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Editorial

Over the years, a significant shortcoming of democratisation in most African states has been the exclusion or near total absence of the judiciary in spaces that shape the discourse on critical political policy and decision making. The year 2017 witnessed significant instances of the highest courts in African countries being called upon to determine election-related and other constitutional disputes. Adding to a long line of influential decisions affirming constitutional rights by the South African Constitutional Court, on 1 September 2017 the Kenyan Supreme Court invalidated the Kenyan presidential elections of 8 August 2017. Similarly, although it eventually found insufficient evidence to invalidate the first round of Liberian presidential elections, the Liberian Supreme Court in November 2017 ordered that country's run-off elections be halted pending a determination of allegations of election fraud and irregularities.

In addition to these decisions related to electoral disputes, courts in Africa have increasingly dealt with rights-based issues during the past year. In November 2017, for example, the Lobatse High Court (in Botswana) ordered the Registrar of National Registration to change the gender marker on a transgender man's identity document (*ND v Attorney-General of Botswana & Others*).

In this issue of the *Journal*, Kibet and Fombad reflect on the South African and Kenyan experiences as a basis for transformative constitutionalism in adjudicating constitutional rights in Africa, more broadly. Against the background of a greater recourse to African judiciaries in the constitutional context, this is a very timely contribution to on-going discussions on the role of the judiciary in post-colonial Africa.

In recent years, the right of access to information has received considerable attention, also in Africa. In 2013, the African Union's longest-standing human rights body, the African Commission on Human and Peoples' Rights, adopted a Model Law on Access to Information for Africa. One of the major obstacles to realising this right is the notion of national security. Salau's contribution to this issue points to the potential of the Model Law and the African Commission's approach to effectively protect access to information on the continent.

Many countries in Africa have undergone, are undergoing, and are likely to undergo transitional processes. A prominent example is The Gambia, which is in the early stages of preparing for such a process

following the restoration of democracy in 2017. Two important elements of these processes are prosecutions for past atrocities, on the one hand, and truth-seeking about such atrocities, on the other. By juxtaposing the truth-seeking in the South African truth and reconciliation process with the Red Terror trials in Ethiopia, Reta argues that prosecution should be combined with other measures to uncover the truth, so as to achieve healing and reconciliation.

Three articles in this issue of the *Journal* speak to pertinent issues in relation to specific African countries. Anifalaje looks into the constitutional and legislative basis of advancing the right to social security in Nigeria. Gumboh's contribution investigates, against the background of recent Malawian jurisprudence, what the most appropriate and constitutionally-compliant test is to apply when a court considers the release of a convicted accused who appeals the conviction. In his analysis of an important Sudanese Supreme Court decision dealing with a conflict between two legislative provisions, delimiting childhood as ending at 15 and 18, respectively, Khalil argues for legal reform to eliminate this discrepancy. It should be noted that this contradiction would have been eliminated if Sudan had accepted as binding and implemented the African Charter on the Rights and Welfare of the Child. This AU treaty is unequivocal in setting 18 as the upper age-limit of childhood. In as much as these analyses depart from the country-specific setting, they offer useful insights into the situation in other African countries.

From time to time, the *Journal* contains a 'special focus' section. In this issue, the focus falls on adolescent sexual and reproductive rights in Africa. The three articles dealing with adolescent sexual and reproductive rights are introduced by an editorial by Charles Ngwena and Ebenezer Durojaye, who took the responsibility as co-editors, including overseeing the peer-review process.

The editors wish to thank the independent reviewers mentioned below, who so generously assisted in ensuring the consistent quality of the *Journal*: Adem Abebe; Amir Abdallah; Patricia Achan; Ernest Yaw Ako; Pierre Brouard; Lisa Chamberlain; Laura Stella Eposi; Charles Fombad; Polycarp Ngufor Forkum; Mark Iyi; Ireh Iyioha; Dan Kuwali; David McQuoid-Mason; Patience Mpani; George Mukundi; Charles Ngwena; Shivaun Quinlivan; Lola Shyllon; Sylvia Tamale; Ben Twinomugisha; Israel Worugji; and Emile Zitzke.

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Transformative constitutionalism and the adjudication of constitutional rights in Africa

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Summary

Transformative constitutionalism, popularised in the context of South Africa's transition from apartheid to constitutional democracy, arguably offers an antidote for failed constitutionalism and weak protection of fundamental rights and freedoms in emergent democracies in Africa. This article examines the idea of transformative constitutionalism and its implications for the adjudication of fundamental rights and freedoms. It recognises that past failures of constitutionalism in Africa, to a significant degree entailed state abuses of fundamental rights and the corresponding inability of the courts to uphold these rights. Using examples of adjudication of rights in the post-2010 period in Kenya and post-apartheid era in South Africa, the article argues that, taken as a model for constitutionalism in Africa, transformative constitutionalism offers hope for increased protection of fundamental rights and freedoms. The article analyses the demands of transformative constitutionalism on the judicial adjudication of rights, and concludes that the concept demands more from judges than has traditionally been understood in the two legal systems.

