred to as the third petitioner. The EMB, its Chairperson, Mr Kenyatta and Mr Ruto were designated the first, second, third and fourth respondents respectively. The respondents opposed all the allegations contained in the petition. The main issue that was set down for trial was whether the third and fourth respondents were validly elected as President-elect and Deputy President-elect respectively. To arrive at a determination of this issue, the Supreme Court set down two main issues: one, whether the presidential election was conducted in a free, fair, transparent and credible manner in compliance with Kenyan law; and two, whether the second respondent erred in including rejected votes in its tally of the final votes cast in favour of each presidential candidate.

After analysing the facts in the light of relevant national, regional and international jurisprudence, the Supreme Court held that the third and fourth respondents were validly elected. According to the Supreme Court, because of imperfections associated with electronic voting technology, section 39 of the Elections Act¹² and regulation 82 of the Elections (General) Regulations had to be construed to mean that the electronic transmission of results is neither exclusive nor mandatory in Kenya. Therefore, it held that the EMB had exercised its discretion properly when it resorted to the manual tallying of votes when the electronic system failed.¹³ The Supreme Court unanimously

12 24 of 2011.

held on this score that no injustice resulted from the fact that the EMB did not use the electronic system exclusively throughout the elections.

Additionally, the Supreme Court held that the petitioners had failed to prove that the tallying system used by the first and second respondents inflated the votes of the third respondent but deflated that of the petitioners.¹⁴ Furthermore, it held that the voter registration process was generally transparent, accurate and verifiable and thus the voter register which resulted from that registration process was also, generally, credible.¹⁵ Therefore, in its view, the discrepancies with the voter register were not of a magnitude that could adversely affect the elections.

Finally, as regards the rejected votes, the Supreme Court held that the rejected votes ought not to have been included in the computation of the total votes of the candidates because 'all the votes cast' in article 138(4)(a) of the 2010 Constitution could only properly refer to only the valid votes cast. Yet, the Supreme Court did not uphold the petitioners' claim on this ground. In unanimously dismissing the petition, it held:¹⁶

In summary, the evidence, in our opinion, *does not disclose any profound irregularity* in the management of the electoral process, nor does it gravely impeach the *mode of participation* in the electoral process by any of the candidates who offered himself or herself before the voting public. It is *not evident*, on the facts of this case, that the candidate declared as the President-elect had not obtained the basic vote-threshold justifying his being declared as such.

3 *Nana Akufo-Addo*

On 7 December 2013, Ghanaians went to the polls to elect a new President. It was the first time in Ghana's history that biometric voting technology was employed. It was also the first time since the commencement of the Fourth Republic that voting occurred on more than one day, spilling over from 7 to 8 December. On 9 December 2013, the Chairperson of the EMB, Dr Kwadwo Afari-Gyan, declared that 5 574 761 votes, representing 50,70 per cent of the total votes, were cast in favour of incumbent president Mr John Dramani Mahama. He also announced that 5 248 898 votes, representing 47,74 per cent of the votes, went in favour of Nana Addo Dankwa Akufo-Addo, the flag-bearer of the main opposition party. Based on these results, Dr Afari-Gyan declared Mr Mahama the winner of the presidential elections in accordance with article 63(9) of the 1992 Constitution of the Republic of Ghana (1992 Constitution).

13 *Raila Odinga* (n 2 above) para 235.

14 *Raila Odinga* para 246.

15 *Raila Odinga* para 257.

16 *Raila Odinga* para 306. For similar comments on when the courts would treat non-compliance as being of such a magnitude as to result in the invalidation of presidential election results, see also *Nana Akufo-Addo* (n 1 above) 42-45.

On 28 December 2012, Mr Akufo-Addo filed a petition in the Supreme Court. He was the first petitioner; Dr Mahamudu Bawumia – his running mate – was the second petitioner; and the Chairperson of the New Patriotic Party, Mr Jake Otanka Obetsebi-Lamprey, was the third petitioner. Mr Mahama was named in the petition as the first respondent, while the EMB was made the second respondent. The National Democratic Congress, the party on whose ticket Mr Mahama contested and won the elections, successfully applied and was joined as the third respondent. On 7 January 2013, while the petition was still pending before the Supreme Court, Mr Mahama was sworn into office as President in accordance with the 1992 Constitution.¹⁷

By their second amended petition, the petitioners sought an order setting aside the election and swearing in of Mr Mahama as President. They alleged that the elections had been marked by the following six categories of non-compliance with Ghana's electoral laws, in various combinations: over-voting; voting without biometric verification; the absence of signatures of presiding officers on some result declaration forms; duplicate serial numbers; duplicate polling station codes; and results from polling stations unknown to the 26 002 polling stations of the country. They contended that, if the Supreme Court annulled 4 381 145 votes from 11 138 of the 26 002 polling stations of the country, the results would tilt in favour of Mr Akufo-Addo. Accordingly, they prayed for an order annulling those votes and for a declaration that Mr Akufo-Addo, instead of Mr Mahama, was the validly-elected President of Ghana. The respondents vehemently opposed the averments contained in the petition.

After perusing the evidence on record, the Supreme Court unanimously found no merit in the last three allegations and accordingly dismissed them. Therefore, it resolved the case based on the allegations of over-voting, voting without biometric verification and the absence of the signature of presiding officers on some result declaration forms.¹⁸ The main issue for trial was whether the first respondent was validly elected as President of Ghana. To determine this, the Supreme Court set down the following issues: first, whether there had been violations against the electoral laws in the conduct of the presidential elections; and second, if there were such violations, whether they affected the election results.

In a sharply-divided opinion, the Supreme Court decided by a very narrow margin of a five-to-four majority that Mr Mahama had been validly elected as President. While four judges held that the alleged instances of over-voting, voting without biometric verification and the absence of the signature of the presiding officers on some of the declaration forms were fatal to the validity of the election of the first respondent, the other five judges were of the opposite opinion.

¹⁷ Art 64(2); see also *Nana Akufo-Addo* (n 1 above) 304.

¹⁸ *Nana Akufo-Addo* 3-4.

It must be mentioned that the minority decision, itself, was not unanimous in its outcome because of the interesting conclusions of some of the judges. Four judges in the minority were satisfied that the petitioners had proven the allegations of over-voting, voting without prior biometric verification and the declaration of results using irregular forms. However, while three of them ordered a rerun of elections at the affected polling stations,¹⁹ one made an order for the conduct of fresh presidential elections.²⁰ The minority nevertheless was united in its view that, because the electoral laws in question are mandatory in nature, infractions against them were 'monumental irregularities' that could not be mitigated by any lenient considerations.²¹

However, in the end, what holds sway is the majority opinion that dismissed the petition. First, the majority was of the opinion that it was unfair to visit the administrative blunders of EMB agents upon the electorate, especially when those errors could be corrected by court orders.²² Therefore, it declined to cancel votes based on the allegations of voting without prior biometric verification and the declaration of results using irregular forms.²³ In respect of the former, the majority also took judicial notice of the fact that the reason why the elections were continued on 8 December 2012 was to enable voters whose biometrics could not be verified at polling stations on 7 December to exercise their franchise.²⁴ In respect of the latter, it observed that the number of irregular declaration forms were not substantial enough to make any adverse impact on the election results. In support of this, Akoto-Bamfo JSC held:²⁵

Elections cannot be perfect so when we are faced with the consideration of irregularities that are alleged to have occurred in an election, we should exercise a reluctance in striking down every single vote just by reference to a provision of the law. On the contrary, the irregularity must have affected the integrity of the elections.

Finally, the majority held that the petitioners had failed to prove the allegation of over-voting except to the limited extent admitted by Dr Afari-Gyan, which it held 'cannot impact much on the declared results'.²⁶ Indeed, Adinyira JSC held that the mere fact that there had been setbacks in the elections did not, without more, automatically mean that the results had been adversely affected.²⁷

It is obvious from the two judgments that both the 2012 and 2013 presidential elections in Ghana and Kenya, respectively, were marred

19 *Nana Akufo-Addo* 101, 218, 231-232 & 418-419.

20 *Nana Akufo-Addo* 505-506.

21 *Nana Akufo-Addo* 65-73.

22 *Nana Akufo-Addo* 37.

23 *Nana Akufo-Addo* 6.

24 *Nana Akufo-Addo* 25.

25 *Nana Akufo-Addo* 543 & 565-566.

26 *Nana Akufo-Addo* 28.

27 *Nana Akufo-Addo* 131.

by instances of non-compliance with the relevant electoral laws. Indeed, the respondents did not deny that, and the courts also acknowledged the imperfections. However, the prevailing consideration in the determination of both cases was whether the non-compliance was substantial enough to have adversely impacted on the results. While the Kenyan Supreme Court unanimously held that the non-compliance did not significantly affect the validity of the results and so did not warrant a declaration of invalidation, in Ghana it was the majority of the bench that held the same view.

So, what is 'substantial non-compliance', and under what circumstances would the courts invalidate presidential election results due to 'substantial non-compliance'?

4 Circumstances under which the courts would invalidate presidential election results

According to Halsbury's Laws of England, the general position of the law is that²⁸

[n]o election is to be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate elections rules if it appears to the tribunal, having cognisance of the question that the election was conducted substantially in accordance with the law as to the elections, and that the act or omission did not affect the result.

Accordingly, in *Medhurst v Lough Casquet*,²⁹ Kennedy J observed that election results should not be declared void just because there had been inadvertent breaches of the law by EMB officials, provided that, in spite of the breaches, the court is satisfied that the elections were conducted in substantial compliance with the electoral laws and that the breaches could not adversely impact on the success of one candidate over the other(s). These views by Kennedy J in the *Medhurst* case were adopted by the Ghanaian Supreme Court, *per* Ansah JSC.³⁰

The justification for not invalidating election results merely because there have been administrative breaches appears to lie with the authorship of the infractions. The general thinking in the jurisprudence is that it is unfair and contrary to the principles regulating adult suffrage that the administrative sins of election officials be visited upon voters, so long as the latter have voted in accordance with the law.

In *Opitz v Wrzesnewskyj*, the court observed:³¹

28 Vol 15(4), fourth edition, para 670.

29 [1901] 17 LTR 230.

30 *Nana Akufo-Addo* (n 1 above) 95.

31 (2012) SCC 55-2012-10-256 para 66; see also *McCavitt v Registrars of Voters of Brockton* 626 (Mass 1982).

By contrast, if a vote cast by an entitled voter were to be rejected in a contested election application because of an irregularity, the voter would be irreparably disenfranchised. This is especially undesirable when the irregularity is outside of the voter's control, and is caused solely by the error of an election official.

Similarly, in the *Nana Akufo-Addo* case, Adinyira JSC held that so long as voters cast their ballot in good faith, their votes should not be annulled just because an officer failed to perform some duty imposed by law.³²

However, there are exceptions to this general principle. One of these is that the court will declare elections void when it is satisfied that the legal trespasses are of such a magnitude that they have resulted in substantial non-compliance with the existing electoral laws. Additionally, where there is a reasonable doubt that the breaches have affected the results³³ and thus it is open to doubt whether the returned candidate actually won the majority of the votes from the election, the court is obliged to declare the elections void.³⁴

It is from this perspective that *Morgan & Others v Simpson & Others*³⁵ must be understood. The English Court of Appeal had occasion to consider the conditions under which electoral results could be nullified on grounds of violations of electoral statutes. According to the facts, the votes in the ballot box at an election were 23 691. Forty-four of these were rejected because some officials at 18 polling stations had inadvertently not affixed the official stamps to the ballot papers. The winner won by a majority of 11, but it was argued that if the rejected votes had been included, he would have had a majority of seven. A petition was filed for a declaration that the election was invalid because the issue of unstamped ballot papers was a breach of the officials' duty which had affected the results adversely.

The court of first instance dismissed the petition, holding that, as the election was conducted substantially in accordance with the electoral laws, the fact that there had been a small number of administrative errors was not a sufficient reason for declaring it invalid. On appeal, the Court of Appeal reversed this decision and ruled that the election was invalid despite the fact that it had been held in substantial compliance with the electoral laws.

Speaking through Lord Denning MR, the Court of Appeal then outlined two circumstances under which the court would nullify election results: firstly, that if elections are so poorly conducted that they cannot be said to have been conducted in substantial compliance with the electoral laws, then they are void whether or not the non-compliance affected the results; secondly, that even if the elections are conducted in substantial compliance with the electoral

32 *Nana Akufo-Addo* (n 1 above) 144.

33 *Nana Akufo-Addo* 446.

34 *Medhurst* (n 29 above) 230.

35 [1974] 3 WLR 517.

laws but there are breaches or mistakes at the polls that adversely affect the results, then the results have to be cancelled.

The following opinion in the Nigerian case of *Ibrahim v Shagari & Others* canvasses this principle:³⁶

[T]he Court is the sole judge and if it is satisfied that the election has been conducted substantially in accordance with Part II of the Act it will not invalidate it. The wording of section 123 is such that it presumes that there will be some minor breaches of regulations but the election will only be avoided if the non-compliance so resulting and established in court by credible evidence is substantial. Further, the court will take into account the effect, if any, which such non-compliance with [the] provisions of Part II of the Electoral Act, 1982 has had on the result of the election.

These common law principles are also codified in section 83 of the Elections Act,³⁷ which provides that elections shall not be declared void if they are conducted in accordance with law and non-compliance, if any, does not affect the election results.

Another exception has to do with express statutory stipulation. It was observed in the *Nana Akufo-Addo* case that if the electoral laws explicitly provide that non-compliance with electoral laws automatically voids an election, then the courts will give effect to that explicit statutory stipulation.³⁸ It was in this respect held in the *Nana Akufo-Addo* case that, since neither article 49 of the 1992 Constitution nor the Public Elections Regulations³⁹ contained any such express stipulations, non-compliance with their provisions was not fatal to the election results.⁴⁰

The last exception to be discussed is fraud. It is a basic principle of law that fraud vitiates everything.⁴¹ Therefore, the courts have held that if the non-compliance with electoral laws can be attributed to fraud or any fraudulent intentions on the part of the election officials, then the election results would be annulled.⁴² It is on the strength of this principle that, in 2004, the Ukrainian Supreme Court ordered a repeat runoff presidential election between Viktor Yanukovich and Viktor Yushchenko when it was proven that the original election had been marked by widespread electoral fraud.⁴³

From the foregoing jurisprudence, it appears that the courts would invalidate presidential election results only if the results are the product of fraud, or if there is an express statutory injunction that non-compliance with the electoral laws automatically voids election results, or if the elections were not conducted in substantial

36 (1985) LRC (Const) 1.

37 n 12 above.

38 *Nana Akufo-Addo* (n 1 above) 144.

39 2012 (CI 75).

40 n 38 above.

41 G Woodward 'Collateral attack upon judgments on the ground of fraud' (1916) 65 *University of Pennsylvania Law Review and American Law Register* 109.

42 n 38 above.

43 n 9 above.

compliance with the electoral laws, or where, although the elections were conducted in substantial compliance with the electoral laws, certain statutory infractions are proven to have muddied the election results.

In conclusion, it is only when non-compliance with electoral laws adversely affects presidential election results that the courts would consider the non-compliance to be substantial enough to require an invalidation of the results. This approach is influenced by the widely-accepted fact among judges that elections, of which presidential elections are a subset, cannot be without hitches and therefore the judiciary should hasten slowly in invalidating their results.⁴⁴ A purposive, as opposed to a regimental, interpretive approach to interpreting electoral laws is preferred by the proponents of this school.⁴⁵

So, how does a petitioner prove to a court that there has been substantial non-compliance with electoral laws?

5 Threshold of proof in presidential election disputes

At common law, it is generally presumed that all official acts are rightly and regularly done.⁴⁶ It is also presumed that all official records are accurate.⁴⁷ Consequently, it is presumed that presidential elections are conducted regularly, and that presidential election results as published by an EMB are also right and accurate.

These presumptions of regularity and accuracy are rebuttable.⁴⁸ Accordingly, it is the duty of a petitioner to adduce evidence in rebuttal.⁴⁹ This is because by the very nature of the burden of proof, it is the person who would lose a case if any stated proposition in issue is not proven who has the singular duty to prove same.⁵⁰ Applied to presidential election disputes, since it is a petitioner who would lose if the presumptions of regularity and accuracy are not rebutted, it is a petitioner who bears the initial burden of proving non-compliance with electoral laws.⁵¹ Thereafter, the burden shifts to the respondents to counter the evidence produced by a petitioner.⁵²

In Ghana and Kenya, the constitutional provisions on elections as well as the electoral laws are silent on the burden of proof that must be discharged in presidential election petitions. Therefore, the burden

44 *Nana Akufo-Addo* (n 1 above) 543 565-566.

45 *Raila Odinga* (n 2 above) para 285.

46 *Raila Odinga* para 196.

47 *Nana Akufo-Addo* (n 1 above) 59-60 62.

48 Sec 37(1) Evidence Act, 1975 (NRCD 323).

49 *Nana Akufo-Addo* (n 1 above) 459.

50 JB Thayer *A preliminary treatise on evidence at the common law* (1898) 355.

51 Sec 17(1) NRCD 323; see also n 49 above.

52 *Raila Odinga* (n 2 above) para 203; see also *Nana Akufo-Addo* (n 1 above) 58-59, 204-205 & 458-459.

of proof is regulated by the general provisions of the common law as codified in the Ghanaian Evidence Act, 1975 (NRCD 323) and the Kenyan Evidence Act.⁵³ This means that the common law rules on the burden of proof as discussed above apply with the same force to presidential election disputes in Ghana and Kenya. The author now examines how the Ghanaian and Kenyan Supreme Courts treated the burden of proof and standard of proof in the *Nana Akufo-Addo* and *Raila Odinga* cases.

6 Burden of proof

The burden of proof basically is concerned with the question of whose duty it is to prove allegations of facts by placing evidence before a court. It has been observed that, since presidential election disputes to a significant degree rest on facts,⁵⁴ they must be proven in the same way as other factual cases are: The petitioner must establish an appreciable degree of belief in the mind of the court.⁵⁵

The burden of proof has two components: the burden of producing evidence that is satisfactory enough to prove a particular issue and the burden of persuading the court that the allegations made are true or untrue.⁵⁶ The burden of producing evidence is also known as the evidential burden,⁵⁷ while the burden of persuasion is sometimes referred to as the legal burden.⁵⁸ Therefore, beyond adducing evidence in support of an allegation, a party must also satisfy the court that the allegations are true, before it would be deemed that he or she has discharged the burden of proof. The result is that it is probable to succeed in the former but fail in the latter.