Key words: *transformative constitutionalism; rights adjudication; South African Constitution; Kenyan Constitution; human rights*

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1 Introduction

In most parts of Africa the much-celebrated independence from colonialism was largely a failed project.[1] In place of freedom, democracy and prosperity that many colonised people had hoped independence would bring, Africa's post-colonial era, especially in the early years of independence, was characterised by political instability, military *coups* and counter-*coups*, dictatorship, civil strife, corruption, massive violations of human rights and misery.[2] To put it figuratively, independence largely became a case of replacing Mr Jones with Napoleon in George Orwell's famed *Animal farm* classic.[3] Similarly, the formation of the South African Republic in 1961, marking the end of allegiance to the British Crown, did not yield much fruit for the African majority.[4] Rather, it meant a continuation and perfection of misery under the apartheid regime.[5] Thus, South Africa's experience under the apartheid regime carries similarities with the colonial experience in the rest of Africa. These include racial segregation; discrimination; disenfranchisement and dispossession; political exclusion; and general socio-economic under-development. While South Africa's transition from apartheid may not be regarded as decolonisation in the same way as the rest of Africa was liberated from European colonial rule, it nonetheless was a process of liberation from a similar plight. Thus, the transition of South Africa from white domination following the multi-racial elections of 1994 may be equated to the liberation of the rest of Africa from colonial fetters in that governance and the power to shape the destiny of the country were now in the hands of a popularly-elected government comprising mainly of the black majority that had suffered marginalisation during apartheid.

The article argues that transformative constitutionalism is an ideal model to anchor constitutionalism and respect for human rights in Africa. Citing it as one of the fundamental pillars of post-apartheid constitutionalism in South Africa, it explores the concept and its implications for the adjudication of fundamental rights and freedoms. It recognises that past failures of constitutionalism in Africa to a

1 HK Prempeh 'Africa's "constitutionalism revival": False start or new dawn?' (2005) 3 *International Journal of Constitutional Law* 469.

2 CM Fombad 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa' (2007) 55 *American Journal of Comparative Law* 36-38. See also HWO Okoth-Ogendo 'The politics of constitutional change in Kenya since independence' (1972) 71 *Africa Affairs* 9.

3 G Orwell *Animal Farm* (1956) (a political satire in which animals carry out a *coup* to liberate themselves from the oppression of their human master, Mr Jones; pigs become the ruling elite in the society of 'free animals', but soon the new regime becomes corrupt and institutes a system that has all the oppressive features of the previous one).

4 J Dugard 'A bill of rights for South Africa?' (1990) 23 *Cornell International Law Journal* 442-443.

5 As above.

significant degree entailed state abuses of fundamental rights and the corresponding inability of the courts to uphold these rights. Using examples of adjudication of constitutional rights in the post-2010 period in Kenya and post-apartheid era in South Africa, the article contends that transformative constitutionalism as a model for constitutionalism in Africa offers hope for the better protection of fundamental rights and freedoms. The article analyses the demands of transformative constitutionalism on the judicial adjudication of rights, and concludes that the concept demands more from judges than has traditionally been understood in the two legal systems. The next section gives a brief overview of the history of constitutionalism and the protection of fundamental rights and freedoms in post-colonial Africa.

2 History of constitutionalism and the protection of rights in Africa

The quest to strike a balance between anarchy, on the one hand, and tyranny, on the other, is a key preoccupation of constitutional law and the core of constitutionalism.[6] The primary function of constitutions is to strike this balance by establishing power maps for the exercise of public power in a fashion that ensures that the government is neither too weak nor despotic.[7] Thus, constitutions create state institutions, allocate to them powers and, importantly, define the limits of their powers.[8] In this sense, constitutionalism is the notion of government limited by law.[9] It posits that it is possible and, indeed, desirable, that government should be limited by law, the constitution sitting at the top in the hierarchy of law.[10] Broadly speaking, constitutionalism encompasses a number of elements such as the protection of fundamental rights and freedoms; the concept of separation of powers; independence of the judiciary; review of laws for constitutionality; and regulation of amendments to the constitution.[11] Fombad, however, cautions that these elements do not automatically guarantee constitutionalism.[12] A mechanism through which citizens can seek legal redress in courts for constitutional violations and to enforce constitutional obligations is necessary to ensure constitutional justice.[13] In this regard, Okoth-Ogendo adds that constitutionalism also entails a culture or commitment by the political elite to respect

6 AW Bradley & KD Ewing *Constitutional and administrative law* (2010).
7 B Nwabueze *Constitutional democracy in Africa* (2003) 36-45.
8 Nwabueze (n 7 above).
9 Bradley & Ewing (n 6 above).
10 As above.
11 Fombad (n 2 above) 7-8.
12 Fombad (n 2 above) 10-14.
13 Fombad (n 2 above). Arts 258(1) & (2), 22(1) & (2) and 70(1) of the Constitution of Kenya 2010 have severely reduced rules of *locus standi* and ripeness, making it easy to institute constitutional and human rights cases.

and abide by constitutional limits, since it is possible, in his words, to have 'constitutions without constitutionalism'.[14]

The elusiveness of constitutionalism in post-colonial Africa has attracted the attention of many scholars in Africa. Okoth-Ogendo, for instance, decried Africa's post-colonial situation as one of 'constitutions without constitutionalism'.[15] Prempeh notes that soon after independence, many constitutions ended up in the dustbins of despots who had little regard for constitutionalism and the rule of law.[16] He describes the early years of independence under the first generation of African leaders as one characterised by the reign of 'founding fathers' who enjoyed 'founders' rights' and, therefore, were above challenge or accountability to citizens and indeed state institutions.[17] They also either inspired or commanded homage from the citizens and the question of being subjects of the law and the Constitution in the same way as ordinary people was unimaginable.[18] The description of Presidents Jomo Kenyatta and Daniel arap Moi of Kenya as *mzee*,[19] *baba wa taifa*,[20] *mtukufu*,[21] 'father of the nation' illustrate this point. These two presidents had become so idolised that there was a common belief among some of their loyalists that they were constitutionally above the law.[22] The same could be said of Ghana's Kwame Nkurumah, Zimbabwe's Robert Mugabe, Malawi's Kamuzu Banda, Milton Obote of Uganda, and Guinea's Sekou Toure, among others. Although these 'larger-than-life' individuals were seen as liberators from colonial rule, they presided over the subversion of democracy, the rule of law and constitutional order as part of a scheme of consolidation of power.[23] During their reign, constitutions were discarded, ignored or amended to concentrate power in the executive and weaken other institutions such as legislatures and the

14 HWO Okoth-Ogendo 'Constitutions without constitutionalism: An African political paradox' in D Greenberg et al (eds) *Constitutionalism and democracy: Transitions in the contemporary world* (1993) 65.

15 As above.

16 Prempeh (n 1 above) 473-475.

17 Prempeh 481.

18 As above.

19 Meaning the 'revered elder'.

20 Meaning 'father of the nation'.

21 Meaning 'most excellent one'.

22 See eg official parliamentary Hansard record, 4 December 1991, recording the assistant Minister for Manpower, Development and Employment, Mr Lugonzo, saying that the President is 'constitutionally above the law'. In his inaugural speech, the newly-appointed Attorney-General, Amos Wako, in 1991 is also on record to have told parliament that the idea of the rule of law in Kenya was to the effect that 'nobody, except the President, is above the law'. See A Shiundu 'After 20 years, Wako serves last days as Kenya's AG' *The Daily Nation,* 14 August 2011 http://www.nation.co.ke/News/politics/After+20+years+Wako+serves+last+days+as+Kenyas+AG+/-/1064/1218988/-/1410vbd/-/index.html (accessed 7 August 2016).

23 Prempeh (n 1 above).

courts.[24] The result was a lack of accountability that created a perfect environment for corruption, political repression and human rights abuses.[25] For this reason, Prempeh blames these generations of African leaders and their regimes for failed constitutionalism and the misery that followed.

While some independence constitutions, such as that of Kenya, created frameworks for multiparty democracy and the protection of human rights,[26] the post-colonial epoch quickly changed and took the shape of one-party rule, personal presidential dictatorships or military juntas.[27] Many post-colonial regimes perfected the repression of the colonial masters and failed to institute meaningful social, political and economic change.[28] For Kenya, in particular, the first four decades of independence were dominated by the independence party and characterised by personal presidential rule that was completely intolerant of political competition.[29] The same could be said of Ghana, Zimbabwe, Malawi, Uganda, Guinea, and Nigeria under military rule.

The evils of the apartheid regime in South Africa are well documented. Systemic racial discrimination, marginalisation and dispossession was the official policy backed by law. The state deployed violence against dissidents with tragic consequences as many were killed, maimed, tortured, detained without trial, or imprisoned under apartheid laws.[30] The next section highlights how courts, at the height of dictatorship and political repression, largely failed to defend constitutionalism and the rule of law.

3 Courts in the context of failed constitutionalism and human rights abuses in Africa

In constitutional arrangements generally, courts of law have the task of upholding the rule of law, constitutionalism and fundamental rights.[31] In functioning democracies, the ideal situation is that the state and all its instrumentalities ought to commit to, respect and uphold these values. The reality, however, shows that more often than not the state and its agents, indeed, are the violators as these values

24 As above. See also SD Mueller 'The political economy of Kenya's crisis' (2008) 2 *Journal of Eastern African Studies* 185; doi 10.1080/17531050802058302.
25 Fombad (n 2 above).
26 Prempeh (n 1 above).
27 As above.
28 As above.
29 MW Mutua *Kenya's quest for democracy: Taming Leviathan* (2008).
30 See eg The Report of the Truth and Reconciliation Commission (Vol 1-5) http://www.justice.gov.za/trc/report/ (accessed 15 November 2016).
31 Nwabueze (n 7 above) 19-30.

serve as limits and inconveniences in the course of the exercise of power.[32] In light of this, a question arises as to how the courts lived up to their mandate of upholding rights and the rule of law, especially in the early years of Africa's independence. How did the courts handle their constitutional responsibilities in the face of despotic and repressive regimes?