In the context of presidential elections, it has been held that where a petitioner alleges non-compliance with electoral laws, the petitioner must first prove that there has been such non-compliance by introducing evidence to that effect. Thereafter, the petitioner must satisfy the court that the non-compliance has adversely affected the validity of the election results.⁵⁹ It is after a petitioner has successfully surmounted these two hurdles of the burden of proof that the onus of proof shifts to the respondent(s).⁶⁰ Therefore, it is incumbent upon a petitioner to first and foremost establish firm and credible evidence of an EMB's departure from the prescriptions of the law. After that, the

53 2009 (Cap 80).

54 *Raila Odinga* (n 2 above) para 191.

55 *Nana Akufo-Addo* (n 1 above) 458; see also *Hawkins v Powells Tillery Steam Coal Co Ltd* [1911] KB 996.

56 M Opoku-Agyemang *Law of evidence in Ghana* (2010) 145; see also sec 10 NRCD 323 and *Nana Akufo-Addo* (n 1 above) 458.

57 Opoku-Agyemang (n 56 above) 157.

58 As above.

59 *Nana Akufo-Addo* (n 1 above) 121-122.

60 *Nana Akufo-Addo* 61.

burden shifts and keeps shifting until the court reaches a determination. In the words of Ansah JSC:⁶¹

If the petitioners are able to establish the facts they rely on to ask for their reliefs, the onus will then shift to the respondents to demonstrate the non-existence of that fact. This [i]s because the court bases its decision on all the evidence before it; the petitioner and the respondent alike have a burden to discharge so as to be entitled to a claim or a defence put up.

EMBs are constitutionally mandated to organise, manage and conduct elections so that people can exercise their political right to vote.⁶² It is conceivable that the electoral laws under which EMBs operate can be flouted through violations, omissions, incompetence, malpractice or sheer fraud on the part of officials. Notwithstanding this, it is appropriate to place the initial burden of proof on a petitioner since it is a petitioner who challenges the presumption that the presidential elections in question were regularly conducted and that their results are accurate.⁶³ At the conclusion of proceedings, the court would deliver judgment for the petitioner if the respondents fail to discharge the burden of proof when it shifts to them or *vice versa*. But to what standard must a presidential election dispute be established? This requires a discussion of the standard of proof in presidential election petitions.

7 Standard of proof

The standard of proof has to do with the weight that a court should place on the material facts that are placed before it.⁶⁴ Generally, in civil cases, the standard of proof is 'on the preponderance of probabilities' and in criminal trials it is proof 'beyond reasonable doubt'.⁶⁵

Unlike the burden of proof, the standard of proof applicable in presidential election disputes is not uniform – it varies from one jurisdiction to the other. For example, in Ghana, presidential election disputes are civil in nature and therefore the standard of proof is on the preponderance of probabilities.⁶⁶ It is only when crime is alleged in a presidential election petition that the criminal elements of the case are required to be proven beyond reasonable doubt. So, in the *Nana Akufo-Addo* case, Anin Yeboah JSC stated:⁶⁷

The petition is simply a civil case by which petitioners are seeking to challenge the validity of the presidential elections. From the pleadings and the evidence, no allegations of fraud or criminality were ever introduced by

61 *Nana Akufo-Addo* 62.

62 Art 45 1992 Constitution and art 88(4) 2010 Constitution.

63 *Nana Akufo-Addo* (n 1 above) 178-179.

64 *Nana Akufo-Addo* 58.

65 *Opoku-Agyemang* (n 56 above) 164.

66 Sec 12 NRCDC 323.

67 *Nana Akufo-Addo* (n 1 above) 459-460.

the petitioners. The standard of proof of allegations in civil cases is proof by preponderance of probabilities. It is only when crime is pleaded or raised in the evidence that the allegation sought to be proved must be proved beyond reasonable doubt.

The position is the same in India. In *Shri Kirpal Singh v Shri VV Giri*⁶⁸ the court held that allegations of corrupt practices had to be proven beyond any reasonable doubt. In the later case of *M Narayan Rao v G Venkata Reddy & Another*,⁶⁹ the Indian Supreme Court explained that this is so because allegations of corrupt practices are quasi-criminal in nature and, accordingly, they must be proven according to the criminal standard.

However, in some other jurisdictions, the standard of proof in presidential election disputes goes beyond the preponderance of probabilities but falls slightly below the criminal standard. For example, in the *Chiluba* case,⁷⁰ it was held that the standard of proof in presidential election petitions is a degree higher than that of the civil standard.⁷¹ Also, in the *Raila Odinga* case, the Supreme Court of Kenya held that the threshold for proving presidential election petitions is slightly above the preponderance of probabilities but below proof beyond reasonable doubt.⁷²

So, whereas in Kenya a presidential election dispute must be established to a degree between the civil and criminal standard, in Ghana, the correct position of the law is proof on the preponderance of probabilities, except when a crime is alleged.⁷³ Indeed, in the words of Anin Yeboah JSC:⁷⁴

The standard of proof of allegations in civil cases is proof by preponderance of probabilities. It is only when crime is pleaded or raised in the evidence that the allegation sought to be proved must be proved beyond reasonable doubt ... The fact that this petition is brought under article 64 of the 1992 Constitution does not make any difference in the applicability of the standard of proof. The allegations in the petition that were denied by the respondents in their answers to the petition ought to be proved as required in every case. The fact that the petition is a constitutional matter is also entirely irrelevant. The standard of proof in all civil cases is the usual standard of proof by preponderance of probabilities and no more.

Therefore, the observation by Adinyira JSC that the standard of proof in presidential election petitions ought to be above the civil standard⁷⁵ is inconsistent with Ghanaian law and must be disregarded.

68 1970 (2) SCC 567.

69 1977 (AIR) (SC) 208.

70 *Chiluba* (n 6 above).

71 However, in the *Mwanawasa* case (n 6 above), which was decided later, the Zambian Supreme Court reviewed its position and held that the applicable standard of proof must depend upon the allegations contained in the petition.

72 *Raila Odinga* (n 2 above) para 203.

73 Sec 12 NRCD 323; see also *Opoku-Agyemang* (n 56 above) 164 167-168.

74 *Nana Akufo-Addo* (n 1 above) 62 459-460.

75 *Nana Akufo-Addo* 123.

So, is it the case that most presidential election disputes are unsuccessful because the petitioners generally fail to discharge the burden and standard of proof, or is it because the judgments are sometimes influenced by extra-legal considerations?

8 Extra-legal considerations in the resolution of presidential election disputes

Presidential election disputes are very important because they trigger all the three arms of government into action simultaneously: They constitute a challenge to the highest executive office of a country which the judiciary must resolve based on laws enacted by the legislature. That notwithstanding, presidential election disputes are not foreign to the law; they are instituted with constitutional or legal backing. Further, they are not extraordinary because the judiciary has the authority to dispose of them in accordance with the rules of evidence, just like all other cases.

However, some judges have created the impression that presidential election disputes are a special breed of cases. In *Peters v Attorney-General*, for instance, Sharma JA said that election petitions are 'sui generis'.⁷⁶ The Court of Appeal in *Chris Nwebueze v Peter Obi & 436 Others*⁷⁷ also remarked that election petitions are 'peculiar from the point of view of public policy'. Also, the Kenyan Supreme Court stated in the *Raila Odinga* case that a presidential election dispute consists of 'special circumstances'.⁷⁸ Finally, in the *Nana Akufo-Addo* case, presidential election disputes were variously described as 'serious and volatile';⁷⁹ of a 'peculiar nature and potential effects';⁸⁰ and 'multidimensional' with 'several legitimate interests at stake which cannot be ignored'.⁸¹ The use of these adjectives in the description of presidential election disputes justifies an enquiry into whether the courts are influenced by extra-legal considerations when resolving presidential election disputes.

In the United States case of *Bush v Al Gore*,⁸² it was submitted that presidential election disputes were, in essence, political contests⁸³ involving questions that are more political than they are legal.⁸⁴ Accordingly, it was argued that the judiciary ought to play a very

76 (2002) 3 LRC 32 CA 101.

77 [2006] 18 WRN 33.

78 *Raila Odinga* (n 2 above) para 230.

79 *Nana Akufo-Addo* (n 1 above) 434.

80 *Nana Akufo-Addo* 51.

81 *Nana Akufo-Addo* 34-37.

82 531 US (2000) (United States Supreme Court).

83 *Raila Odinga* (n 2 above) para 225.

84 *Raila Odinga* para 188.

limited role,⁸⁵ exercising 'judicial care and restraint'.⁸⁶ What is subtly meant by these submissions is that, since it is the province of an electorate to determine its leadership, judicial intervention in presidential election disputes must be geared towards preserving that political right.⁸⁷ The US Supreme Court rendered it in the following words:⁸⁸

None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people ... and to the political sphere.

These extra-legal sentiments were re-echoed by counsel in the *Raila Odinga* case, and they appear to have influenced the decision of the Kenyan Supreme Court. This is because the Supreme Court remarked that its role in resolving the *Raila Odinga* case was 'fundamentally political-cum-constitutional'.⁸⁹

Similarly, in Ghana, it appears that some extra-legal considerations engaged the minds of some of the judges in the majority. Akoto-Bamfo JSC, for instance, took into consideration the evolving phenomenon of democracy and the imperfect nature of elections and observed that '[w]e should exercise a reluctance in striking down every single vote just by reference to a provision of the law'.⁹⁰ Adinyira JSC went a step further and attributed the general reluctance of judges to void election results to public policy. According to her, since it is a very serious matter to overturn election results, '[p]ublic policy favours salvaging the election and giving effect to the voter's intent, if possible'.⁹¹ Similarly, the president of the court, Atuguba JSC, also noted that '[t]he judiciary in Ghana, like its counterparts in other jurisdictions, does not readily invalidate a public election but often strives in the public interest to sustain it'.⁹²

But what is this 'public policy' or 'public interest', and why does it favour a voter-friendly approach? The answer appears to lie in the following passage from the *Raila Odinga* case:⁹³

An alleged breach of an electoral law, which leads to a perceived loss by a candidate, as in the presidential election which has led to this petition, takes different considerations. The office of President is the focal point of political leadership ... This office is one of the main offices which, in a democratic system, are constituted strictly on the basis of majoritarian expression. The whole national population has a clear interest in the

85 n 82 above.

86 *Raila Odinga* (n 2 above) para 189.

87 *Raila Odinga* paras 220 & 225.

88 *Raila Odinga* para 222.

89 *Raila Odinga* (n 2 above) para 226.

90 *Nana Akufo-Addo* (n 1 above) 565-566 (my emphasis).

91 *Nana Akufo-Addo* 144-147 178-179.

92 *Nana Akufo-Addo* (n 1 above) 40.

93 *Raila Odinga* (n 2 above) para 298.

occupancy of this office which, indeed, they themselves renew from time to time, through the popular vote.

From this viewpoint, the Kenyan Supreme Court concluded that 'as a basic principle, it should not be for the Court to determine who comes to occupy the presidential office'.⁹⁴

9 Conclusion

Most presidential election disputes have been unsuccessful. Although the petitioners have almost invariably adduced evidence of non-compliance with electoral laws, so far the judiciary has hardly been persuaded that these trespasses had any significant or adverse impact on the validity of presidential election results. The *Raila Odinga* case appears to confirm the reluctance of judges to overturn presidential election results. However, the narrow win of the respondents in the *Nana Akufo-Addo* case suggests that the era of unsuccessful presidential election petitions may be drawing to a close.

Another point to note is that in declining to invalidate the results of presidential elections, the courts have insisted that they have been guided only by the law.⁹⁵ However, the literature indicates that some judges have been influenced by extra-legal considerations, which some of them have indicated is necessary because of public policy or the public interest. Perhaps the judiciary has been mindful that it is the unelected minority arm of government and so it must tread cautiously on any path that would easily be construed as a usurpation of the right of the electorate to determine their political leadership through the ballot.

Finally, it should be noted that the Ivorian crisis⁹⁶ indicates that the resolution of presidential election disputes has critical implications for the democratisation process of a country. Indeed, while the acceptance of its judgment can contribute immensely to the smooth operation of the government apparatus, the converse can hardly be seriously disputed. Accordingly, the judiciary, which is the arm of government with the constitutional mandate to resolve presidential election disputes, ought to strike a proper balance between providing effective redress to the grievances of petitioners and supplanting its will for that of the people.

94 *Raila Odinga* para 299.

95 *Raila Odinga* para 230.

96 n 8 above.

Public participation in decentralised governments in Africa: Making ambitious constitutional guarantees more responsive

Oliver N Fuo*

Postdoctoral fellow, North West University, Potchefstroom, South Africa

Summary

Following the example of South Africa, Kenya, Tunisia and Zimbabwe have recently adopted constitutions that contain bills of rights, embrace the ideals of decentralisation and profess a commitment to participatory democracy. In these countries, different forms of local government are constitutionally protected and accorded some degree of self-governing powers. As part of the state's overarching governance machinery, these governments are obliged to contribute towards the realisation of constitutionally-defined objectives, including a variety of constitutionally-entrenched rights, the pursuit of social justice and sustainable development. As the level of government closest to communities, a local government is constitutionally obliged to facilitate public participation in local governance. In South Africa, the Constitutional Court has interpreted the scope of the government's obligation to facilitate public participation in policy formulation and law-making processes extensively. The article explores the Court's jurisprudence on the nature and extent of the duty to facilitate public participation in order to distil lessons that could guide local authorities in Kenya, Tunisia and Zimbabwe to optimise the quality of public participation in local governance. I argue that, if implemented, guidelines distilled from the Court's jurisprudence could help optimise the quality of public participation at the local level in the various countries.

Key words: *Decentralisation in Africa; public participation; human rights; Constitutions of Kenya, South Africa, Tunisia and Zimbabwe*

* LLB (Hons) (Buea), LLM LLD (North West); njuhfu@gmail.com. This article was written during the course of the author's post-doctoral fellowship at the North West University. I would like to thank Prof Anel du Plessis and the two anonymous reviewers for commenting on draft versions of the article.

1 Introduction

Over the past three decades there have been several initiatives to promote decentralisation¹ in different parts of the world.² The commitment towards reinforcing decentralisation can be understood against the background of some of the difficulties faced by central governments to provide public services and to adequately meet the diverse needs of citizens in especially far-flung areas.³ It generally has been argued that, in all cases, decentralisation is expressly or implicitly driven by the need to improve the delivery of basic services such as water, sanitation, health services and education to communities.⁴

Decentralisation in government refers to the restructuring of state authority, in accordance with the principle of (institutional) subsidiarity,⁵ in order to create a system of governance that ensures co-responsibility between institutions of government at the central, regional and local levels, in meeting the needs of citizens.⁶ In other words, central governments relinquish certain functions and powers to lower-level units, such as local authorities that are legally constituted as separate governance bodies.⁷

The general trend towards decentralisation⁸ suggests that local government authorities will increasingly be required to contribute

1 Generally, three forms of decentralisation can be distinguished based on the degree of local government's autonomy in decision making. These are deconcentration, delegation and devolution. See J de Visser *Developmental local government: A case study of South Africa* (2005) 14-15; R Bird & F Vaillancourt (eds) 'Fiscal decentralisation in developing countries: An overview' in R Bird & F Vaillancourt *Fiscal decentralisation in developing countries* (1998) 3-4; EL Yulani 'Decentralization, deconcentration and devolution: What do they mean?' (2011), http://www.cifor.org/publications/pdf_files/interlaken/Compilation.pdf (accessed 10 March 2012).

2 See P Reddy 'Local government democratization and decentralization: Theoretical considerations, and recent trends and developments' in P Reddy (ed) *Local government democratisation and decentralisation: A review of the Southern African region* (1999) 9-10. The following instruments have been adopted to promote decentralisation: the European Charter of Local Self-Government (1985), signed in Strasbourg on 15 October 1985; UN-HABITAT International Guidelines on Decentralisation and Access to Basic Services for All (2009); Final Declaration of the Second Ordinary Session of the All-Africa Ministerial Conference on Decentralisation and Local Development, done at Maputo, Mozambique, on 12 August 2011.

3 J Cloete & C Thornhill *South African municipal government and administration: The new dispensation* (2005) 57; J Ahmed *et al Decentralisation and service delivery* (2005) 1.

4 Ahmed (n 3 above) 1.

5 The principle of subsidiarity is considered the underlying rationale of decentralisation. See UN-HABITAT (n 2 above) para 15.

6 UNDP *Decentralised governance programme: Strengthening capacity for people-centred development* (1997) 4.

7 UNDP *Decentralisation: A sampling of definitions* (1999) 6.

8 J Kauzya *Political decentralisation in Africa: Experiences of Uganda, Rwanda, and South Africa* (2007) 3; Reddy (n 3 above) 9-10.

towards realising broad national objectives.⁹ In recent years, several African countries have adopted constitutions that establish different forms of decentralised governments and profess commitment towards democratic values, social justice, fundamental human rights and respect for the rule of law.¹⁰ These constitutions emphasise public participation in government decision-making processes and embrace varying forms of decentralised government as a mechanism for realising defined constitutional objectives. South Africa seems to have set the pace towards this trend on the African continent with the adoption of the Constitution of the Republic of South Africa, 1996. This trend has been followed more recently by Kenya, Tunisia and Zimbabwe.¹¹

Through a synthesis of theories and scholarly perspectives, the author elsewhere established¹² that public participation in local governance is an indispensable requirement for local authorities' pursuit of social justice.¹³ The article explores the South African Constitutional Court's jurisprudence on the nature and extent of the duty to facilitate public participation in order to distil lessons that could guide local authorities in Kenya, Tunisia and Zimbabwe in order to optimise the quality of public participation in local governance.¹⁴ This approach is motivated by the fact that, unlike the other countries that constitute part of this analysis, the Constitutional Court in South Africa has over the past two decades had opportunities to develop extensively jurisprudence on the right to public participation.

In order to achieve the above objective, the article is divided into four sections. It begins by providing an overview of the constitutional commitment of South Africa, Kenya, Tunisia and Zimbabwe towards decentralisation as a mechanism for realising national objectives and highlighting how the various constitutions have imposed obligations on local authorities to facilitate public participation. The second

9 See UN *Report of the UN Summit for Social Development* (1995) para 27; S Fainstein 'Competitiveness, cohesion and governance: The implications for social justice' (2001) 25 *International Journal of Urban and Regional Research* 884-888.