The story of the responses of the courts to political repression and abuses of human rights by the state in post-colonial Africa, of course, cannot be over-generalised. However, there is a clear pattern that courts were generally either impotent or complicit.[33] A few illustrations support this assertion. During the one-party rule, in Kenya, for example, the judiciary generally was unable to protect and enforce human rights against a despotic executive.[34] The judiciary constantly avoided making decisions that would upset the executive, especially the President.[35] In *Matiba v Moi*,[36] an election petition filed against the incumbent, President Daniel arap Moi, by a presidential candidate in the 1992 elections was dismissed because the petitioner had not signed the election petition in person as required by the election law. The Electoral Commission had announced Moi as the winner of the election. Matiba, who was a presidential candidate, disputed the election results and filed a petition before the High Court. However, he could not personally sign the petition because he had suffered a stroke which impaired him physically, making him unable to write. Instead, his wife signed the petition on his behalf under a power of attorney granted to her by the petitioner. On the basis of this technicality, the Court refused to entertain the petition arguing that the law was clear that the petitioner must sign in person. In so holding, the Court ignored the real issues and denied the petitioner justice on the basis of a technicality.

In 1997, the second elections since the return of multipartyism in Kenya in 1992 were held. Mwai Kibaki, who emerged second, disputed the results and filed a petition against the incumbent, President Moi, who had been declared the winner.[37] The High Court again dismissed the suit on the basis of a technicality. Election laws required that an election petition must be served in person upon the respondent.[38] The petitioner's lawyers had not served President Moi personally. The reality was that attempts to serve the President personally were frustrated by his security detail. Although these

32 Nwabueze (n 7 above).

33 Human Rights Watch World Report 1989 https://www.hrw.org/reports/1989/WR89/Kenya.htm (accessed 10 November 2012).

34 MW Mutua 'Justice under siege: The rule of law and judicial subservience in Kenya' (2001) 23 *Human Rights Quarterly* 97.

35 JT Gathii 'The dream of judicial security of tenure and the reality of executive involvement in Kenya's judicial process' (1994) *Thoughts on Democracy Series (Issue II)* 10.

36 Election Petition 27 of 1993.

37 *Kibaki v Moi* Election Petition 1 of 1998.

38 Ch 7 sec 20(1)(b) National Assembly and Presidential Elections Act.

frustrations were brought to the attention of the Court, it still dismissed the petition, thereby denying the petitioner justice. On appeal, the Court of Appeal upheld the decision of the High Court.[39]

Gibson Kamau Kuria v Attorney-General[40] is another case that illustrates the courts' connivance or helplessness in enforcing fundamental rights and the rule of law during the one-party era in Kenya. In this case, Gibson Kamau Kuria had been awarded the Robert F Kennedy Human Rights Award from the Robert F Kennedy Center for Justice and Human Rights in the United States for defending human rights in Kenya. He received an invitation to travel to the United States to receive the award. The government of Kenya was unhappy with this award as it considered Kuria an opponent of the regime. It responded by confiscating his passport to prevent him from travelling. Kuria sued the state to compel it to return his passport so that he could travel to receive the award. The High Court dismissed the case on the pretext that, although the right to freedom of movement was guaranteed, the Court could not enforce it since the Chief Justice 'had not made rules' to guide the litigation process.[41] In so holding, the Court sacrificed the protection of fundamental rights and freedoms on the altar of technicalities. It was curious that the Chief Justice, who had failed to make rules to guide constitutional litigation, in fact was on the same bench that refused to entertain the case under the guise of a lack of rules.[42] It is also worth noting that before this decision, constitutional litigation had been going on for years and this technical situation had not hindered courts from enforcing rights in the past.[43] This suggests that the Court only resorted to the technicality in order to conveniently avoid upsetting the executive, which was determined to frustrate the petitioner.

The same situation is generally reflected in most of Africa especially before the multiparty wave that began in the 1990s.[44] In South Africa, the capacity of the courts to enforce and protect human rights was severely hampered by legal and constitutional designs aimed at supporting apartheid.[45] First, the doctrine of parliamentary supremacy entrenched in pre-1993 Constitutions ensured the

39 Nairobi Civil Appeal 172 of 1999.

40 High Court Miscellaneous Application 279 of 1985 (unreported).

41 Sec 84(6) of the repealed Constitution of Kenya empowered the chief justice to make rules to guide the enforcement of fundamental rights and freedoms. It is surprising that no rules were made subsequently to 2001. Therefore, some courts resisted to enforce the Bill of Rights for technical reasons, while others took the view that the absence of rules of procedure could not defeat substantive rights. See, generally, M Thiankolu 'Landmarks from El Mann to the Saitoti ruling: Searching a philosophy of constitutional interpretation in Kenya' (2007) *Kenya Law Journal* http://www.kenyalawreports.or.ke/Downloads_Other/Landmarks_from_El_Mann_to_the_Saitoti_Ruling.pdf (accessed 20 June 2015).

42 Gathii (n 35 above).

43 As above.

44 CM Fombad 'Constitutional reforms and constitutionalism in Africa: Reflection on some challenges and future prospects' (2011) 59 *Buffalo Law Review* 1007.

45 Dugard (n 4 above).

subordination of the judiciary to a legislature that did not represent the interests of the black majority.[46] Amendments to the 1910 Constitution, for example, specifically denied courts the power to review the constitutionality of laws enacted by parliament.[47] The implication of this rule was that whatever parliament enacted, however outrageous, could not be challenged. This subordination, which was retained in subsequent Constitutions of 1961 and 1983, entrenched apartheid laws that provided for gross human rights violations such as racial discrimination, detention without trial, suppression of freedom of expression, and the denial of orders of *habeas corpus*.[48]

Second, the pre-1993 Constitutions did not contain bills of rights. This fact, coupled with the official constitutional subordination of the judiciary, meant that there was no basis upon which the courts could enforce fundamental rights and freedoms.[49] Third, at the time, staffed by white judges trained by a legal education system designed to support apartheid, courts could not do much to advance the agenda of protecting fundamental rights and freedoms, especially those of the marginalised African majority.[50] Klare describes this problem as 'legal culture' that limited the way in which lawyers think and determined their sensibilities and responses to issues.[51] In other words, the despotism and abuses of human rights in the pre-1993 period were sustained, at least in part, by a legal culture fashioned to support the apartheid policy. More generally, where were the courts amidst widespread human rights abuses by rogue regimes in post-colonial Africa? Examples from Kenya cited above, and from Nigeria under the various military regimes, show that courts for the most part chose to avoid controversy by resorting to technicalities of the law and rigid positivism or formalism that emptied legal human rights protection of their substance.[52]

Nevertheless, it is important to acknowledge the fact that during the early years of Africa's independence in countries presided over by civilian or military dictators, the courts operated under extremely difficult political circumstances. Judicial courage sometimes had tragic or even fatal consequences as some regimes were prepared to go to

46 As above.

47 Under the constitutional design that existed, parliament was sovereign. Whatever parliament enacted could not be invalidated by the courts.

48 Dugard (n 4 above) 443-444. Cases such as *Harries & Others v Minister of Interior & Another* 1952 (2) SA 428 (A); *Minister of the Interior & Another v Harries & Others* 1952 (4) SA 769 (A); and *Collins v Minister of the Interior & Another* 1957 (1) SA 552 (A) are good examples.

49 Dugard (n 4 above).

50 T Madala 'Rule under apartheid and the fledgling democracy in post-apartheid South Africa: The role of the judiciary' (2000-2001) 26 *North Carolina Journal of International Law and Commercial Regulation* 749-751.

51 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 150.

52 B Ogochukwu 'Adjudicating human rights in transitional contexts: A Nigerian case study, 1999-2009' unpublished PhD thesis, Osgood Hall Law School, 2014.

whatever lengths to rule while ignoring constitutionalism and the rule of law.[53] As a result, some judges simply avoided issuing orders with which they believed the political elite was not prepared to comply. As was common during Nigeria's notorious military regimes, many judges avoided issuing such orders on the rationale that doing so would open the courts to embarrassment and further erode the already shaky judicial authority.[54] In spite of these circumstances, Prempeh and other African scholars assert that the judiciary cannot escape blame for the failure of constitutionalism in post-colonial Africa.[55] Although the executive was determined to entrench its rule at all costs, including ignoring constitutionalism and the rule of law, there are examples of many squandered opportunities where courts simply failed to stand up to defend these values, or even connived in their subversion.

The next part discusses the idea of transformative constitutionalism and assesses whether the adoption of the concept could cure some of the problems in constitutional adjudication highlighted in this section.

4 Transformative constitutionalism: An antidote for past failures?

Although South Africa's transition in 1994 entailed the assumption of power by an African majority government, the post-apartheid South Africa has generally escaped the constitutional failures and turmoil that befell most of Africa following the departure of colonial powers. Since the transition, the country has strived to uphold democracy, constitutionalism and the rule of law despite numerous challenges that could predispose it to a similar fate. What followed the end of apartheid were concerted legal and political processes of correcting the wrongs of the past and establishing an egalitarian constitutional order, which distinguished South Africa as a model of socio-political change through law. From the implementation of the 1993 interim Constitution to the enactment and operationalisation of the 1996 final Constitution, the courts have been pivotal as guardians of the transformation, handing down landmark decisions that affirm a resolute commitment to human rights and the new order generally.[56] The question that then arises is: What sets South Africa apart from other African states? What spares the country from the turmoil that followed the departure of European colonial powers in most of Africa?