10 See, eg, the Constitutions of South Africa, Kenya, Tunisia and Zimbabwe.

11 This becomes clear from the discussion in part 2 below.

12 See ON Fuo 'Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa' unpublished PhD thesis, North West University, 2014.

13 Fuo (n 12 above) 24-64. Several South African authors acknowledge the importance of public participation in government's pursuit of social justice. See D Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 3 *Stellenbosch Law Review* 622-625; L Stewart 'The politics of poverty: Do socio-economic rights become real only when enforced by courts?' (2011) IV *Diritto Pubblico Comparato ed Europeo* 1515.

14 Local governance embraces the duties of local government authorities to 'govern' and 'represent' local communities. To govern in this context means to exercise authority and to have the power to adopt and enforce by-laws, to design and implement policy, to take decisions that can affect the rights of other people, and to exercise discretion in matters of public administration. See AA du Plessis 'Local environmental governance and the role of local government in realising section 24 of the South African Constitution' (2010) 2 *Stellenbosch Law Review* 275.

section examines how courts in South Africa, with emphasis on the Constitutional Court, have interpreted the nature and extent of government's duty to facilitate public participation. The third part of the article draws potential lessons from the jurisprudence of South Africa's Constitutional Court that can help local authorities optimise the quality of public participation in Kenya, Tunisia and Zimbabwe. The last section concludes the article.

2 Sub-national governments and public participation in selected African constitutions

2.1 Constitution of the Republic of South Africa, 1996

The Constitution of the Republic of South Africa, 1996 is considered to be different from liberal classic constitutions or bills of rights in other parts of the world in that it is an engagement with the future that it will partly shape.¹⁵ It is a constitutional text with a transformative vision aimed at correcting the injustices of the past and establishing a society based on social justice.¹⁶ This transformative vision is understood as a constitutional commitment which translates into an implicit yet omnipresent constitutional mandate to pursue social justice.¹⁷ The execution of this mandate is in large part dependent on authorities' respect for and the realisation of a range of rights entrenched in the Bill of Rights.¹⁸ As such, the constitutional mandate places an obligation on the three spheres of government to realise the rights entrenched in the Constitution to benefit the needs of impoverished people.¹⁹ All of the rights in the Constitution have the same status in that they are all justiciable.²⁰

The Constitution also influenced post-apartheid institutional change.²¹ The result of this institutional change at the government

15 Stewart (n 13 above) 1510. By virtue of globalisation, the future of South Africa will equally be shaped by regional and international trends and developments with respect to, eg, economic growth and job creation.

16 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 153; M Pieterse 'What do we mean when we talk about transformative constitutionalism' (2005) 20 *South African Public Law* 156-161.

17 See A van der Walt 'A South African reading of Frank Michelman's theory of social justice' in H Botha *et al* (eds) *Rights and democracy in a transformative constitution* (2003) 163-164.

18 See Van der Walt (n 17 above) 163-164.

19 See D Brand 'Introduction to socio-economic rights in the South African Constitution' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 12-20; M Pieterse 'Eating socio-economic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) 29 *Human Rights Quarterly* 796-822.

20 *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC) para 20.

21 See DJ Brand 'Courts, socio-economic rights and transformative politics' unpublished PhD thesis, University of Stellenbosch, 2009 4.

level is a unique, multi-spherical constitutional system of government.²² The Constitution established three (national, provincial and local) spheres of government, which are distinctive, interdependent and interrelated and obliged to function in accordance with the constitutional principles of co-operative government.²³ The three spheres consist of a number of different line functionaries, while the local sphere of government is constituted by 279 municipalities.²⁴

Local government, as the sphere of government closest to communities, has been given extensive legislative and executive powers and functions by the Constitution.²⁵ This was confirmed by the Court in *City of Cape Town & Others v Robertson & Others*.²⁶ In brief, the Court emphasised that municipalities could adopt and implement any measures that foster their developmental mandate, provided such measures do not violate the Constitution and constitutionally-compliant legislation.²⁷ The powers of local government also speak to several of the socio-economic rights of local communities.²⁸ Unlike other spheres of government, local government is also expressly mandated by the Constitution to fulfil an expanded 'developmental' role.²⁹ Although the Court confirmed in *Joseph & Others v City of Johannesburg & Others*³⁰ that service delivery remains a central mandate of post-apartheid local government,³¹ municipalities are now required to generally promote sustainable development.³² The developmental role of municipalities is captured

22 J Hattingh *Governmental relations: A South African perspective* (1998) 3. See ch 3 of the Constitution on co-operative government, especially sec 40.

23 See T Edwards 'Co-operative governance in South Africa, with specific reference to the challenges of intergovernmental relations' 2008 27 *Politeia* 65-85; C Kirkby *et al* 'Towards a more co-operative local government: The challenge of district intergovernmental forums' (2007) 22 *South African Public Law* 144; L Malan 'Intergovernmental relations and co-operative government in South Africa: The ten year review' 2005 24 *Politeia* 226-243.

24 According to sec 151(1) of the Constitution, the local sphere of government comprises of municipalities (metropolitan, district and local) in South Africa. Based on this, the terms 'local government' and 'municipalities' will be used interchangeably. For a complete list of municipalities in the country, see <http://www.demarcation.org.za/> (accessed 5 March 2013).

25 See secs 151(2) and (3) of the Constitution; sec 11(3) of the Local Government Municipal Systems Act 32 of 2000; *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1998 12 BCLR 1458 (CC) para 36.

26 2005 (2) SA 323 (CC) para 60.

27 As above.

28 See J de Visser 'Developmental local government in South Africa: Institutional fault lines' (2009) 2 *Commonwealth Journal of Local Governance* 11-12; AA du Plessis 'Fulfillment of South Africa's constitutional environmental right in the local government sphere' unpublished LLD thesis, North West University, 2008 141-150 363.

29 See secs 152 and 153(1) of the South African Constitution.

30 2011 7 BCLR 651 (CC).

31 *Joseph* (n 30 above) paras 34-40.

32 *Fuo* (n 13 above) 96-98.

in the notion of 'developmental local government' which, over time, permeated South Africa's local government law and policy frameworks.³³ Furthermore, Part B of Schedule 4 and Part B of Schedule 5 of the Constitution outline the areas where local government has 'original' executive and legislative powers including, *inter alia*, water and sanitation services limited to potable water supply systems and domestic waste water and sewage disposal systems, electricity and gas reticulation, municipal health services, air pollution, building regulations, municipal public transport and childcare facilities.³⁴ In addition, in line with the principle of institutional subsidiarity, national and provincial governments can assign additional (new) responsibilities to municipalities.³⁵ This means that the range of services provided by municipalities is not confined to the lists contained in Schedules 4B and 5B of the Constitution.³⁶ The Pietermaritzburg High Court confirmed this in *Le Sueur*.³⁷

The Preamble to the Constitution purports to lay the foundations for a democratic and open society in which government is based on the will of the people and in which every citizen is equally protected by law.³⁸ However, there is no enumerated right to public participation in government decision-making processes in the Bill of Rights. The Constitutional Court has indicated that the right to public/political participation 'is given effect ... through the political rights guaranteed in section 19 of the Bill of Rights',³⁹ as supported by the right to freedom of expression and the duties imposed on government to facilitate public participation and promote democratic and accountable government.⁴⁰

The right to public participation is given considerable importance at the local government level. The Constitution obliges municipalities to provide democratic and accountable government to local communities and to encourage community participation in local government matters.⁴¹ In addition, section 160(7) of the Constitution obliges a municipal council

33 See para 1 of 'Section B: Developmental Local Government' in the *White Paper on Local Government* (1998) GN 423 in GG 18739 of 13 March 1998.

34 See sec 156 read with Schedules 4B and 5B of the Constitution.

35 See sec 156(4) of the Constitution; J de Visser 'Institutional subsidiarity in the South African Constitution' (2010) 1 *Stellenbosch Law Review* 90.

36 See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* 2012 2 BCLR 150 (CC) paras 21-97; *Le Sueur & Another v Ethekwini Municipality & Others* (2013) Case 9714/11 paras 19-29.

37 See *Le Sueur* (n 36 above) para 19.

38 See Preamble to the Constitution.

39 Sec 19 of the Constitution guarantees every citizen the right to make political choices.

40 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 12 BCLR 1399 (CC) para 106.

41 See also secs 152(1)(a) and (e) and 195(e) of the Constitution.

to conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted.

In terms of legislation, the entire chapter 4 of the Systems Act is dedicated to community participation at local government level. The Systems Act obliges municipalities to encourage and create conducive conditions for communities to participate in municipal affairs, including: the preparation, implementation and review of integrated development plans (IDPs); the establishment, implementation and review of performance management systems; the monitoring and review of municipal performance; the preparation of municipal budgets; and strategic decisions relating to the provision of municipal services.⁴² In order to enhance public participation in local governance processes, municipalities are obliged to use their resources and annually allocate funds in their budgets for building the capacity of communities, municipal councils and municipal officials.⁴³ By building local capacity, communities may gain the skills needed to participate in local governance processes and hopefully those needed to address some of their daily challenges.

The main vehicles for public participation envisaged by the Systems Act include councillors, ward committees and advisory committees.⁴⁴ Ward committees create a formal and direct communication channel through which community residents can interact with their ward councillors, and forward complaints and suggestions on matters affecting them to the council.⁴⁵ Despite their potential to enrich the content of local policies, it has been indicated elsewhere that many ward committees are dysfunctional.⁴⁶ This has been attributed to the fact that some municipalities face severe resource constraints and some community residents do not take an interest in the operation of ward committees.⁴⁷ The nonchalant attitude of some community members is often borne out by the fact that they have lost confidence in the potential of ward committees to defend their interests or because their capacities have not been fully developed to engage with ward members.⁴⁸

The elaborate provisions on public participation at the local level is also extended to people who cannot read or write, people with disabilities, women and other disadvantaged persons. Municipalities are obliged to ensure that the mechanisms, procedures and processes

42 See secs 16(1)(a)(i)-(v) of the Systems Act.

43 See secs 16(1) (b) and (c) of the Systems Act.

44 See secs 17(1)(d) and (4) of the Systems Act; *Borbet South Africa (Pty) Ltd & Others v Nelson Mandela Bay Municipality* 2014 (5) SA 256 (ECP) (3 June 2014) para 18.

45 T Smith *The role of ward committees in enhancing participatory local governance and development in South Africa: Evidence from six ward committee case studies* (2008) 4; O Fuo 'Local government indigent policies in the pursuit of social justice in South Africa through the lenses of Fraser' (2014) 1 *Stellenbosch Law Review* 205-206.

46 Fuo (n 45 above) 206; Smith (n 45 above) 4-5.

47 Fuo (n 46 above) 206.

48 As above.

put in place to enhance public participation do not exclude these categories of people.⁴⁹ The emphasis and special attention given to people who cannot read and write is commendable, given the high levels of adult illiteracy in South Africa.⁵⁰ This has the potential of ensuring that the needs and concerns of vulnerable groups of people are reflected in socio-economic policy choices, which will ensure that such policies reflect their lived experiences. Taking into consideration the extensive provisions on the right to public participation at the local government level, De Visser argues that the Systems Act has made 'a concerted attempt to rejuvenate the battered relationship' that existed between the state and society in the old order and that the Act legislates what can be called a 'social pact' between community residents and municipalities.⁵¹ According to De Visser, the Act 'shows a remarkable commitment to ensuring public participation'.⁵² The 'elaborate' legal framework on public participation at the local level signals a clear attempt to correct the past that was characterised by exclusionary governance processes and repression.⁵³

Despite the legal commitment toward promoting public participation in local governance, effective public participation remains problematic in some municipalities.⁵⁴ Apart from dysfunctional ward committees, De Visser has indicated that some municipal officials have reduced public participation to a more technical exercise driven to merely ensure compliance with the requirements of framework legislation.⁵⁵ In addition, some municipalities often overlook the need for effective public participation in the context of discharging their socio-economic rights obligations.⁵⁶ Although the increasing number of service delivery protests across the country is attributed to different reasons, they are also an indicator of the lack of quality public participation in some local communities.⁵⁷

49 See secs 17(3)(a)-(d) of the Systems Act.

50 See J Aitchison & A Harley 'South African illiteracy statistics and the case of the marginally growing number of literacy and ABET learners' (2006) 39 *Journal of Education* 89-112.

51 De Visser (n 1 above) 105.

52 As above.

53 As above.

54 See SAHRC *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014* (2014) 56; *Ntombentsha Beja & Others v Premier of the Western Cape* 2011 (10) BCLR 1077 (WCC) paras 81-84 & 146.

55 De Visser (n 1 above) 106.

56 See *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* 2008 (5) BCLR 475 (CC) para 9.

57 For a detailed analysis of this trend, see P Alexander 'Rebellion of the poor: South Africa's service delivery protests – A preliminary analysis' 2010 13 *Review of South African Political Economy* 25-40.

2.2 Constitution of Kenya, 2010

The Constitution of Kenya, 2010 is described as transformative because of its commitment to fundamental social and political change.⁵⁸ It records the commitment of Kenyans to establish a decentralised democratic system of government based on principles of human rights, social justice, good governance and sustainable development.⁵⁹ The Bill of Rights, chapter 4 of the Constitution of Kenya, provides a framework for the country's socio-economic and cultural policies and serves as a mechanism for promoting social justice.⁶⁰ It guarantees a variety of justiciable rights, including the rights to freedom of expression; freedom of association; access to information; to make political choices; to acquire and own property; a clean and healthy environment; the highest attainable standard of health, including the right to health care services, accessible and adequate housing, reasonable standards of sanitation, adequate food, clean and safe water in adequate quantities; education; and social security.⁶¹ All organs of state are obliged to respect, protect, promote and fulfil the rights in the Bill of Rights.⁶² The Bill of Rights applies to all law and binds all persons and organs of state.⁶³

The Constitution of Kenya entrenches the principles of devolution of power and public participation.⁶⁴ It creates two (national and county) levels of government, which are distinct and interdependent and obliged to conduct their mutual relations on the basis of cooperation and consultation.⁶⁵ The entire chapter 11 of the Constitution is devoted to the objects, principles, powers and functions and structures of sub-national (county) governments. The legislative and executive powers of the 47 county governments are constitutionally guaranteed.⁶⁶ According to article 174, the objects of the devolution of government are to promote democratic and accountable exercise of power; foster national unity by recognising diversity; give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them; recognise the right of communities to manage their own affairs and further their development; protect and promote the interests and rights of marginalised communities; and promote the provision of easily-

58 NW Orago 'Limitation of socio-economic rights in the 2010 Kenyan Constitution: A proposal for the adoption of a proportionality approach in the judicial adjudication of socio-economic rights disputes' (2013) 16 *Potchefstroom Electronic Law Journal* 172.

59 See Preamble and art 10(2) of the Constitution of Kenya, 2010.

60 Arts 19(1)-(2) Constitution of Kenya.

61 Arts 33, 35, 36, 38, 40, 42 & 43 Constitution of Kenya.

62 Art 21 Constitution of Kenya.

63 Art 20(1) Constitution of Kenya.

64 Art 10(2) Constitution of Kenya.

65 Art 6 Constitution of Kenya.

66 See arts 176 (1)-(2), 185 and First Schedule of the Constitution of Kenya, read together with Schedule 4B.

accessible services throughout the country. In addition, the Constitution provides that, subject to agreement, a specific function can be transferred from one level of government to another level of government if that function would be more effectively performed or exercised by the receiving government.⁶⁷ This provision embraces aspects of the principle of institutional subsidiarity and confirms that, in addition to their constitutional defined powers and functions, local governments can in appropriate circumstances be required to play a broader developmental role. The Constitution requires every county government to decentralise its functions and the provision of its services to the extent that it is efficient and practicable to do so.⁶⁸ Legislation specifies that functions and services of county governments can be decentralised further to urban areas or cities, wards or village units within a county.⁶⁹ The ward administrator is expected to co-ordinate, manage and supervise general administrative functions in a ward unit, including the development of policies and service delivery.⁷⁰

The Constitution guarantees that sovereign power rests with the people and that such power can be exercised directly by citizens or indirectly through democratically-elected representatives.⁷¹ Chapter 11 of the Constitution provides extensively for transparency and public participation at the level of county governments. Each county assembly is obliged to conduct its business in an open manner, to hold its sittings and those of its committees in public and to facilitate public participation and involvement in the legislative and other business of its assembly and committees.⁷² Each county is required to assist and develop the capacity of communities to participate in local governance.⁷³ Ward and village administrators are required to co-ordinate and facilitate the participation of citizens in the development of policies and plans and in the delivery of services at their respective levels.⁷⁴ Part VIII of the County Government Act is dedicated to enhancing public participation at the decentralised level. It outlines, *inter alia*, principles that inform public participation at the local level, modalities and platforms for public participation, the right of citizens to petition county governments, and the duty of county governments to respond to such petitions.⁷⁵

67 See generally sec 187 of the Constitution of Kenya.

68 See generally sec 176(2) of the Constitution of Kenya.

69 See secs 48(1)(a)-(e) of County Government Act 17 of 2012.

70 See generally sec 52 of County Government Act.

71 Arts 1 & 2 Constitution of Kenya.

72 Arts 196(1)-(2) Constitution of Kenya.

73 See Function 14 in Part 2 of Schedule 4 of the Constitution of Kenya.

74 See generally secs 51(3)(g) and 52(3)(a)(i)-(ii) of the County Government Act.

75 See generally secs 87-92 of the County Government Act.

2.3 Constitution of Zimbabwe Amendment Act 20, 2013

The Constitution of Zimbabwe Amendment Act 20 of 2013 was purportedly introduced to bring about socio-political change in the country. The Constitution expresses the people's commitment to build a just, democratic and prosperous nation founded on the values and principles of constitutional supremacy, the rule of law, fundamental human rights and freedoms, equality and good governance.⁷⁶ Chapter 4 of the Constitution contains a Bill of Rights that guarantees a variety of justiciable human rights.⁷⁷ The rights guaranteed include freedom of assembly and association; freedom to demonstrate and petition; access to information; political rights; property rights; environmental rights; the right to education; the right to health care; the right to food and water; and freedom from arbitrary eviction.⁷⁸ The protection and 'full realisation and fulfilment' of the fundamental rights remains a constitutional objective that should inform the design and implementation of all government policies and legislation in Zimbabwe.⁷⁹ The state is expected to respect, protect, promote and fulfil these rights.⁸⁰ These obligations apply to all levels of government and organs of state.⁸¹

To bring administration closer to communities and ensure their participation in determining development priorities, local authorities (urban and rural councils) are constitutionally recognised as a third tier of government in Zimbabwe.⁸² Chapter 14 of the Constitution of Zimbabwe deals with the powers and functions of provincial and local government. Section 264 of the Constitution provides that, whenever appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities which are competent to carry out those responsibilities efficiently and effectively.⁸³ It further states that the objectives for the devolution of governmental powers include the need to give powers of local governance to the people and enhance their participation in the exercise of the powers of the state and in making decisions affecting them; to promote democratic, accountable and transparent government; to recognise the right of communities to manage their own affairs and further their development; to ensure equitable sharing of national and local resources; and to transfer responsibilities and resources from the national government in order to establish a sound financial base for each provincial and metropolitan council and local

76 See Preamble and sec 3 of the Constitution of Zimbabwe Amendment Act.

77 Secs 44 & 45 Constitution of Zimbabwe Amendment Act.

78 Secs 58, 59, 62, 67 & 71-77 Constitution of Zimbabwe Amendment Act.

79 Sec 11 Constitution of Zimbabwe Amendment Act.

80 Sec 44 Constitution of Zimbabwe Amendment Act.

81 Sec 45(1) Constitution of Zimbabwe Amendment Act.

82 See sec 5 and Preamble to ch 14 of the Constitution of Zimbabwe Amendment Act.

83 Sec 264(1) Constitution of Zimbabwe Amendment Act.

authority.⁸⁴ Local authorities are expected to represent and manage the affairs of people in rural and urban areas.⁸⁵ As one of the three tiers of government, local authorities in Zimbabwe are therefore obliged to comply, albeit in varying degrees, with the human rights obligations imposed by the Constitution.