There are many possible answers to this question. First, although there were deep political divisions in South Africa that could have resulted in turmoil as in many other African countries, the ravages of

53 As above.
54 As above. For Kenya in particular, see Gathii (n 35 above).
55 Ogochukwu (n 52 above).
56 Fombad (n 44 above) 1069.

apartheid and the fact that the white minority group that had been politically dominant were not departing, compelled various factions to work together for change through peaceful means. Second, South Africa's transition occurred at a time when a wave of democratisation was sweeping across Africa following the collapse of the Soviet Union. The appeal of the values of democracy, the rule of law and human rights, drummed up by the West, took centre stage now that the Cold War had ended or weakened.[57] This influence was readily taken up and reflected in South Africa's constitutional change and subsequent practice.[58] Third, and perhaps most importantly, was the recognition of the inadequacies of the Western liberal constitutional model to prevailing socio-political realities in South Africa. Constitutionalism, simply understood as the idea of limited government, was transplanted into African constitutional thought mainly though the agency of European colonial powers who acted as patrons of the decolonisation process and handed down to the newly-independent African states constitutions modelled after European constitutions.[59] However, these models, fashioned after Western liberal ideology, failed to meet the peculiar needs of African situations characterised by widespread poverty, underdevelopment, wide ethnic and cultural diversity as well as African communitarian orientation.[60]

Klug argues that South Africa's transformation took place against a declining dominance of liberalism and a corresponding rise in social democracy or liberal egalitarianism.[61] Liberal ideology, premised mainly on formal autonomy and abstract equality, had been on the decline,[62] and had faced criticism for failing to adequately meet the challenges of non-Western societies in Africa and elsewhere. These critiques of Western classical liberalism and responses through social democracy or liberal egalitarianism constitute one of the external influences on South Africa's post-apartheid era.[63] As an internal influence, political sentiments fomented by historical marginalisation, systemic discrimination, disenfranchisement and human rights abuses,

57 M Mutua 'The transformation of Africa: A critique of the rights discourse' in FG Isa & K de Feyter (eds) *Human rights and diversity: International human rights law in a global context* (2009) 899, https://ssrn.com/abstract=1526734 (accessed 5 October 2017).

58 H Klug *Constituting democracy: Law, globalism and South Africa's political reconstruction* (2000).

59 Prempeh (n 1 above).

60 N Bohler-Muller 'Western liberal legalism and its discontents: A perspective from post-apartheid South Africa' (2007) 3 *Social-Legal Review* 1.

61 Klug (n 58 above).

62 As above. See also T Allen 'Liberalism, social democracy and the value of property under the European Convention on Human Rights' (2010) 59 *International and Comparative Law Quarterly* 1055. The trend here is one of counter-balancing classical liberal ideals with social democratic ideals, not death of classical liberalism ideology. The labour movement and labour law as a transitional project have greatly contributed to the rise in social democratic ideals in Europe and the rest of the world.

63 Klug (n 58 above).

provided the impetus for an egalitarian order.[64] Thus, South Africa's transformation process fashioned a social democratic or liberal egalitarian system premised on the traditional concept of constitutionalism in the liberal sense, but going beyond it to include pragmatic designs to address prevailing social and political realities.[65] This is what Klare has described as 'transformative constitutionalism', and which is discussed in detail below.

The traditional notion of constitutionalism is inadequate in meeting peculiar needs of transitional societies emerging from traumatic pasts characterised by war, deep divisions or political repression. In such societies, constitutions and law generally have to do more,[66] including addressing past injustices and crises as well as inspiring hope for a better future.[67] Inevitably, the law and politics divide faces the greatest challenge as the law is engaged in mediating political change.[68] South Africa's interim Constitution of 1993 and the final 1996 Constitution provide a good illustration in this regard. They devised delicately-balanced mechanisms to end an immoral and oppressive legal and political regime and usher in a more inspiring future.[69] The goal was to end apartheid and institute a democratic regime founded on freedom, multiculturalism, equality, equity, respect for human dignity and human rights.[70] To this list, Klare adds the protection of socio-economic rights, the imposition of positive duties on the state to ensure the enjoyment of human rights, and the horizontal applicability of the Constitution.[71] This necessitated a Constitution designed not only to limit government powers in the traditional sense, but also to institute social and political transformation as a means of lending legitimacy to the new constitutional and political order.[72] A constitutional and political change that would not help to emancipate previously-oppressed groups and create an egalitarian society in which the interests of all are protected would suffer a serious legitimacy problem, hence the

64 As above.

65 H Klug 'Towards a sociology of constitutional transformation: Understanding South Africa's post-apartheid constitutional order' (2016) University of Wisconsin Legal Studies Research Paper 1373.

66 R Teitel 'Transitional jurisprudence: The role of law in political transformation' (1997) 106 *Yale Law Journal* 2014 (arguing that law in transitional situations plays the role of facilitating both change and stability).

67 Klug (n 58 above).

68 Teitel (n 66 above).

69 Klug (n 58 above). See also A Chaskalson 'From wickedness to equality: The moral transformation of South African law' (2003) 1 *International Journal of Constitutional Law* 590.

70 D Moseneke 'A journey from the heart of apartheid darkness towards a just society: Salient features of the budding constitutionalism and jurisprudence of South Africa' (2012) 101 *Georgetown Law Journal* 749.

71 Klare (n 51 above) 153.

72 Klare (n 51 above).

need for a transformative constitution and the idea of transformative constitutionalism.[73]

The colonial system pursued by the British administration in Kenya was very similar to South Africa's apartheid regime to the extent that it was based on ideas of white racial supremacy and exploitation.[74] The law was skewed to serve the interests of minority colonial settlers and the colonial administration while subjugating and alienating the black majority.[75] Under the system, state authority was unchallengeable and unaccountable[76] in the same way that Mureinik described apartheid as a system operating on a 'culture of authority' in which the state did not need to justify its actions.[77] Although a liberal democratic constitution was adopted to usher in Kenya's independence, the colonial system of administration, with its laws, attitudes and traditions, was bequeathed almost intact upon the African political elite. Among the top priorities of the political elite after independence was to consolidate political power. Thus, soon after independence, the Constitution was amended in fundamental ways such that by 1982, Kenya had become a highly-centralised unitary *de jure* one-party state with an 'imperial presidency', and with institutions too weak to safeguard human rights, the rule of law and constitutionalism.[78] As a result, the first three decades of Kenya's independence were characterised by despotism, a refusal by the state to institute land reforms, and widespread human rights abuses.[79] It is against this background that the 2010 Constitution of Kenya was enacted to institute social and political transformation in the country. This transformation entails a reconfiguration of the governance structures and the equilibrium of power among state institutions; the democratisation of governance; changing the normative

73 Klare (n 51 above) 150. (Mureinik described the Interim Constitution as a 'bridge' from authority to a culture of justification: E Mureinik 'A bridge to where – Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 32.

74 E Huxley *White man's country: Lord Delamere and the making of Kenya* (1969).

75 MK Mbondenyi et al *Human rights and democratic governance in Kenya: A post-2007 appraisal* (2007).

76 CM Ngugi 'Free expression and authority in contest: The evolution of freedom of expression in Kenya' unpublished PhD thesis, Emory University, 2007.

77 Mureinik (n 73 above) 31.

78 Mureinik (n 73 above). See also MW Mutua 'Human rights and state despotism in Kenya: Institutional problems' (1994) 41 *Africa Today* 50 (illustrating how the Kenyan state under Jomo Kenyatta and Daniel Moi presided over a despotic government that carried out widespread human rights abuses). See also Mueller (n 24 above) (arguing that the political crisis in Kenya in the aftermath of the disputed presidential elections of 2007 was a consequence of a deliberate scheme in the post-independence period to weaken state institutions to appoint where they could not be trusted to act as credible mediators). It should be recalled that in 1988, the security of tenure of judges was removed. Although it was later restored, the judiciary remained largely weak in relation to the executive arm of government. See eg Mutua (n 34 above) 96 and Gathii (n 30 above). See also Mueller (n 24 above). The term 'imperial presidency' is attributed to Okoth-Ogendo (n 1 above).

79 Mutua (n 29 above).

arrangements; culture, attitudes and practices that surround politics and the exercise of public power; as well as a robust protection of civil and political rights, socio-economic rights, solidarity rights and gender equality rights so as to shift state-citizen relationship in an egalitarian direction.

Through the 2010 Constitution, Kenya adopted a transformative Constitution modelled after that of South Africa and tailor-made to address situations peculiar to the country. The Constitution seeks to do more than secure constitutionalism in the traditional sense. Its vision is to redress social and political crises in the country; both those that are a legacy of colonialism and those that began in the post-colonial era. The Supreme Court of Kenya recognised this transformative character in *Speaker of the Senate & Another v Attorney-General & Another & 3 Others*,[80] in which it held:[81]

> Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional 'liberal' Constitutions of the earlier decades which essentially sought the control and legitimisation of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy* …

In a subsequent decision in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*,[82] the Supreme Court of Kenya, citing Klare, observed that in enacting the 2010 Constitution, Kenya had entered the league of India, South Africa, Colombia and other countries that have embraced transformative constitutionalism as a model for social and political change.[83]

What then is transformative constitutionalism and what are its essential elements? The idea has received a lot of scholarly attention since the end of apartheid in South Africa and its transition to a constitutional democracy. Writing in the context of South Africa's 1996 Constitution, Klare defines 'transformative constitutionalism' as

> a long-term project of constitutional enactment, interpretation, and enforcement committed … in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.[84]

Other scholars have also commented extensively on transformative constitutionalism in the context of South Africa. The late Chief Justice of the Constitutional Court of South Africa, Pius Langa, for instance,

80 [2013] eKLR.
81 Para 51 (our emphasis).
82 [2014] eKLR (Petition 14 as consolidated with Petitions 14A, 14B and 14C of 2014).
83 *Royal Media Services* (n 82 above) para 377.
84 Klare (n 51 above) 150.

acknowledged the difficulty of defining the concept in juridical terms, noting that social and political change is its primary goal.[85]

Although the meaning and scope of transformative constitutionalism may be disputed, a number of its elements may be deduced. In contrast to classical liberalism which assumes formal equality, its focus is on substantive equality and substantive justice. This entails a deliberate effort to empower previously-excluded segments of society through devices such as the protection of socio-economic rights, and others aimed at the attainment of social justice. This inevitably requires a broader view of justice beyond the narrow 'negative rights' conception since the realisation of substantive justice requires proactivity by the state. This necessarily requires less emphasis on technicalities and procedure so as to maximise the realisation of substantive rights. In a legal context, this entails methods of legal reasoning that transcend formalism or positivism to ensure that rights are indeed enjoyed.[86] In this regard, Klare suggests a 'post-liberal' reading of the Constitution since the Constitution is itself post-liberal, requiring more than the minimum guarantees of the liberal conception.[87] In addition, this aspect requires a change in lawyers' understanding of the law and its role in society and politics. This is what Klare calls 'legal culture', which he defines to mean lawyers' 'professional sensibilities, habits of mind, and intellectual reflexes'.[88] Since transformative constitutionalism places a lot of faith in the law as an instrument for social and political change, it follows that lawyers, including judges (as well as legislators and law enforcers), must view the law as such and be prepared to conceptualise and deploy it to achieve the envisaged transformation.