2.4 Constitution of the Tunisian Republic, adopted on 26 January 2014

The adoption of the Constitution of the Tunisian Republic on 26 January 2014 legally concretised the ideals of the Jasmine Revolution that started on 17 December 2010. The Preamble to the Constitution expresses the commitment of Tunisians to build a participatory and democratic system of government based on, *inter alia*, social justice, the rule of law, respect for human rights and freedoms and the sovereignty/will of the people.⁸⁶ The commitment towards social justice and sustainable development is clearly re-echoed as a constitutional objective in article 8 of the Constitution.⁸⁷ In line with its commitment towards social transformation, the Constitution of the Tunisian Republic equally guarantees some socio-economic rights: the rights to social assistance, health care, education, work, water, and a healthy environment.⁸⁸ The Constitution also guarantees the rights of women, children and people with disabilities.⁸⁹

The Constitution further commits the state to strengthen and apply the principle of decentralisation throughout the country.⁹⁰ The entire chapter 7 (also referred to as Title Seven) of the Constitution is dedicated to various aspects of local government. Local government is synonymous to local authorities comprising municipalities, districts and regions that cover the entire country in accordance with legally-established boundaries.⁹¹ Local authorities are headed by elected councils and enjoy a certain degree of self-governing powers – ‘financial and administrative independence’.⁹² Additional powers and functions as well as relevant resources can be transferred from central government to local authorities.⁹³ As a co-responsible sphere of government, local authorities can be expected to contribute towards realising the objectives defined by the Constitution, albeit in varying

84 Sec 264(2) Constitution of Zimbabwe Amendment Act.

85 Secs 5(c), 274 & 276 Constitution of Zimbabwe Amendment Act.

86 See Preamble and arts 2, 12 and 145 of the Constitution of the Tunisian Republic, adopted on 26 January 2014.

87 Art 12 Constitution of the Tunisian Republic.

88 Arts 38, 39, 40, 44 & 45 Constitution of the Tunisian Republic. These rights can be limited in accordance with art 49.

89 Arts 46-48 Constitution of the Tunisian Republic.

90 See art 14 on decentralisation in the Constitution of the Tunisian Republic.

91 Art 131 Constitution of the Tunisian Republic.

92 Arts 132-134 Constitution of the Tunisian Republic.

93 Art 135 Constitution of the Tunisian Republic.

degrees. Therefore, local authorities can be expected to contribute towards realising entrenched socio-economic rights, the pursuit of social justice and sustainable development.

In line with the commitment towards establishing a participatory democracy, chapter 7 of the Constitution of the Tunisian Republic promotes public participation in local governance.⁹⁴ It requires local authorities to 'adopt the mechanisms of participatory democracy and the principles of open governance to ensure the broadest participation of citizens and of civil society' in the design and implementation of development programmes and land use planning.⁹⁵ In addition, the Constitution places a responsibility on the state (inclusive of local authorities) to provide the necessary conditions for developing the capacities of the youth and supporting them to participate in political (as well as sustainable) development.⁹⁶ Other guaranteed rights closely associated with the right to public participation include the right to freedom of opinion, expression, media and publication;⁹⁷ access to information;⁹⁸ academic freedom;⁹⁹ elections and vote;¹⁰⁰ establish political parties, unions and association;¹⁰¹ and the right to assembly.¹⁰²

From the above discussion, it is clear that South Africa, Kenya, Zimbabwe and Tunisia have adopted constitutions that profess a commitment to different forms of decentralised government. The constitutions of these countries impose obligations on local authorities to facilitate public participation in local governance.

3 Duty to facilitate public participation as interpreted by South African courts

As the discussion below indicates, the Constitutional Court has developed two strands of jurisprudence on the duty of government to facilitate public participation. The first strand relates to the general duty to facilitate public participation in policy formulation and law-making processes; and the second specifically relates to situations where there is an imminent threat of eviction. While the former deals with discussions around mutually-acceptable trade-offs and prioritisation in policies and legislation that give effect to people's rights, the latter exclusively deals with instances of planned evictions. The discussion that follows bears this distinction in mind.

94 Art 139 Constitution of the Tunisian Republic.

95 As above.

96 Art 8 Constitution of the Tunisian Republic. [ART 8?] I corrected. It is art 8

97 Art 31 Constitution of the Tunisian Republic.

98 Art 32 Constitution of the Tunisian Republic.

99 Art 33 Constitution of the Tunisian Republic.

100 Art 34 Constitution of the Tunisian Republic.

101 Arts 35-36 Constitution of the Tunisian Republic.

102 Art 37 Constitution of the Tunisian Republic.

The most elaborate pronouncements of the Constitutional Court on the general duty of government to facilitate public participation have been made in the context of the duties of parliament and provincial legislatures (the National Council of Provinces).¹⁰³ In *Doctors for Life International*, the Court indicated that the words 'public involvement' and 'public participation' often are used interchangeably to refer to the 'active participation of the public' in decision-making processes.¹⁰⁴ The Court explained that the phrase 'facilitate public involvement' is a broad concept which relates to the duty to ensure public participation in government decision-making processes.¹⁰⁵ Furthermore, the Court asserted that the right to public participation guarantees a positive right of the public to participate in public affairs and a duty on government to facilitate public participation in the conduct of public affairs in order to ensure that this right is realised.¹⁰⁶

In *Doctors for Life International*, the Court made it clear that it would not dictate to other branches of government the method to be followed to ensure quality public participation in policy formulation and law making as well as the implementation thereof.¹⁰⁷ However, it explained that the duty to facilitate public participation has two legs: First, there is the duty to provide meaningful opportunities for public participation in policy formulation and law-making processes and, second, there is the duty to implement measures to ensure that people have the ability to take advantage of the opportunities provided.¹⁰⁸ According to the Court, these basic requirements could be met where government provides: notice to communities of the issues under consideration and the opportunities for participation that are available; and public education that builds on the capacity of ordinary citizens to meaningfully engage in local government matters.¹⁰⁹ According to the Court, education and awareness can be achieved, for example, through road shows, community workshops, radio programmes, and publications informing the public about activities of the government.¹¹⁰

In *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*,¹¹¹ Van der Westhuizen J made it clear that the obligation to facilitate public involvement was open to innovation and may be fulfilled in different ways.¹¹² Just as in *Fedsure Life*, the

103 See, eg, *Doctors for Life International; Matatiele Municipality & Others v President of the Republic of South Africa & Others* (2) 2007 1 BCLR 47 (CC) paras 50-68.

104 Para 118 *Doctors for Life International* (n 103 above).

105 Paras 119-129 *Doctors for Life International*.

106 Para 129 *Doctors for Life International*.

107 Paras 123-124 *Doctors for Life International*.

108 Para 129 *Doctors for Life International*.

109 Para 131 *Doctors for Life International*.

110 Para 132 *Doctors for Life International*.

111 2008 10 BCLR 968 (CC).

112 Para 27 *Merafong Demarcation Forum* (n 111 above).

Court noted that legislatures and executives in all spheres of government had a discretion to determine how to fulfil the obligation. However, in exercising this discretion, citizens must be given a meaningful opportunity to be heard. The concern of the Court in any given instance is to determine whether government has done what is reasonable in all the circumstances. The method and degree of public participation that is reasonable in a given case depends on a number of factors, including the nature and importance of the legislation/policy and the intensity of its impact on the public. In any instance, people who stand to be directly affected by government decisions should be given a reasonable opportunity to submit oral and written comments and representations.¹¹³

In the *Merafong* case, the Court asserted that, despite the obligation to involve the public in government decision processes, the views of the majority could not always override government policy positions.¹¹⁴ Van der Westhuizen J stressed that, although government is certainly expected to be responsive to the needs and wishes of minorities or interest groups, South Africa's constitutional system of government would not be able to function if the legislature (and by extension the executive) were bound by these views. Public participation in government decision-making processes, as envisaged by the Constitution, is supposed to supplement and enhance the democratic nature of general elections and majority rule and not to conflict with or even overrule or veto them.¹¹⁵ According to Justice van der Westhuizen, to say that the views expressed during a process of public participation are not binding when they conflict with government's mandate from the national electorate is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind.¹¹⁶ Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public.¹¹⁷ The Court held that public participation requirements aimed to ensure that the legislature is informed of the public's views on the main issues addressed in a Bill and not at the accurate formulation of a legally-binding mandate.¹¹⁸ The Court held that the obligation to facilitate public participation was met because the community had a proper opportunity to air their views.¹¹⁹

In *Borbet South Africa (Pty) Ltd & Others v Nelson Mandela Bay Municipality*,¹²⁰ the Port Elizabeth High Court drew from section 27(4)

113 As above.

114 Para 50 *Merafong Demarcation Forum*.

115 As above.

116 Paras 53 & 116 *Merafong Demarcation Forum*.

117 As above.

118 Para 51 *Merafong Demarcation Forum*.

119 Paras 59-116 *Merafong Demarcation Forum*.

120 n 44 above.

of the Municipal Finance Management Act,¹²¹ to hold that non-compliance with legal requirements for public participation specifically relating to budgeting processes, including budget approvals, did not render a previously-approved municipal budget (2011/2012) unlawful or invalid.¹²² In plain terms, although the municipality did not meet the requirements for public participation in relation to the adoption of its budget, the adopted budget was not unlawful or invalid. The Court declined to grant an order setting aside the adopted budget in its entirety and an order precluding the respondent from enforcing any claims for recovery against the applicants based on the rates determined in that budget.¹²³ This was based on a consideration of the knock-on effect such orders would have on successive – 2012/2013 and 2013/2014 – budgets and the significant practical difficulties associated with undoing parts of the budget or of making provision for claims founded upon an order declaring parts or the whole of the budget invalid.¹²⁴ The Court held that to undo the budget process some years after the event would inevitably give rise to significant disruption and uncertainty and that it was not in the interests of justice to do so.¹²⁵

Despite the absence of a remedy with teeth in favour of the applicants, this judgment is significant in that it draws from the rich jurisprudence of higher courts in South Africa,¹²⁶ to expound on the nature and extent of the obligation imposed on municipalities to facilitate participation in local governance. Justice Goosen observed that the obligation to encourage the involvement of communities in local governance extended to all facets of the functioning of the local sphere of government.¹²⁷ He stressed that the obligations imposed on municipalities to facilitate public participation in local governance were extensive and that the use of the phrase ‘develop a culture of municipal governance’ suggested that a municipal council is obliged to take steps to extend and deepen its democratic processes.¹²⁸ This means that each municipal council must ‘create conditions’, ‘build capacity’ and, most importantly, allocate resources to comply with its obligations regarding public participation. The judge went on to indicate that this obligation required each municipal council to take these steps in order to encourage public participation in the preparation and implementation of its Integrated Development Plan

121 Sec 27(4) of the Municipal Finance Management Act 53 of 2003 provides: ‘Non-compliance by a municipality with a provision of this chapter relating to the budget process or a provision in any legislation relating to the approval of a budget-related policy does not affect the validity of an annual or adjustments budget.’

122 Paras 92-95 *Borbet South Africa* (n 120 above).

123 Paras 106-108 *Borbet South Africa*.

124 As above.

125 As above.

126 Paras 56-71 *Borbet South Africa*.

127 Para 9 *Borbet South Africa*.

128 Para 15 *Borbet South Africa*.

(IDP) and the preparation of its budget. The obligation to facilitate public involvement also requires municipal councils to communicate information concerning the available mechanisms, processes and procedures to encourage and facilitate community participation.¹²⁹ According to the Court, extensive guarantees for public participation in local government law suggest that municipal councils are to function as the primary spheres of active engagement with members of the community and as the basis upon which participatory democracy is to be founded.¹³⁰ Acknowledging that legislation does not provide a closed list of mechanisms for public participation at the local level, Justice Goosen indicated that community participation must take place through engagement with councils, executive committees and ward committees.¹³¹ Restating the jurisprudence of the Constitutional Court, Justice Goosen indicated that the obligation to encourage public participation at local government level went beyond a mere formalism in which public meetings are convened and information shared.¹³² This requires meaningful opportunities for participation and that municipalities take steps to ensure that people have the ability and capacity to take advantage of those opportunities.¹³³

The above discussion indicates that, due to their proximity to local communities, municipalities carry a higher degree of responsibility in ensuring that community residents participate in the design and implementation of policies and programmes that affect their lives. Local authorities are expected to use their resources to ensure that mechanisms are put in place to ensure public participation and to implement proactive measures that enable citizens to take advantage of the opportunities created for public participation. Local decisions must be informed by concerns raised by communities. However, local authorities cannot be expected to abdicate their governing powers to the public. They have the final say in policy and legislative choices.

The Constitutional Court has specifically developed jurisprudence on what is now referred to as 'meaningful engagement' to guide especially local government officials when effecting evictions.¹³⁴ It should be stressed that this jurisprudence was developed in line with the obligations imposed by section 26(3) of the Constitution¹³⁵ and

129 As above.

130 Para 18 *Borbet South Africa*.

131 Para 19 *Borbet South Africa*.

132 As above.

133 As above.

134 Two paragraphs of the discussion on meaningful engagement are reproduced from one of my earlier articles: See ON Fuo 'Constitutional basis for the enforcement of "executive" policies that give effect to socio-economic rights in South Africa' (2013) 16 *Potchefstroom Electronic Law Review* 16-18. I want to thank the editor of PER for giving me the permission to do so.

135 Sec 26(3) of the Constitution provides: 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

relevant housing legislation.¹³⁶ These laws prohibit unlawful evictions of occupiers from state or private property without a court order. In a number of cases, the Court has established that a key factor for determining the fairness of an eviction of persons from private or public property by state authorities is whether they have meaningfully engaged with each other.¹³⁷

In *Occupiers of 51 Olivia Road*, more than 400 occupiers of two buildings in the inner city of Johannesburg applied for leave to the Court to set aside a judgment of the Supreme Court of Appeal that authorised their eviction by the City. The occupiers argued, among others, that the City did not give them a hearing before deciding to evict them.¹³⁸ The Supreme Court of Appeal based its findings on the fact that the buildings were unsafe and unhealthy. The Supreme Court then ordered the City to provide housing assistance to those in desperate need by relocating them to a temporary settlement area.¹³⁹ After hearing the application for leave to appeal, the Court issued an interim order in which it required that the City and the occupiers should engage with each other meaningfully on certain issues.¹⁴⁰ Specifically, the interim order obliged the City and occupiers to engage meaningfully, as soon as possible, in order to resolve the difficulties and differences aired in the application before the Court in light of the values of the Constitution, the constitutional and legislative duties of the municipality, and the rights and duties of the citizens concerned; and to alleviate the plight of the occupiers by making the buildings as safe and as conducive to health as is reasonably practicable. The Court ordered the City and the occupiers to submit reports on the results of the engagement, which was taken into consideration in writing the judgment.¹⁴¹ As a result of this interim order, an agreement was reached between the City and the occupiers on how to resolve the eviction problems.¹⁴² *Occupiers of 51 Olivia Road* therefore illustrates that quality public participation or meaningful engagement at the local government level can be used to find common grounds on challenges that municipalities face in the pursuit of social justice.

In *Occupiers of 51 Olivia Road*, the Court defined meaningful engagement as a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives.¹⁴³ It held that meaningful engagement

136 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; Extension of Security of Tenure Act 62 of 1997.

137 See *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) paras 39-43; *Occupiers of 51 Olivia Road* (n 56 above) paras 5 & 14-21.

138 For details on the grounds raised by the occupiers, see para 7 of *Occupiers of 51 Olivia Road* (n 56 above).

139 Para 1 *Occupiers of 51 Olivia Road* (n 56 above).

140 Para 5 *Occupiers of 51 Olivia Road*.

141 As above.

142 Paras 6 & 25-29 *Occupiers of 51 Olivia Road*.

143 *Occupiers of 51 Olivia Road*, para 14.

has the potential to contribute towards the resolution of disputes and to 'increased understanding and sympathetic care' if both sides are willing to participate in the process. The Court noted that people may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. The Court held that if this happens, a municipality cannot merely walk away but must make reasonable efforts to engage with such vulnerable people and it is only if these reasonable efforts fail that it may proceed without appropriate engagement. The Court stated that, because the engagement process precisely seeks to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people, that process should preferably be managed by careful and sensitive people.¹⁴⁴ It held that the failure of the City to engage with the occupiers was contrary to the spirit and purport of the Constitution, a violation of the right to human dignity, as well as other socio-economic rights obligations imposed by the Constitution.¹⁴⁵ Yacoob J held that where a municipality's strategy, policy or plan is expected to affect a large number of people, there is a greater need for 'structured, consistent and careful engagement'.¹⁴⁶ The Court further observed that the process of meaningful engagement could only work if both sides act reasonably and in good faith.¹⁴⁷ The Court cautioned that community residents who approach the engagement process with an intransigent attitude or with unreasonable and non-negotiable demands may stall the engagement process. On the other hand, municipalities must not perceive vulnerable groups and individuals as a 'disempowered mass', but rather encourage them to be pro-active rather than being purely defensive. The Court expressed the view that civil society organisations that champion the cause of social justice should preferably facilitate the engagement process in every possible way.¹⁴⁸ Lastly, the Court indicated that secrecy was inimical to the constitutional value of openness and counter-productive to the process of meaningful engagement.¹⁴⁹ This requires that, in negotiating a policy, plan or programme that affects the rights of communities, municipalities must furnish complete and accurate information that will enable affected communities to reach reasonable decisions.¹⁵⁰ The objectives of meaningful engagement will differ from one context to another.¹⁵¹

144 Para 15 *Occupiers of 51 Olivia Road*.

145 Para 26 *Occupiers of 51 Olivia Road*.

146 Para 19 *Occupiers of 51 Olivia Road*.

147 Para 20 *Occupiers of 51 Olivia Road*.

148 As above.

149 Para 21 *Occupiers of 51 Olivia Road*.

150 As above.

151 Para 14 *Occupiers of 51 Olivia Road*. See also *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* 2009 9 BCLR 847 (CC) paras 241-242.

In *Port Elizabeth Municipality v Various Occupiers*,¹⁵² the Court assigned itself a managerial role in ensuring that the parties (Port Elizabeth Municipality and 68 occupiers) find mutually-acceptable solutions to their conflicting interests. Writing on behalf of the majority, Sachs J stated that one potentially-dignified and effective mode of achieving sustainable reconciliation of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually-acceptable solutions. He asserted that wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.¹⁵³ The Court expressed the view that in a context such as South Africa where communities have long been divided and placed in hostile camps, mediation had the potential of enabling parties to relate with each other in pragmatic and sensible ways, building up prospects for respectful good neighbourliness for the future.¹⁵⁴ In addition, the Court indicated that mediation promoted respect for human dignity, underlined the fact that 'we all live in a shared society', contributed towards reducing conflicts between the different parties involved in the process and minimised the expense of litigation.¹⁵⁵

The Court indicated that in deciding whether it is just and equitable for an eviction order to be made, courts have to consider whether there was an attempt at mediation.¹⁵⁶ The Court stressed that the housing obligations of municipalities extended beyond the development of housing schemes to treating those within their jurisdiction with respect. The Court stated that where the need to evict people arises, municipalities must make attempts to resolve the problem before seeking an eviction order.¹⁵⁷ The Court held as follows:¹⁵⁸

To sum up: In the light of the lengthy period during which the occupiers have lived on the land in the question, the fact that there is no evidence that the Municipality or the owners of the land need to evict the occupiers in order to put the land to some other productive use, the absence of any significant attempts by the Municipality to listen to and consider the problems of this particular group of occupiers, and the fact that this is a relatively small group of people who appear to be genuinely homeless and in need, I am not persuaded that it is just and equitable to order the eviction of the occupiers.

In view of the above finding, the Court held that in all future litigation involving occupiers, courts should be reluctant to accept that it will be just and equitable to order their eviction if it is not satisfied that all

152 *Port Elizabeth Municipality* (n 137 above).

153 Para 39 *Port Elizabeth Municipality*.

154 Para 43 *Port Elizabeth Municipality*.

155 Para 42 *Port Elizabeth Municipality*.

156 Para 47 *Port Elizabeth Municipality*.

157 Paras 56 & 61 *Port Elizabeth Municipality*.

158 Para 59 *Port Elizabeth Municipality*.

reasonable steps had been taken to get an agreed, mediated solution.¹⁵⁹

In *Residents of Joe Slovo Community*, Ngcobo J asserted that in implementing any relocation programme, the key requirement which must be met is meaningful engagement between the government and residents.¹⁶⁰ This requirement flows from the need to treat community residents with respect and care for their inherent human dignity as well as the need for government to ascertain the needs and concerns of individual households.¹⁶¹ The process of meaningful engagement does not require the parties to agree on every issue. What is required of the parties is that they should approach the engagement process in good faith and reasonableness and should understand the concerns of the other side.¹⁶² Meaningful engagement can only be achieved if all the parties approach the process in good faith and a willingness to listen and, where possible, to accommodate one another. Justice Ngcobo stressed that the goal of meaningful engagement was to find a mutually-acceptable solution to the difficulties confronting the government and citizens in the quest to realise socio-economic rights.¹⁶³ The need for structured and concerted engagement was equally emphasised by Justice Ngcobo when he observed that different messages and perhaps conflicting information from officials of all three spheres of government conveyed to residents of Joe Slovo created misunderstanding and distrust in the minds of the residents regarding the relocation project.¹⁶⁴ Even though mutual understanding and accommodation of each others' concerns remain the primary focus of meaningful engagement, the decision ultimately lies with government. However, government must ensure that the decision is informed by the concerns raised by the residents during the process of engagement.¹⁶⁵

In *Abahlali Basemjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others*,¹⁶⁶ a majority of the Court found section 16 of the Slums Act, enacted by the KwaZulu-Natal provincial legislature,¹⁶⁷ to be in violation of the obligations imposed by section 26 of the Constitution.¹⁶⁸ This is because under section 16 of the Slums Act, the MEC could by notice order any municipality or private landowner to evict unlawful occupiers of slums without due consideration of the requirement of justice and fairness prescribed by

159 Para 61 *Port Elizabeth Municipality*.

160 Para 238 *Joe Slovo* (n 151 above).

161 As above.

162 Para 244 *Joe Slovo*.

163 As above.

164 Para 237 *Joe Slovo*.

165 Para 244 *Joe Slovo*.

166 2010 (2) BCLR 99 (CC). For the facts of this case, see paras 1-10 and 87-91.

167 The details of sec 16 of the Slums Act are outlined in para 103 of *Abahlali Basemjondolo* (n 166 above).

168 Paras 102-123 *Abahlali Basemjondolo* (n 166 above).

the Prevention of Illegal Eviction from and Unlawful Occupation of Land (PIE) Act.¹⁶⁹ The Court held that section 16 was unconstitutional because it requires a municipality or owner of private property to 'proceed with the eviction of unlawful occupiers even if the PIE Act cannot be complied with'.¹⁷⁰

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another*,¹⁷¹ the Constitutional Court declared the City of Johannesburg's housing policy unconstitutional in that it excluded people evicted by a private landowner from its temporary housing programme, as opposed to those relocated by the City.¹⁷² The Court held that even without assistance from other spheres of government, municipalities were entitled to self-fund housing projects in the realm of emergency situations.¹⁷³ Based on an interpretation of the relevant provisions of the National Housing Code (2009), the Court held that besides its entitlement to approach the province for assistance, the City has both the power and the duty to finance its own emergency housing scheme. It stated that local government must first consider whether it is able to address an emergency housing situation out of its own means and that the City has a duty to plan and budget proactively for situations like those of the occupiers.¹⁷⁴

In *Schubart Park Residents' Association & Others v City of Tshwane Metropolitan Municipality & Another*,¹⁷⁵ residents of Block C in Schubart Park, a residential complex owned by Tshwane City, were removed from the residential complex on 21 September 2011 after a fire had broken out. They, together with all other residents returning from work on that day, were denied access to the complex. After failed attempts at the High Court and Supreme Court of Appeal to re-occupy their homes, the applicants approached the Constitutional Court for relief.¹⁷⁶ The Court had to determine what order was justified in circumstances where residents approached it for the re-occupation of their homes after they had been removed from them in an emergency situation. The Constitutional Court ordered the applicants and respondents to engage meaningfully with each other, through their representatives, in order to ensure that residents of Schubart Park's right to restoration of occupation of their homes was eventually realised.¹⁷⁷ Schubart Park Residents' Association shows that engagement orders are not limited to situations where they accompany eviction orders, but that they can be made in other circumstances where it is appropriate and necessary.

169 Paras 110-111 *Abahlali Basemjondolo*.

170 Para 111 *Abahlali Basemjondolo*.

171 n 36 above. For details of the facts, see paras 1-9.

172 Para 97 *Blue Moonlight* (n 171 above).

173 Para 57 *Blue Moonlight*.

174 Para 67 *Blue Moonlight*.

175 2013 1 BCLR 68 (CC).

176 For details, see *Schubart Park Residents' Association* (n 176 above) paras 2-38.

177 Paras 42-52 *Schubart Park Residents' Association*.

4 Lessons for local authorities in Kenya, Zimbabwe and Tunisia

As the South African experience shows, elaborate constitutional, legislative and policy provisions that (a) guarantee the right to public participation in local governance; (b) oblige local authorities to facilitate community participation in local government matters; and (c) create political structures for community participation, do not necessarily translate to active public participation at the grass roots level. In addition to the above measures, it is argued that, in order to realise meaningful public participation at the grass roots level generally, it is important for local authorities to understand the nature of the right to public participation, how to generally facilitate quality public participation in local governance, and how to optimise the potential of local political structures in enhancing public participation. It is submitted that the jurisprudence of South African courts discussed above provides useful lessons, which are outlined below.

In terms of the nature of the right to facilitate public participation in local governance, the preliminary lesson relates to nuances in the formulation of this right and ensuing obligation. As the jurisprudence of the Constitutional Court indicates, despite nuances in phraseology, where the Constitution or enabling law requires that local authorities should 'facilitate', 'promote' or 'involve' local communities in local governance, this should be understood as obliging them to ensure that communities actively take part in local decision-making processes. In the main, the right to facilitate public participation in local government processes should be understood as having two legs: It (a) confers community members a right (as opposed to a privilege) to participate in local government matters; and (b) imposes a duty on local authorities to use their legislative, executive and administrative powers, as well as financial and human resources, to make it easier for community members to participate in the design and implementation of local policies, plans, programmes and laws.

In relation to how community participation should be facilitated in local governance, the jurisprudence of the Court indicates that this requires creativity on the part of local authorities. Based on the nature and potential impact of issues under consideration, local authorities in Kenya, Tunisia and Zimbabwe must explore the most appropriate methods of ensuring that the voices of especially affected communities are heard. However, it is generally submitted that local authorities in these countries will have satisfied the duty to facilitate public participation by (a) providing meaningful opportunities for communities to participate in local decision-making processes; and (b) implementing proactive measures that ensure that communities take advantage of the opportunities created for public participation. Without being prescriptive, local authorities in Kenya, Tunisia and Zimbabwe could optimise the quality of public participation at the local level by providing communities sufficient information on matters

that are to be considered and the mechanisms and structures that are available for participation, and using their resources to build on the capacity of communities to participate in local decision-making processes. The method and degree of public participation that is required at any given instance should depend on a number of factors, including the nature and importance of the legislation, policy, plan or programme and the intensity of its impact on the public. In any case, those directly affected should be given a meaningful opportunity to make representations and to submit oral and written comments.

The jurisprudence of the High Court in the *Borbet* case shows that local authorities must clearly communicate, allow for, and enable public participation through (a) their political structures (such as municipal councils and ward committees) and other committees (to which the general public has access); (b) the structures and processes of the local administration mandated to receive petitions and complaints; and (c) forums for community participation in respect of public input into and review of local development programmes. These measures can ensure that established local government structures facilitate active public participation in local decision-making processes.

Despite the constitutional obligation to facilitate public participation, local authorities in Kenya, Tunisia and Zimbabwe must be aware of the fact that they cannot abdicate their governing powers to the public. Public involvement can be largely expected to produce mutually-acceptable trade-offs and at best consensus on local matters. However, consensus or even mutually-acceptable trade-offs are often not attainable. At the end of public consultation, local authorities have the final say. Where mutually-acceptable policy positions cannot be reached, courts may be invited to objectively scrutinise the reasonableness or rationality of a decision taken by local authorities. In this scenario, local authorities must show that they have considered all the views submitted by the public.

In terms of the specific jurisprudence on meaningful engagement, it is submitted that the lessons distilled are directly relevant to Kenya and Zimbabwe. This is because, just as is the case in South Africa, the 2010 Constitution of Kenya expressly guarantees the right of access to adequate housing,¹⁷⁸ while the Constitution of Zimbabwe forbids arbitrary eviction.¹⁷⁹ However, it is possible to argue that, because the African Commission on Human and Peoples' Rights (African Commission) has located the right to housing within other rights guaranteed in the African Charter on Human and Peoples' Rights

178 Sec 43(1)(b) of the Constitution of Kenya, 2010 and sec 26 of the Constitution of the Republic of South Africa, 1996.

179 See sec 74 of the Constitution of Zimbabwe Amendment Act.

(African Charter),¹⁸⁰ lessons distilled from the jurisprudence on eviction may equally be relevant for local authorities in Tunisia. The African Commission has indicated that a core element of the right to housing is the obligation of each government to refrain from and protect against forced evictions from homes.¹⁸¹ Where the need arises for local authorities in Kenya, Tunisia and Zimbabwe to evict community residents in order to implement development projects, for example, it is submitted that, in accordance with lessons emanating from the Court's jurisprudence, they should consider appointing careful and sensitive people to manage the process of engaging affected people, approach the engagement process in good faith and act reasonably, and furnish complete and accurate information about planned evictions. Local authorities should clearly acknowledge government's human rights obligations, including the dignity of people living in poverty,¹⁸² and should, where possible, forge long-term deliberative partnerships with communities.¹⁸³

5 Conclusion

Just as in other parts of the world, countries in Africa are increasingly embracing political decentralisation as a mechanism for promoting the ideals of sustainable development at the local level. The Constitutions of South Africa, Kenya, Tunisia and Zimbabwe have embraced different forms of decentralised governments with express commitments to enhance public participation in local governance. The implementation of these constitutional guarantees will determine the extent to which they positively impact on the lives of local communities. Drawing from the jurisprudence of South Africa's Constitutional Court, this article explores the nature and extent of the duty to facilitate public participation in order to distil lessons that could guide local authorities in Kenya, Tunisia and Zimbabwe to optimise the quality of public participation in local governance. It is argued that local authorities in Kenya, Tunisia and Zimbabwe could draw valuable guidelines from the Court's jurisprudence on public participation, including meaningful engagement, in order to optimise the quality of public participation in local governance.

180 African Commission *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (2010) paras 77-79.

181 As above.

182 S Wilson 'Planning for inclusion in South Africa: The state's duty to prevent homelessness and the potential of "meaningful engagement"' (2011) 22 *Urban Forum* 281.

183 See G Muller 'Conceptualising "meaningful engagement" as a deliberative democratic partnership' (2011) 22 *Stellenbosch Law Review* 755-756.

Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice

*Ally Possi**

Advocate of the High Court of Tanzania

Summary

The article exposes the difficult position in which the East African Court of Justice (EACJ) finds itself when faced with matters containing human rights allegations, which the Court is barred from deciding as such. The EACJ is often called upon to draw a line between what might constitute a human rights case and a claim relating to an East African Community (EAC) norm which is not barred under article 27(2) of the East African Community Treaty. As the main judicial mechanism of the EAC, the EACJ is primarily mandated to interpret and apply EAC law, of which human rights form part. Despite the existing limitations, the EACJ has clearly laid down its position that it cannot 'abdicate' exercising its interpretive mandate, even if a matter before it contains allegations of human rights violations. In doing so, the EACJ has indirectly protected human rights in the EAC through other forms of cause of actions, such as the rule of law and good governance. This contribution advances two key arguments: First, the EAC Treaty contains human rights norms that the EACJ cannot escape from interpreting. Second, due to the continuing restrictions in adjudicating human rights, as well as the existing human rights norms in the EAC Treaty, the EACJ is trapped in precarious attempts to balance the advancing of EAC norms, on the one hand, and adhering to the Treaty restrictions in adjudicating human rights, on the other.

Key words: *East African Court of Justice; human rights; jurisdiction; sub-regional courts; African economic communities*

* LLB (Mzumbe), LLM (Cape Town), LLD (Pretoria); ally.possi@hotmail.com. This article is based on the author's LLD thesis prepared at the Centre for Human Rights, Faculty of Law, University of Pretoria.

1 Introduction

Human rights form an important component in the contemporary agenda of international institutional law. The integration of human rights into various international organisations is one of the characteristics of a modern international community. This is evident in a number of international organisations that have made human rights one of their founding principles. Some organisations have gone even further by considering respect for human rights as one of the prerequisites for a state to be a party to such organisation.¹ To ensure that member states and all other institutions in the international organisation adhere to treaty norms, a judicial organ is usually established. Over the last decade, in Africa, African regional economic communities have been at the forefront in realising human rights. These communities have established judicial organs which supervise their community activities. The role of African community courts in protecting human rights within their respective communities is widely acknowledged.²

The East African Community (EAC), which was established in 1999, is made up of Burundi, Kenya, Rwanda, Tanzania and Uganda. The overarching goal of the EAC is to widen and deepen social, economic, political and cultural integration in order to improve the standard of life of the East African people. The EAC Treaty establishes the East African Court of Justice (EACJ), as the main judicial organ of the Community. The Court is primarily responsible for interpreting and applying EAC law.³ The Court is a creature of the express will of EAC member states as codified in the EAC Treaty. As such, the EACJ has the status of being an international court responsible for supervising EAC norms.⁴

1 See art 49 read with art 2 of the Treaty on the European Union; art 3(b) of the Treaty Establishing the EAC; art 3 of the Statute of the Council of Europe.

2 See LN Murungi & J Gallinetti 'The role of sub-regional courts in the African human rights system' (2010) 7 *SUR-International Journal on Human rights* 119.

3 The EACJ is established under arts 9, 23(1) and 27(1) of the EAC Treaty. For an overview of the EACJ and its role in protecting human rights, see A Possi 'The East African Court of Justice: Towards effective protection of human rights in the East African Community' (2013) 17 *Max Planck Yearbook of United Nations Law* 173-195; JE Ruhangisa 'The East African Court of Justice' in R Ajulu (ed) *The making of a region: The reviving of the East African Community* (2005) 95; TO Ojienda 'The East African Court of Justice in the re-established East African Community: Institutional structure and function in the integration process' (2005) 11 *East African Journal of Peace and Human Rights* 220-240, JE Ruhangisa 'The East African Court of Justice: Ten years of operations (achievements and challenges)' paper presentation during the sensitisation workshop on the role of the EACJ in the EAC integration, Kampala, 1-2 November 2011, <http://www.eacj.org/docs/EACJ-Ten-Years-of-Operation.pdf> (accessed 12 April 2014); SB Bossa 'A critique of the East African Court of Justice as a Human Rights Court' Conference paper on Human Rights Institutions in Eastern Africa, presented 26 October 2006, Arusha, Tanzania, http://www.icj.org/IMG/_Speech_BOSSA_.pdf (accessed 12 March 2014).

4 Bossa (n 3 above) 9.

As far as human rights jurisdiction is concerned, the EACJ does not have an explicit human rights mandate. Nonetheless, it may be claimed that through judicial activism, the Court has been playing an important role in protecting human rights within the Community. Article 27(2) of the EAC Treaty confers the power upon the Council of Ministers to adopt a protocol that would extend the current jurisdiction of the EACJ. The EACJ has laid down its position clearly that it cannot 'abdicate' exercising its interpretive mandate, even if a matter before it contains allegations of human rights. In doing so, the EACJ has been protecting human rights indirectly in the EAC through other forms of cause of actions, such as the rule of law and good governance.

Two key arguments are advanced in this contribution. First, the EAC Treaty contains human rights norms that the EACJ cannot escape from interpreting. Second, due to the continuing restrictions on adjudicating human rights, coupled with the human rights norms existing in the EAC Treaty, the EACJ is trapped between balancing advancing EAC norms, on the one hand, and adhering to the Treaty restrictions on adjudicating human rights, on the other. This undertaking has not been fulfilled adequately by the Court. This is due to the fact that there is a thin line between human rights and EAC norms, such as the rule of law, good governance and environmental issues that the Court has relied upon in deciding human rights-related cases so far.

The article has six sections. The first section is an introduction that outlines the scope of the article. Section two contains a general reflection on sub-regional courts in Africa and their role in realising human rights. This is important for a general understanding of the current involvement of these courts in realising human rights on the continent. Section three highlights the existing human regime in the EAC, arguing that the EAC Treaty has a human rights content that cannot be ignored by the EACJ. Section four deals with the role of the EACJ in the adjudication of human rights, while section five examines article 27(2) of the EAC Treaty, and provides some of the latest developments with regard to the protocol, aimed at extending and conferring upon the EACJ an explicit human rights mandate. Section six is a general conclusion.

2 Rise of sub-regional courts and the realisation of human rights

Considering the dynamics surrounding international law after World War II, it was not surprising that efforts to promote and protect human rights around the world were witnessed. Global and regional

mechanisms for protecting human rights rose sharply.⁵ International courts and tribunals are among the most important means for the peaceful settlement of disputes.⁶ Through supranational organisations, states have established judicial organs with the primary task of adjudicating disputes and establishing the rule of law within their respective organisations.⁷ It is said that the existence of multiple international judicial bodies contributes to a degree of 'experimentation' and 'exploration' that might result in the advancement of the international legal order.⁸ With relevance to the emergence of sub-regional courts in Africa, on the one hand, the proliferation of international courts and tribunals in the region can be seen as a sign of a movement towards a rule of law based on a dispute settlement culture. On the other hand, the multiplication of international judicial bodies raises concerns when they arrive at 'divergent or even conflicting rulings', which has been the case on a number of occasions.⁹

It took a while for a regional court in Africa that would judiciously supervise the protection of human rights on the continent to be established. The African Court on Human and Peoples' Rights (African Court) was formed after the Organisation of African Unity (OAU) adopted the Protocol on the African Court in June 1998. The Protocol entered into force on 25 January 2004.¹⁰ As the main human rights court in Africa was struggling to establish its authority, sub-regional courts gradually started to be involved in protecting human rights by the middle of the 2000s. This started in the Economic Community of West African States (ECOWAS) in 2004, when Olajide Afolabi, a Nigerian businessman, brought a case against Nigeria for a violation of EAC law in the closing of Nigeria's border with Benin. During that time, the ECOWAS Treaty did not give individual access to the EACJ. As expected, the ECOWAS Court ruled that under the Court Protocol, only member states could institute cases.

The ruling triggered a lengthy discussion, spearheaded by the Court's judges, themselves, on the necessity of amending the Protocol to permit individuals to have standing before the Court. In 2005,

5 FO Vicuna 'Individuals and non-state entities before international courts and tribunals' (2001) 5 *Max Planck Yearbook of United Nations Law* 55.

6 RP Alford 'The proliferation of international courts and tribunals: International adjudication in ascendance' (2000) 94 *American Society of International Law* 165.

7 P Mahoney 'The international judiciary - Independence and accountability' (2008) 7 *The Law and Practice of International Courts and Tribunals* 315.

8 JL Charney 'The impact on the international legal system of the growth of international courts and tribunals' (1996) 31 *NYU Journal on International Law and Politics* 697-700.

9 N Lavranos 'Regulating competing jurisdictions among international courts and tribunals' (2008) 68 *Heidelberg Journal for International Law* 576-577. For a general reflection on the conflicting jurisdiction and the proliferation of international courts and tribunals, see Y Shany *The competing jurisdictions of international courts and tribunals (International courts and tribunals series)* (2003).

10 According to art 2 of the Protocol, the African Court complements the protective mandate of the African Commission.

ECOWAS member states adopted a supplementary protocol that permitted individuals to bring disputes against member states. Beyond this monumental shift, the Council took the opportunity to review the jurisdiction of the Court to include human rights. Since clothing the ECOWAS Court with an explicit human rights mandate, the human rights jurisprudence of the ECOWAS Court has been a novelty on the continent. With such vigorous developments in ECOWAS at the time, other sub-regional courts, such as the EACJ and the now moribund Southern African Development Community (SADC) Tribunal, tried to emulate what was a relatively immature success of the ECOWAS Court. Undoubtedly, the progress made by the ECOWAS Court, nevertheless, has had an influence on the current functioning of the EACJ.

3 Evidence of human rights in the EAC Treaty

Human rights do not form part of the objectives of the EAC. They constitute governing principles to achieve the objectives of the Community. Article 6 of the EAC Treaty provides for fundamental principles which should be adhered to by member states, necessary for achieving the targeted EAC goals. When carrying out Community activities, member states are directed to adhere to good governance, including the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights (African Charter).¹¹ Article 7(2) of the EAC Treaty states that '[t]he [member states] undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights'. Apart from the founding principles of the EAC, there are other significant human rights-related features in the EAC Treaty. The recognition of and respect for human rights are among factors to be taken into account when considering a new member of the EAC.¹² This reflects the commitment of EAC members to have a region that respects human rights.

The promotion of peace and security is one of the objectives of the EAC.¹³ By maintaining peace and security, a stable society is ensured and, therefore, a lack of peace and security automatically affects the realisation of human rights.¹⁴ The EAC member states agree on the importance of peace and security for social and economic

11 Art 6(d) EAC Treaty.

12 Art 5(3)(b) EAC Treaty.

13 Arts 5(1) & 5(3)(f) EAC Treaty.

14 OC Ruppel 'Regional economic communities and human rights in East and Southern Africa' in JA Bösl & J Diescho (eds) *Human rights in Africa* (2009) 304.

development and the achievement of their objectives.¹⁵ Member states intend to strengthen co-operation to maintain regional peace and security. This will involve greater co-operation in cross-border conflicts, the establishment of regional disaster management mechanisms, and the establishment of common mechanisms for the management of refugees.¹⁶ When there is peace and security, there is an environment suited to investment and trade, which will even better suit the economic objectives of the EAC.

Gender equality is centre stage in East African integration. Gender equality is recognised as one of the fundamental principles of the EAC.¹⁷ Abiding by the principle of gender equality, member states have pledged to take into account the issue of gender balance when appointing staff members of the organs and institutions of the Community.¹⁸ Realising the role of women in social and economic development, member states, through appropriate and other legislative measures, are obliged to promote women's empowerment, to eradicate all legislation and customs which are discriminatory and to take all necessary measures that will eliminate prejudice against women.¹⁹

Furthermore, several measures have been taken in the EAC in order to comply with the provisions in the Treaty and to seek to improve the quality of life of women in the region. The final draft of the Community Framework on Gender and Community Development was adopted in 2006, seeking to cater for the rights of women in the region. In 2009, the East African Legislative Assembly (EALA) adopted a resolution encouraging member states to take 'urgent and concerted action to end violence against women'.²⁰ Significantly, it called on member states to 'enhance the mainstreaming of gender and human rights into budgets' at the national level.²¹

AIDS being a pandemic, EAC member states have been called upon to take joint action in the prevention and control of HIV and AIDS, together with other communicable diseases.²² HIV and AIDS are given emphasis in the EAC due to their impact on human resources. They may spread rapidly due to the free movement of persons in the integration process.

15 Art 124(1) EAC Treaty.

16 Arts 124(3),(4) &(5)] EAC Treaty.

17 Art 6(d) EAC Treaty.

18 Art 9(5) EAC Treaty.

19 Art 121 EAC Treaty.

20 ST Ebobrah 'Human rights development in African sub-regional economic communities during 2009' (2010) 10 *African Human Rights Law Journal* 236.

21 The EALA Resolution: Action to end violence against women in the EAC Region, http://www.eala.org/key-documents/doc_details/8-resolution-action-to-end-violence-against-women-in-the-eac-region-and-particularly-partner-states.html (accessed 12 January 2013).

22 Art 118 EAC Treaty. Ch 21 of the EAC Treaty has been dedicated to health, cultural and social activities in the region.

Other human rights-related features of the EAC Treaty include the free movement of persons; the right to establishment and residence; labour services;²³ agriculture and food security;²⁴ and natural resources and environmental management.²⁵ Member states are required to develop and adopt a common approach for improving the living standards of disadvantaged groups such as children, the elderly and persons with disabilities, through the rehabilitation and provision of, among others, foster homes, health care, education and training.²⁶

Third generation rights, such as the right to a clean and healthy environment, are recognised within the EAC legal framework. A healthy environment is essential for human life. Sustainable environmental conditions promote the right to dignity and improve the health standards of people. In the EAC legal framework, EAC member states have adopted a Protocol on Environment and Natural Resources, providing closer co-operation in environmental and natural resource management. Member states are committed to observe the 'principle of the fundamental right of the people to live in a clean and healthy environment'.²⁷ The Protocol covers various aspects of the environment, such as water, wildlife, generic resources, climate change, energy and mining, biodiversity and forests. In *Tanzania v African Network for Animal Welfare*,²⁸ the appellant was aggrieved by the decision of the First Instance Division which ruled that it had jurisdiction to hear a case concerning allegations that the proposed super-highway project proposed by Tanzania would have an impact on the environment and climate of the Masai Maara National Park and the interests of the international community, through the designation by the United Nations Educational, Scientific and Cultural Organization (UNESCO) of the Serengeti National Park as a world heritage site. Ultimately, the Appellate Division held that the EACJ had jurisdiction to determine a case that involves environmental issues in exercising its duty of interpreting the EAC Treaty.²⁹

It is debatable whether the principles provided in the EAC Treaty bind members. Article 38(1)(c) of the Statute of the International Court of Justice (ICJ) mandates the ICJ to use 'general principles of law recognised by civilised states' as a source of international law.³⁰ In *Kodi v Council of the EU & Another*,³¹ the European Union (EU) Court

23 Ch 17 EAC Treaty.

24 Ch 18 EAC Treaty.

25 Ch 19 EAC Treaty.

26 Art 120(2) EAC Treaty.

27 Art 4(2)(a) Protocol on Environment and Natural Resources, 2005.

28 Appeal 3 of 2011, EAC Appellate Division.

29 Appeal (n 28 above), 14 of the judgment.

30 L Bartels 'Review of the role, responsibilities and terms of reference of the SADC Tribunal', World Trade Initiative Advisors (2011) 10.

31 *Kadi v Council of the European Union and Commission of the European Communities*, Case C-402/05 P, [2008] ECR I-6351.

reaffirmed the importance of fundamental principles such as the rule of law, democracy and human rights that were common to member states for protecting legal order in the EU. In addition, in interpreting a treaty, the context of interpretation includes the Preamble, the main text and annexes to the treaty.³² It is on this basis that principles within the EAC Treaty are never read to have been intended to be merely inspirational; rather, they impose a legal obligation on member states and they are subject to interpretation by the EACJ.³³

The ultimate goal of the EAC is to achieve a political federation. Whether such objective will be reached or not is another matter. However, in forming a political federation, the protection of human rights must be given prime consideration. Special attention to promoting and protecting human rights by the EAC organs and institutions is inevitable in order to deepen EAC integration. The EACJ needs to be given an expanded mandate to deal with human rights disputes. The lack of a human rights jurisdiction for the EACJ is an obstacle to realising the dream of having viable regional integration in East Africa. This argument is also supported by the EACJ when it stated:³⁴

National courts have the primary obligation to promote and protect human rights. But supposing human rights abuses are perpetrated on citizens and the state in question shows reluctance, unwillingness or inability to redress the abuse, wouldn't regional integration be threatened? We think it would. Wouldn't the wider interests of justice, therefore, demand that a window be created for aggrieved citizens in the Community [member state] concerned to access their own regional court ... for redress? We think they would.

On the face of it, as highlighted above, the EAC Treaty is enriched with provisions containing human rights norms. The existing human rights content in the EAC Treaty is the basis for the ever-increasing voice which advocates for the EACJ to be granted explicit human rights jurisdiction. It is also difficult to anticipate the EACJ not receiving any cases relating to a common market dispute, as an example, without touching on human rights. In such circumstances, the EACJ has to determine what constitutes a human rights case.

4 Human rights architecture of the EACJ

4.1 Interpreting human rights norms in the EAC Treaty

After showing that the EAC Treaty has a human rights content, I below reflect on the role of the EACJ in interpreting the EAC Treaty with respect to provisions with human rights elements.

32 Art 31(2) VCLT.

33 *Plaxeda Rugumba v Secretary-General of the EAC & Attorney-General of Rwanda*, Ref 8 of 2010, EACJ First Instance Division, para 37.

34 *Sitenda Sebalu v Secretary-General of the EAC & Others*, Ref 1 of 2010, EACJ First Instance Division 50.

One of the intriguing challenges faced by international courts is treaty interpretation, the EACJ being no exception.³⁵ The main purpose of treaty interpretation is to ascertain and give effect to the norms in the treaty. Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) provide for the basic rules of treaty interpretation. The rules provided in the two articles are not 'an exclusive compilation of guidance on treaty interpretation',³⁶ implying that there could be other factors relevant to interpreting a treaty. Article 31 of the VCLT provides that a treaty should be interpreted in good faith, taking into consideration the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.³⁷

In interpreting a treaty, the scope of interpretation should include the main text along with the Preamble and annexures of the treaty.³⁸ Interpretation rules require a treaty to be interpreted in good faith.³⁹ This principle flows directly from the principle of *pacta sunt servanda* enshrined in article 26 of the Vienna Convention. Accordingly, under international law, there are three basic approaches to treaty interpretation. The first approach centres on the actual text of the treaty; the second looks at the intention of the parties to a treaty; and the third approach focuses on the object and purpose of the treaty. Reliance on the textual approach simply means a literal interpretation of the text in the treaty. With the second approach, on the object and purpose of a treaty, judges are likely to be called upon to define the object and purpose of the treaty. At this point, a judge-made law might be imminent. It goes without saying that any true interpretation of a treaty under international law must take cognisance of all the aspects of the agreement, 'from the words employed to the intention of the parties and the aim of the particular document'.⁴⁰ Recourse may be had to supplementary means of interpretation.⁴¹ As stated above, the insertion of human rights principles under the EAC Treaty was not meant to be a 'cosmetic' exercise.⁴²

When discharging its interpretative duties, the EACJ is duty bound to take into consideration the object and purpose of the EAC Treaty. On the one hand, because of the fact that the context of treaty interpretation includes the whole text of a treaty, together with the treaty's objectives and purposes, one can easily advance an argument that there is no reason for the EACJ to refrain from directly

35 See MN Shaw *International law* (2008) 932.

36 R Gardiner *Treaty interpretation* (2008) 36.

37 Art 31(1) VCLT.

38 Art 31(2) VCLT.

39 Art 31(1) Vienna Convention. See also A Aust *Modern treaty law and practice* (2004) 187.

40 Shaw (n 35 above) 933.

41 Art 32 Vienna Convention.

42 Ref 8 of 2010, EACJ First Instance Division, para 37.

interpreting the human rights provisions in the EAC Treaty, even if there are limitations imposed under article 27(2) of the EAC Treaty. On the other hand, the EACJ will be presumed to be adjudicating human rights when its findings will be based on human rights, a mandate currently suspended by article 27(2) of the EAC Treaty. Under such premises, member states should confer on the EACJ an explicit human rights mandate as soon as possible. Potentially, the continuing presence of article 27(2) of the EAC Treaty might lead to a backlash between the EACJ and member states, as the Court can never escape touching on human rights when discharging its duties, because of the human rights content of the EAC Treaty.

EAC leaders are committed to fast-tracked regional integration in East Africa based on democratic values. Placing human rights in the EAC Treaty, as one of the governing principles of the Community, serves as a yardstick for monitoring the activities of EAC member states in their activities connected with EAC integration. Observance of human rights also provides the means of achieving the socio-economic and political objectives of the EAC. Being the main judicial arm of the Community, the EACJ is properly positioned to supervise the fast-tracking of EAC integration by interpreting and applying EAC law in good faith and within the context of the EAC Treaty, as required by the VCLT. However, the EACJ cannot succeed in its mission of supervising EAC integration if an important aspect such as human rights is explicitly curtailed under the EAC Treaty.

4.2 Judicial law making or purposive interpretation?

The interpretive approach of the EACJ in matters that contain human rights claims may lead to the perception that the Court is trying to stretch EAC law in ways which EAC member states have not intended. With the present interpretive approach, indirectly, the EACJ is protecting human rights in the Community, which is an encouraging sign to litigants, but which may be a worrying trend to member states. This is evident due to the fact that, in all human rights-related cases, litigants have been asking the Court to interpret human rights violations in accordance with the African Charter, and member states have persistently disputed the Court's ability to entertain any human rights claim. One need not be reminded of how the EU Court judges transformed EU law. The EU Court was able to transform the Rome Treaty in to 'a *de facto* constitution' for the EU.⁴³ This was possible due to the fact that the EU Court promoted EU objectives such as human rights, which were not extensively provided in the Treaty of Rome. A less bold bench could easily decline entertaining most of the cases that are admitted before the EACJ due to their human rights nature.

43 KJ Alter & LR Helfer 'Nature or nurture? Judicial law making in the European Court of Justice and the Andean Tribunal of Justice' (2010) 64 *International Organization* 564.

It could be argued that judicial creativity of the EACJ judges to protect human rights is in line with a literal interpretation of the EAC Treaty. Article 27(2) of the EAC Treaty mentions the human rights jurisdiction to be put on hold, but the same article is silent as regards democracy, good governance and the rule of law as well as all other provisions which have human rights elements, such as provisions relating to environmental issues. As such, the Court has been using the opportunity to freely interpret and find states to be in breach of the rule of law, democracy and good governance as provided for in the EAC Treaty. It is only the human rights jurisdiction of the EACJ that has always been questioned by respondents, but not the role of the Court to determine the liability of member states to preserve and protect the rule of law, democracy and good governance.

International judges, such as those of the EACJ, are more likely to become expansionist law makers where they are supported by interlocutors and compliance constituencies, including government officials, advocacy networks, national judges and administrative agencies.⁴⁴ Given the current trend of the EACJ's approach in cases with human rights elements, it could well be the foundation period for establishing an EAC constitutionalism, as was the case with the EU Court in the 1960s and 1970s. The EACJ judges have not crossed the boundaries of their interpretive mandate. With respect to human rights litigants, it is easy to commend the EACJ's approach and classify it as judicial activism. As Alter and Helfer put it, '[i]nternational judicial decision making that clarifies ambiguities and fills gaps in treaties is an inherent part of judging'.⁴⁵ Therefore, with respect to human rights principles provided in the EAC Treaty and the limitations imposed under article 27(2), EACJ judges have attempted to cover the ambiguity concerning their human rights mandate. EACJ judges, as any other international court judge, are supposed to 'clarify the meaning of ambiguous international rules and apply them to unforeseen contexts'.⁴⁶

Because of the fact that the EACJ has developed its own human rights profile through judicial activism, the question might be whether such a strategy is best suited only for a transitional period or for a more permanent approach to human rights; and whether it can navigate the existing obstacles imposed under article 27(2) of the EAC Treaty. Before engaging in the issue at hand, a few points should be made. The involvement of civil society, legal practitioners and political actors has to some extent turned the EACJ into a forum for power struggles and the 'vindication of rights claims'.⁴⁷ The EACJ's

44 Alter & Helfer (n 43 above) 563.

45 Alter & Helfer 586.

46 LR Helfer & KJ Alter 'Legitimacy and lawmaking: A tale of three international courts' (2013) 14 *Theoretical Inquiries in Law* 481.

47 J Gathii 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy' (2013) 24 *Duke Journal of Comparative and International Law* 231 249.

involvement in human rights is not an exception. It is part of a growing trend towards a rights-based approach adopted by most supranational organisations.⁴⁸ East African integration is not solely established for economic integration.⁴⁹ EAC member states strive to⁵⁰

develop policies and programmes aimed at widening and deepening co-operation among the [member states] in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.

Indeed, the EACJ is not a human rights court. It is a community court entrusted with the role of interpreting and applying the EAC Treaty. Whether the EACJ is to deal with trade or human rights or to be an appellate court in the region is at the discretion of member states. Despite the existing limitations to adjudicate human rights disputes, it is undeniable that the EACJ has adopted some kind of judicial activism when adjudicating cases with human rights allegations. In such circumstances, it is likely to provoke controversy among member states. It can also be propounded that the continuing politicisation of the EACJ's human rights jurisdiction may have been caused by the Court's activism. As a matter of fact, judicial activism can easily lead to unwanted results, particularly when a court is called upon to make judgments in sensitive areas where it lacks jurisdiction, when presiding judges are not conversant with the matter in question and, with the case of supranational courts, judicial activism may lead to a negative response from member states because they are displeased with the kind of judicial behaviour adopted by the judiciary.⁵¹ While the EACJ's bravery in adjudicating cases with human rights allegations is commendable, one should also be skeptical about the Court's direct involvement in human rights. Because of the fact that EAC member states are parties to the African Court, direct involvement of the EACJ in human rights might result in conflicting jurisdiction, consequently yielding forum shopping and jurisprudential concerns.

The EACJ's present technique of invoking the rule of law as the basis for adjudicating cases with human rights allegations is the right path for the Court to take. However, the approach is not sustainable if the Court is to effectively protect human rights in the region. It is submitted that the current judicial activism adopted by the EACJ in human rights-related cases is only suitable for the current situation. It is hoped that the EACJ's adoption of a rights-based approach is a stepping stone towards having an explicit human rights mandate in

48 As above.

49 See art 5 of the EAC Treaty.

50 Art 5(1) EAC Treaty.

51 For a general reflection of judicial activism of international judiciaries, see E McWhinney 'The International Court of Justice and international law making: The judicial activism/self-restraint antinomy' (2006) 5 *Chinese Journal of International Law* 3; P Kooijmans 'The ICJ in the 21st century: Judicial restraint, judicial activism, or proactive judicial policy' (2007) 56 *International and Comparative Law Quarterly* 741.

the near future. It would be an enormous leap for the EACJ to interpret human rights norms beyond its current stance. In the event that the EACJ attempts to adjudicate human rights disputes beyond its present approach, there would be a risk of inviting a political response from member states. One would easily conclude that the EACJ's current approach in human rights-related cases is a cautious but progressive judicial law-making strategy.

4.3 Landmark cases on human rights

The first case relating to human rights to be determined by the EACJ was *Katabazi & Others v Uganda*.⁵² The matter involved 14 applicants who were arrested and charged with treason in 2005. On 16 November 2006, the High Court of Uganda was in the process of granting bail to the 14 suspects. During the process, the Ugandan security officials interfered with the preparation of bail documents and re-arrested the suspects, who were later charged in a military court with terrorism and the unlawful possession of firearms. The Ugandan Law Society successfully challenged before the Constitutional Court of Uganda the constitutionality of the conduct by the Ugandan security officials for their interference with the lawful court process.⁵³ Despite the ruling by the Constitutional Court of Uganda that the applicants should be released, this was not done. This caused the applicants to seek legal relief before the EACJ. The applicants averred that the interference with the lawful court process by Ugandan security officials and the failure by the Ugandan government to comply with the decision of the Constitutional Court of Uganda was contrary to articles 6, 7(2) and 8(1)(c) of the EAC Treaty.

One of the key issues before the Court was whether the EACJ had jurisdiction to adjudicate a human rights-related issue. Both the Secretary-General and the Attorney-General of Uganda opposed the jurisdiction of the EACJ to deal with human rights matters, lamenting the fact that such jurisdiction awaits the adoption of a protocol that would extend the Court's mandate, as provided for in article 27(20) of the EAC Treaty. The EACJ was of the view that it may not determine matters concerning the violation of human rights *per se*; as it is clear that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a protocol to that effect.⁵⁴ The EACJ extensively assessed the objectives⁵⁵ and principles of the EAC. The EACJ was conscious of recognising a number of objectives of the

⁵² *Katabazi & Others v Attorney-General of Uganda* Ref 1 of 2007.

⁵³ *Uganda Law Society v Attorney-General of Uganda* Constitution Petition 18 of 2005. The applicant applied for orders and relief as provided for in arts 50(1) and (2) and 137(3) of the Constitution of Uganda.

⁵⁴ *Katabazi* case (n 52 above) para 34.

⁵⁵ There are views that the objectives clauses within a treaty do not create independent or substantive grounds for granting relief. See JT Gathii 'The under-appreciated jurisprudence of Africa's regional trade judiciaries' (2010) 12 *Oregon Review of International Law* 262.

EAC, particularly the intention of EAC member states to harmonise programmes and policies in different fields, including legal and judicial matters.⁵⁶ After considering the objectives and founding principles provided in the EAC Treaty, the Court stated:⁵⁷

While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under article 27(1) merely because the [r]eference includes an allegation of human rights violation.

After holding that it has jurisdiction as provided for in article 27 of the EAC Treaty, the EACJ pondered the principle of the rule of law in assessing whether the conduct of the Ugandan security officials was in breach of the EAC Treaty. The principle of the rule of law is not limited in article 27(2) of the EAC Treaty. Therefore, the finding of the case was relying on a breach of the rule of law and not human rights.

The position in the *Katabazi* case is emphasised by the EACJ in a number of subsequent cases. It is the position of the Court that it will interpret any allegation before it, regardless of such allegation containing a human rights claim. In *Samuel Mohochi v Attorney-General of Uganda*,⁵⁸ the First Instance Division stated that the envisaged extension stipulated in article 27(2) of the EAC Treaty in no way intends to limit the Court from interpreting and applying any provision of the EAC Treaty, including all provisions making reference to human rights.⁵⁹

After the *Katabazi* case, more cases touching on human rights violations started to come before the EACJ. When the two-tier court structure became operational in the first few cases that had human rights allegations in the two divisions, the difference in terms of their approach in interpreting the EAC Treaty was evident. In *Independent Medical Legal Unit v Attorney-General of Kenya*,⁶⁰ the First Instance Division directly exercised its interpretive jurisdiction of the EAC Treaty, without linking the alleged cause of action to the rule of law. In that case, the applicant alleged that the failure by the Kenyan government to prevent, investigate and apprehend the perpetrators of the post-2007 election violence in the Mt Elgon District, causing the death, torture and inhuman and degrading treatment of over 3 000 civilians, was a breach of the established EAC principles as provided for in articles 6(d) and 7(2) of the EAC Treaty. Apart from acknowledging that it had jurisdiction to interpret provisions with reference to human rights, the First Instance Division went further and held that the omission by the Kenyan government contravened not

56 See art 5(1) of the EAC treaty.

57 *Katabazi* case (n 52 above) para 39.

58 *Samuel Mohochi v Attorney-General of Uganda* Ref 1 of 2011, EACJ First Instance Division.

59 *Mohochi* case (n 58 above) para 26.

60 *Independent Medical Legal Unit v Attorney-General of Kenya* Ref 3 of 2010, EACJ First Instance Division.

only the principles provided for in the EAC Treaty, but also the Constitution of Kenya and a number of international human rights instruments, such as the Universal Declaration of Human Rights (Universal Declaration).⁶¹

In the *Plaxeda Rugumba* case,⁶² the applicant alleged that the act of the government of Rwanda of arresting and detaining Seveline Rugigana Ngabo, who was a lieutenant-colonel in the Rwanda Patriotic Front (RPF), was contrary to articles 6(d) and 7(2) of the EAC Treaty. The Court held that it would be a dereliction of the Court's oath of office to desist from exercising its jurisdiction to interpret the EAC Treaty, even when the reference before it relied on articles 6(d) and 7(2) of the EAC Treaty. The Court stressed its mandate to interpret the EAC Treaty by stating as follows:⁶³

[T]here is no doubt that the use of the words '[o]ther original, [a]ppellate, [h]uman [r]ights and [o]ther [j]urisdiction ...' is merely in addition to, and not in derogation to, existing jurisdiction to interpret matters set out in [a]rticles 6(d) and 7(2). That would necessarily include determining whether any [p]artner [s]tate has 'promoted' and 'protected' human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights and the [a]pplicant is quite within the treaty in seeking such interpretation and the Court quite within its initial [j]urisdiction in doing so and it will not be shy in embracing that initial [j]urisdiction.

The First Instance Division took a more progressive approach than the Appellate Division in interpreting the EAC Treaty. Contrary to the Appellate Division, the First Instance Division was not hesitant to base its findings on direct human rights values contained in the EAC Treaty. It did not rely on other forms of cause of action which are not restricted under article 27(2) of the EAC Treaty. By using the phrase 'in addition to, and not in derogation to', the First Instance Division considered the protocol that would extend the jurisdiction of the EACJ to deal with human rights cases to be an addition to the current interpretive jurisdiction. In other words, the Court, as it had decided in that case, was of the view that the current jurisdiction that it possessed empowered it to interpret, analyse and reach its findings based on human rights norms provided for in the EAC Treaty and other human rights instruments, without finding a link to the rule of law.

The decision of the First Instance Division in the *Rugumba* case sheds some light on the ambiguity on the interpretive mandate of the EACJ. It might be straightforward for one to conclude that, as long as the Court is empowered to interpret the EAC Treaty, taking into consideration the Treaty principles and objectives, there is no reason for the EACJ to refrain from its current mandate of interpreting directly all the EAC Treaty provisions and to make findings based on human

61 Ref 3 of 2010 4.

62 n 33 above.

63 *Plaxeda Rugumba* case (n 33 above) para 23.

rights values even without using other forms of cause of action as a path to adjudicate human rights-related cases. From the experience of the SADC Tribunal, it is clear that a mere reference to human rights in a constitutive instrument of an international court is sufficient for such courts to directly interpret human rights provisions in the treaties and to make findings in relation to human rights violations.⁶⁴ However, the situations in the SADC Tribunal and the EACJ must be made clear. The SADC Tribunal did not contain any provision close to article 27(2) of the EAC Treaty. On the contrary, the Tribunal had a mandate to develop its own jurisprudence when exercising its interpretive mandate.⁶⁵

The interpretive approach adopted by the First Instance Division in both the *Rugumba* and *Independent Medical Legal Unit* cases is not in line with that of the Appellate Division in cases that relate to human rights. The Appellate Division has always been clear in its approach when interpreting cases that have human rights claims. It uses other forms of causes of action, such as the rule of law, as an escape route to interpret the EAC Treaty, based on human rights values as provided for in the Treaty. It should be pointed out that the judgments of the First Instance Division in *Rugumba* and *Independent Medical Legal Unit* were delivered after the amendment of the EAC Treaty that established a two-tier court structure. The case of *Katabazi* was used as a precedent by the First Instance Division in the two cases. These two cases had taken a greater judicial activist approach than in the *Katabazi* case, simply by directly exercising its interpretation jurisdiction of human rights provisions without linking human rights with a violation of the rule of law. The two cases also made reference to other human rights instruments not mentioned in the EAC Treaty, such as the Universal Declaration.⁶⁶

The Appellate Division has made it clear that for the EACJ's jurisdiction to be triggered in references which relate to human rights, a cause of action has to be instituted distinct and separate from human rights. This requirement was not clearly articulated in the *Katabazi* case. In the *Independent Medical Legal Unit* case,⁶⁷ the Appellate Division was of the view that the First Instance Division ought to have delved into the cause of action that is distinct from human rights violations, thus, acquire the basis for its jurisdiction,⁶⁸ a position that was later reaffirmed by the Appellate Division in the *Rugumba* case.

Further, in cases concerning EAC Common Market or Customs Union integration activities, it is highly unlikely the EACJ will not be

64 L Bartels *Review of the role, responsibilities and terms of reference of the SADC Tribunal* (2011) 10.

65 Art 21(b) of the defunct SADC Tribunal Protocol.

66 See J Crawford *Brownlie's principles of public international law* (2012) 634.

67 Appeal 1 of 2011, EACJ Appellate Division.

68 Appeal 1 (n 67 above) 10-11.

called upon to interpret human rights provisions. In what is already seen as the court's human rights mission, it will continue interpreting the EAC Treaty 'in its own way as it is used to without any fear or favour'.⁶⁹

In *Samuel Mohochi v Attorney-General of Uganda*,⁷⁰ the applicant arrived at Entebbe International Airport on 13 April 2011 and was denied entry into Uganda without being given a reason. He was then restrained, confined and detained in the offices of the Uganda Immigration Department at the airport from 09:00 to 15:00, when he boarded a flight back to Kenya. The respondents argued that the applicant was a prohibited immigrant in Uganda. Due to the nature of the case, the EACJ found itself analysing issues concerning free movement and discrimination, which are human rights-related aspects.

During the trial, the Attorney-General defended the actions of its state officials by submitting that Uganda was an independent state and not subject to the EAC.⁷¹ This submission by the Attorney-General might be a reflection of a lack of awareness of the legal regime of the EAC upon member states, or a continuation of the attitude of member states who are reluctant to surrender some of their sovereignty to the EAC. As in the case of all EAC member states, Uganda gave the EAC Treaty the force of law in its territory.⁷²

The main issue of contention was whether Uganda is entitled to deny an EAC citizen entry into its territory, given the provisions of sections 52 and 66(4) of Uganda's Citizenship and Immigration Control Act, and articles 104 and 7 of the EAC Treaty and Common Market Protocol respectively. Article 104 of the EAC Treaty and article 7 of the Protocol guarantee the free movement of persons, labour, services, and the right of establishment and residence in the Community. The Court found that the actions of Ugandan immigration officials were in violation of the freedom of movement of the applicant, which constituted part of the foundational principles of the Common Market and a violation of article 104 of the Treaty.⁷³

Most of the cases that the EACJ receive are related to human rights. The EACJ has already developed a strong reputation in the region as a forum where democracy, the rule of law and human rights have the potential of being protected. Due to the limitations imposed under article 27(2) of the EAC Treaty, the prospects of the EACJ being a human rights protector are stalled. The above cases reveal that the EACJ relies heavily on other causes of action, such as the rule of law,

69 A response from the Principal Judge of the EACJ, Jean Bosco Butasi, in an interview held on 4 December 2013.

70 Ref 1 of 2011, EACJ First Instance Division.

71 *Mohochi* case (n 58 above) para 45.

72 Sec 3(1) of the East African Community Act, 2002 of Uganda provides that '[the treaty as set out in the Schedule to this Act shall have force of law in Uganda']

73 *Mohochi* case (n 58 above) para 112.

democracy and good governance which have not been circumscribed under article 27(2) of the EAC Treaty.

The question could be whether rule of law issues are not human rights issues. The response to this question is debatable, but what is certain is that the EACJ will always find itself receiving matters which are of a human rights nature. Litigants, as has always been the case, will attempt to pass their human rights agenda before the EACJ by using the Court's approach, that is, by relying on other causes of action, such as the rule of law. In the process, there is a likelihood that the EACJ might be stringent or might change its current approach on cases that touch on human rights.

5 Towards an explicit human rights mandate?

5.1 The tyranny of article 27(2)

Regardless of the existence of human rights provisions in the EAC Treaty, member states have impeded the EACJ's effectiveness in protecting human rights by inserting article 27(2) into the EAC Treaty. Article 27(2) is often invoked by respondents before the EACJ, particularly on matters which have human rights allegations. The provision is simply used as a protective shield by member states to escape any liability from the breach of an EAC obligation. States tend to question the competence of the Court to determine what they have termed to be human rights claims. In such circumstances, the EACJ is mostly found wanting. On the one hand, the Court seems to be sceptical of the repercussions if it is to base its findings on human rights values. The EACJ is obviously cautious of any backlash if it is to interpret human rights norms in the EAC Treaty in a more progressive manner. On the other hand, the Court does not want to lose its legitimacy with litigants by being seen to abdicate its interpretive duties. To balance the two scenarios, the EACJ carefully interprets the EAC Treaty when dealing with cases with human rights allegations, so as not to exercise its jurisdiction beyond the established boundaries. It is because of this that it can be said that article 27(2) of the EAC Treaty brings confusion to both the EACJ and its litigants regarding the Court's mandate on human rights provisions under the EAC Treaty. This has been evident in the persistent filing of cases containing human rights allegations before the Court and the continuing denial of the Court's powers to entertain such matters. Litigants still believe that the EACJ is in a position to give a human rights finding. Respondents invoke article 27(2) of the EAC Treaty whenever faced with human rights allegations before the EACJ. With the continuing delays and lack of political commitment to adopt a protocol that would give the EACJ an explicit human rights mandate, article 27(2) will continue to raise alarm over the ability of the EACJ to interpret EAC Treaty provisions which make reference to human rights. In such circumstances, the EACJ is currently ineffective, as it is placed in a vulnerable position to the extent of interpreting the EAC

Treaty cautiously. With respect to human rights, the Court will continue to be restricted in making findings based on human rights.

5.2 Protocol to extend the jurisdiction of the EACJ to include human rights

Article 27 of the EAC Treaty needs to be amended or a new protocol has to be adopted for the EACJ to have an explicit human rights mandate. In the spirit of fast-tracking the EAC integration, the EAC Secretariat identified an urgent need to adopt a protocol that would extend the jurisdiction of the EACJ in order to effectively supervise the activities of the Community.⁷⁴ The Council approved that decision on 9 April 2005, leading to the preparation of a Zero Draft Protocol by the Secretariat for the extension of the jurisdiction of the EACJ. The expansion of the EACJ's jurisdiction is an ongoing battle by civil society and all stake holders in the region. The business community and law societies of East Africa once called for the Court to have trade, human rights and appellate jurisdiction. The then President of the East African Magistrates and Judges Association once stated:⁷⁵

The formation of the East African Court of Appeal is a necessary and overdue step. We need a court of the highest resort in East Africa whose decisions bind all our national courts. The world trend now is to use international norms and standards to interpret national laws ... Further delay in establishing the East African Court of Appeal will just leave us behind while other regions forge ahead.

After a series of meetings, the Sectoral Council's meeting held in January 2009 had a number of recommendations. First, the extended jurisdiction of the EAC should not include an appellate jurisdiction as this will be contrary to the constitutional provisions of the Court's hierarchy of member states. Second, the Court should not have human rights jurisdiction as the member states are already parties to the African Court. Third, the Secretariat 'should take into account the original jurisdiction vested in the national courts in commercial matters in order not to overwhelm [the EACJ] with litigation'.⁷⁶ In another meeting held in February 2009, the Sectoral Council directed member states, when discussing the Zero Draft Protocol, to consider, among other things, a recommendation that, pending the attainment of a political federation, the application and interpretation of universal human rights jurisdiction should be left to the national courts and should be determined at national level.⁷⁷ On 30 November 2013, the EAC Summit approved the recommendation of the Council to extend the jurisdiction of the EACJ to cover trade and investment disputes as

74 Revised background paper on the 13th meeting of the Sectoral Council in legal and judicial affairs, 12-16 March 2012, Arusha, Tanzania, 4.

75 The President of the East African Magistrates and Judges Association during the association's Annual General Meeting held in Dar es Salaam in January 2004, quoted by Ruhangisa (n 2 above).

76 Revised background paper (n 74 above) 6.

77 Revised background paper 4-5.

well as matters associated with the EAC Monitory Union.⁷⁸ In respect of human rights and matters concerning crimes against humanity, the Summit directed the Council of Ministers to work with the African Union. This decision of the Summit is a turn of events, considering the fact that since 2012 it was calling upon the Council to expatiate the process of granting the EACJ jurisdiction on matters connected to crimes against humanity. On 26 April 2012, the East African Legislative Assembly adopted a Resolution requesting the EAC Council of Ministers to request the transfer of Kenyan cases currently before the International Criminal Court to the EACJ.⁷⁹ On 28 April 2012, the Summit endorsed the EALA Resolution and instructed the EAC Council of Ministers to examine the possibility and expedite the extension of the EACJ's jurisdiction to cover international crimes.⁸⁰ The current draft Protocol does not confer on the Court human rights or appellate jurisdiction. Instead, the Protocol intends to extend the Court's jurisdiction to deal with commercially-related matters.⁸¹

5.3 Efforts to speed up the process

The lack of political will to adopt a protocol which is to bestow the EACJ with an explicit human rights mandate prevents the majority of victims to access the EACJ. In *Sitenda Sebalu v Secretary-General of the EAC & Others*,⁸² the applicant, after having exhausted the local courts, sought to appeal to the EACJ, only to discover that the EACJ was not an appellate court. Following this, the applicant, displeased with the reluctance shown by EAC member states, specifically Uganda, to adopt the protocol conferring on the EACJ appellate and human rights jurisdiction, sought the Court's declaration that the undue delay in adopting the protocol was against the principle of good governance, observance of the rule of law and democracy as provided in the EAC Treaty. While upholding the prayers sought by the applicant, the EACJ further stressed that regional integration would be in danger when member states are unwilling or reluctant and lack the ability to protect human rights at the national level and at the same time denying their citizens access to the EACJ for such redress.⁸³ The views expressed by the EACJ emphasises that the Court, itself, feels it has a strong role to play in protecting human rights in the region. This is evident when the Court stated that the delay to extend the jurisdiction of the EACJ contravenes the principles of good governance as stipulated in article 6 of the Treaty.

78 Communiqué of the 15th ordinary summit of the EAC Heads of State, para 15.

79 See the EACJ Resolution 'Seeking to try Kenya 2007 general elections aftermath accused persons at EACJ, not ICC' http://www.eala.org/component/docman/cat_view/45-key-documents/46-resolutions.html (accessed 23 February 2014).

80 See the Communiqué of the EAC Summit, 28 April 2012.

81 Part E of EACJ Revised Protocol to operationalise the extended jurisdiction of the EACJ.

82 *Sitenda Sebalu* (n 34 above).

83 Ref 1 of 2010, EACJ First Instance Division 40.

Being dissatisfied with the progress of expanding the jurisdiction of the EACJ, Sebalu approached the EACJ for a second time. He questioned its compliance with the EACJ's earlier decision which was in his favour.⁸⁴ This came after the Council of Ministers/Sectoral Committee on Legal and Judicial Affairs, through its meetings held on 2-3 November 2011 and 12-14 March 2012, had revised the Zero Draft Protocol and precluded the appellate and human rights jurisdiction of the EACJ as initially envisaged. Consequently, Sebalu referred the matter to the EACJ with two major claims. First, the applicant was of the view that the failure by the Council of Ministers to implement the decision of the Court, Reference I of 2010, which ordered the expeditious adoption of a protocol for expanding the jurisdiction of the EACJ, amounted to contempt of court. Second, Mr Sebalu contested that the act of precluding human rights in the present Draft Protocol that had earlier been adopted from the Zero Draft Protocol which had human rights and appellate jurisdiction for the EACJ, was an infringement of the fundamental principles provided for in the EAC Treaty.

When determining the matter, the EACJ was not hesitant to hold that the failure by the Council of Ministers/Sectoral Committee on Legal and Judicial Affairs to implement the judgment of the Court in Reference 1 of 2010 contravened article 38(3) of the EAC Treaty and amounted to contempt of court.⁸⁵ On whether the act of changing the Draft Protocol was an infringement of Community principles, the EACJ was of the view that the Protocol was still being revised and, therefore, it could not fault the Council at that stage.⁸⁶ Member states are required to take all necessary measures to implement the judgments of the EACJ without any foreseeable delays.⁸⁷ This is to ensure that the judgments of the EACJ are not delivered in vain. It was stated in the second *Sebalu* case that the Attorney-General of Uganda had attempted to appeal against the decision on Reference I of 2010. The fact that there is not an order of stay of execution from the Court on the *Sebalu* decision in Reference 1 of 2010, the judgment in that reference of the Court remains to be valid and has to be complied with, and failure amounts to contempt of court.

In spite of existing pressure from many quarters of stakeholders calling for the EACJ to be granted a human rights mandate, EAC leaders remain reluctant to do so. As events are unfolding, it seems that the EACJ will not be granted an explicit human rights mandate in the near future. There is also an indication that EAC political leaders have realised the complications with regard to criminal jurisdiction of the EACJ. Nevertheless, human rights remain a key element in the current East African integration process.

84 *Sitenda Sebalu v Secretary-General of the EAC & Others*, Ref 8 of 2012, EACJ First Instance Division.

85 Ref 8 of 2012, EACJ First Instance Division, para 49.

86 n 85 above, paras 67-68.

87 Art 38(3) EAC Treaty.

6 Conclusion

The article has shown that article 27(2) of the EAC Treaty has so far placed the EACJ in a precarious position. While the Court is firm in safeguarding EAC norms, article 27(2) circumscribes the EACJ from effectively protecting human rights in the Community. When exercising its mandate in matters that touch on human rights, the EACJ is often found wanting. Thus, the Court is placed in a position to choose what constitutes a human rights violation. At present, the Court has failed clearly to draw the line to distinguish between the two. As it stands, the EACJ's jurisprudence attempts to strike a balance between human rights limitations and Community norms enshrined in the EAC Treaty. On a few occasions, the EACJ First Instance Division has tried to practise judicial activism by interpreting the EAC Treaty in conjunction with various international human rights instruments. This was overruled by the Appellate Division. It is concluded that the EACJ's current approach when dealing with human rights-related cases shows encouraging signs to litigants, that it has the potential to protect human rights in the region, a trend that should not be discouraged.

AFRICAN HUMAN RIGHTS LAW JOURNAL
GUIDE FOR CONTRIBUTORS

Contributions should be e-mailed to:
isabeau.demeyer@up.ac.za All communications should be sent to the
same address.

Books for review should be sent to:

The Editors
African Human Rights Law Journal
Centre for Human Rights
Faculty of Law
University of Pretoria
Pretoria 0002
South Africa

The editors will consider only material that complies with the
following requirements:

- The submission must be original.
- The submission should not already have been published or sub-
mitted elsewhere.
- Articles that do not conform to the *African Human Rights Law
Journal's* style guidelines will be rejected out of hand.
- The *African Human Rights Law Journal* utilises plagiarism detection
software. Please ensure that submissions do not infringe other
persons' intellectual property rights.
- Papers should average between 5 000 and 10 000 words
(including footnotes) in length.
- The manuscript should be in Arial, 12 point (footnotes 10 point),
1½ spacing.
- Authors of contributions are to supply their university degrees,
academic qualifications (with institutions where obtained) and
professional or academic status.
- Authors should supply a summary of their contributions of
between 250 and 300 words and at least four keywords.
- Footnotes must be numbered consecutively. Footnote numbers
should be in superscript without any surrounding brackets. The
manuscript will be submitted to a referee for evaluation. The
editors reserve the right to change manuscripts to make them in
conformity with the house style, to improve accuracy, to
eliminate mistakes and ambiguity, and to bring the manuscript in
line with the tenets of plain legal language.
- The following general style pointers should be followed:
- First reference to books: eg UO Umozurike *The African Charter on
Human and Peoples' Rights* (1997) 21.
- First reference to journal articles: eg C Anyangwe 'Obligations of
states parties to the African Charter on Human and Peoples'
Rights' (1998) 10 *African Journal of International and Comparative
Law* 625.

- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34 above) 243.
- Use UK English.
- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN)
- Words such as 'article' and 'section' are written out in full in the text.
- Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; secs. No full stops should be used. Words in a foreign language should be italicised. Numbering should be done as follows:
1
2
3.1
3.2.1
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than 30 words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes): 28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms 'constitution', but when a specific country's constitution is referred to, capitals are used 'Constitution'.
- Official titles are capitalised: eg 'the President of the Constitutional Court'.
- Refer to the *Journal* or <http://www.chr.up.ac.za/index.php/ahrlj-contributors-guide.html> for additional aspects of house style.

**THE CENTRE FOR HUMAN RIGHTS
UNIVERSITY OF PRETORIA**

The Centre for Human Rights, founded in 1986, is part of the Faculty of Law of the University of Pretoria. The main focus of the Centre is human rights law in Africa.

For full information on the Centre, see www.chr.up.ac.za or contact

The Director
Centre for Human Rights
Faculty of Law, University of Pretoria
PRETORIA 0002
Tel: (012) 420-3810/3034
Fax: (012) 362-5125
chr@up.ac.za

Staff

Romola Adeola
LLD Candidate

Dennis Kweku Antwi
Project Manager: Advanced Human Rights Courses (AHRC)

Yolanda Booyzen
Senior Communications and Marketing Manager

Daniel Bradlow
SARChI Professor of International Development Law and African Economic Relations, University of Pretoria
Emeritus Professor of Law, American University Washington College of Law

Ashwanee Budoo
Tutor; LLD Candidate

Cristiano d'Orsi
Post-Doctoral Fellow

Isabeau de Meyer
Publication Manager: African Human Rights Law Journal;
Administrator: LLM (Human Rights and Democratisation in Africa)

Erika de Wet
Professor of International Law; Co-Director: Institute for International and Comparative Law in Africa (ICLA)

Prof Charles Fombad
Professor of Law and Head of Constitutional Law Unit at the Institute for International and Comparative Law in Africa (ICLA)

Michael Gyan Nyarko
Tutor; LLD Candidate

Michelo Hansungule

Professor in Human Rights Law
Academic Co-ordinator: LLM (Multidisciplinary Human Rights)
and MPhil (Multidisciplinary Human Rights)

Lizette Hermann

Manager: Pretoria University Law Press (PULP)

Christof Heyns

Professor of Human Rights Law; Co-Director: Institute for
International and Comparative Law in Africa (ICLA); United
Nations Special Rapporteur on extrajudicial, summary or arbitrary
executions

Katy Hindle

Programme Manager: Gender Unit

Thuto Moratuo Hlalele

Special Projects Co-ordinator & Nelson Mandela World Human
Rights Moot Court Competition Co-ordinator

Nora Ho Tu Nam

Tutor; LLD Candidate

Ikeagwuchi Andrew

Project Officer: Advanced Human Rights courses

Adetokunbo Johnson

Project Officer: Gender Unit

Mariam Kamunyu

Project Officer: Gender Unit

Eduardo Kapapelo

Academic Associate

Magnus Killander

Associate Professor & Head of Research

Emily Laubscher

Assistant Financial Manager

Josua Loots

Project Manager: Business and Human Rights

Eric Taseera Lwanga

Project Co-ordinator: LLM (Human Rights and Democratisation in
Africa)

Chiedza Machaka

Project Co-ordinator: Freedom of Expression and Access to
Information

Sydney Mdhlophe

Assistant: Pretoria University Law Press (PULP)

Harold Meintjes
Financial Manager

Charles Ngwena
Professor of Law
Areas of interest: Sexual and Reproductive Health Rights; Disability Rights

Jehoshaphat John Njau
Project Co-ordinator: Disability Rights Programme

Bright Nkrumah
Researcher

Damian Oakes
Project Officer: Business and Human Rights Unit

Onuora-Oguno Azubike C
Tutor; LLD Candidate

Adebayo Okeowo
Alumni Co-ordinator

Sarita Pienaar-Erasmus
Assistant Financial Manager

Ahmed Yusuf Sayaad
Project Co-ordinator: African Human Rights Moot Court Competition

Ololade Shyllon
Programme Manager: Freedom of Expression and Access to Information

Olufemi Soyaju
Project Co-ordinator: LLM (International Trade and Investment Law in Africa)

Karen Stefiszyn
Gender Unit Advisor

Norman Taku
Assistant Director
Project Manager: African Human Rights Moot Court Competition

Carole Viljoen
Office Manager

Frans Viljoen
Director, Centre for Human Rights
Professor of International Human Rights Law

Extraordinary/Honorary professors

Jean Allain

Professor of Public International Law, Queen's University of Belfast, Northern Ireland

Cecile Aptel

Office of the High Commissioner for Human Rights, Geneva, Switzerland

Danny Bradlow

Head: International Economic Relations and Policy Department, South African Reserve Bank

Jakkie Cilliers

Director, Institute for Security Studies

Mustaqeem de Gama

Acting Director of International Trade and Economic Development, Department of Trade and Industry

Fernand de Varennes

Université de Moncton, Canada

John Dugard

Member, International Law Commission

Johann Kriegler

Retired Justice of the Constitutional Court of South Africa

Edward Kwakwa

Legal Counsel, World Intellectual Property Organisation, Geneva, Switzerland

Cephas Lumina

Independent Expert of the United Nations Human Rights Council

Richard Maiman

University of Southern Maine, USA

David Padilla

Formerly Assistant Executive Secretary, Inter-American Commission on Human Rights

Mary Robinson

President, Mary Robinson Foundation – Climate Justice, Northern Ireland

Johann van der Westhuizen

Justice of the Constitutional Court of South Africa

Extraordinary lecturers

Adem Abebe

Senior Research Fellow, Max Planck Institute, Germany

Oagile Dingake

Justice of the Botswana High Court

Solomon Ebobrah

Co-ordinator and Senior Lecturer, Department of Jurisprudence and Public Law, Niger Delta University, Nigeria

Nicole Fritz

Executive Director, Southern Africa Litigation Centre

Sarah Knuckey

Director, Project on Extrajudicial Executions, New York University School of Law, USA

Asha Ramgobin

Executive Director, Human Rights Development Initiative

Jure Vidmar

St John's College, University of Oxford, United Kingdom

Advisory board

André Boraine

Dean, Faculty of Law, University of Pretoria

Edouard Jacot Guillarmod

Consultant

Johann Kriegler

Retired Justice of the Constitutional Court of South Africa

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

Academic Programmes

- LLM/MPhil (Human Rights & Democratisation in Africa)
- LLM (International Trade & Investment Law in Africa)
- LLM/MPhil (Multidisciplinary Human Rights)
- LLM/MPhil (Sexual & Reproductive Rights in Africa)
- LLM (Dissertation) Human Rights
- Doctoral Programme (LLD)
- Programmes at the Faculty of Law
- Gill Jacot Guillarmod Scholarship
- Disability Rights Scholarship Programme

- Alumni Association: LLM (HRDA)

Projects

- Advanced Human Rights Courses (AHRC)
- African Human Rights Moot Court Competition
- Concours Africain de Procès Simulé des Droits de l'Homme
- Concurso Africano de Julgamento Fictício sobre Direitos Humanos
- World Human Rights Moot Court Competition
- Annual African Trade Moot
- Human Rights Clinics

Regular publications

- *African Human Rights Law Journal*
- *African Human Rights Law Reports* (English and French)
- *African Disability Rights Yearbook*

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 31 May 2015)

	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 2014 are indicated in bold