Transformative constitutionalism, however, has received a fair amount of criticism. For example, it has been criticised for obscuring the law-politics divide.[89] The objective of attaining social or substantive justice through law inevitably compels courts to engage in policy decision making or make orders that have significant budgetary implications such as in the enforcement of socio-economic rights. This inevitably creates points of conflict with the political arms of government that largely retain the power over policy and government expenditure.[90] This is perhaps the most controversial element of

85 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

86 T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 2 *Stellenbosch Law Review* 260.

87 Klare (n 51 above) 150-151. Roux (n 86 above) sees the interpretative approach advocated by Klare as the critical legal studies approach, and adds that the approach advocated by Dworkin in his theory of interpretation is another plausible approach.

88 Klare (n 51 above) 166-167.

89 Roux (n 86 above).

90 An order for the enforcement of socio-economic rights such as food, healthcare and housing, requires the deployment of financial resources and effort, for example.

transformative constitutionalism as it necessarily engages the judiciary in the murky waters of politics and policy decision making.[91] It is more controversial because the contours of judicial activism that sometimes goes with transformative constitutionalism are undefined or amorphous. This facet of transformative constitutionalism could mean judicial pragmatism in bringing about socio-political change. It could also sound a death knell for the legitimacy of the judiciary since it may bring it into direct collision with political players who feel more entitled to drive the political agenda. In addition, transformative constitutionalism has been criticised as being an insufficient cure for widespread poverty and inequality that continue to ravage post-colonial Africa.[92] Despite the celebration of transformative constitutionalism in scholarly commentary, landmark decisions of the courts and development milestones reached in South Africa since the end of apartheid, deep poverty and inequality continue to be a big challenge. Sibanda in his criticism argues that this failure is partly because, while the concept is touted as 'post-liberal', it sits comfortably within liberal discourses and fails to place poverty eradication at the centre of constitutional discourses.[93]

Despite these criticisms, it is clear that transformative constitutionalism offers hope for better prospects of constitutionalism and protection of fundamental rights in Africa. What becomes clear is that transformative constitutionalism takes a more pragmatic approach towards the realisation of constitutionalism and fundamental rights and freedoms. This is essential especially in emergent democracies in the global south where the culture of human rights and constitutionalism is either nascent or fragile. There is little doubt that the present South Africa is better off than in the apartheid era as far as the protection of human rights, the rule of law and constitutionalism are concerned.[94] The landmark decisions of the South African Constitutional Court in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others*[95] (striking down laws criminalising sex between consenting males); *Minister of Home Affairs & Another v Fourie & Another*[96] (validating same-sex marriages); *Du Toit & Another v Minister of Welfare and Population*

91 K van Marle 'The spectacle of post-apartheid constitutionalism' (2007) 16 *Griffith Law Review* 418.

92 S Sibanda 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22 *Stellenbosch Law Review* 482.

93 As above.

94 F Michelman 'Liberal constitutionalism, property rights, and the assault on poverty' (2011) 22 *Stellenbosch Law Review* 706 gives a more comprehensive rebuttal of Sibanda's criticism. Also see Sibanda's reply to Michelman in S Sibanda 'Not quite a rejoinder: Some thoughts and reflections on Michelman's liberal constitutionalism, property rights, and the assault on poverty' (2013) 24 *Stellenbosch Law Review* 329.

95 1999 (1) SA 6 (CC).

96 [2005] ZACC 19.

Development & Others[97] (affirming the rights of a lesbian couple to jointly adopt a child); *S v Makwanyane & Another*[98] (striking down the death penalty); *Government of the Republic of South Africa & Others v Grootboom & Others*[99] (affirming the right to adequate housing for the most vulnerable in the society); and *Economic Freedom Fighters v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly & Others*[100] (ordering President Jacob Zuma to refund public funds used to improve his private Nkandla home in violation of the Constitution) and others, are outstanding, and illustrate this point.

Similarly, the prospects of protection of human rights and respect for constitutionalism and the rule of law in Kenya are better than in any other time in the country's history. Decisions such as *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 Others* (affirming freedom from discrimination on grounds of sex including sexual orientation);[101] *Kituo Cha Sheria v Independent Electoral and Boundaries Commission & 2 Others* (affirming prisoners' rights to vote);[102] *Coalition for Reform and Democracy (CORD), Kenya National Commission on Human Rights and Samuel Njuguna Ng'ang'a v Republic of Kenya & Another* (invalidating various security laws seeking to restrict freedom of expression);[103] and *Trusted Society of Human Rights Alliance v Attorney-General & Others* (invalidating various decisions of the President and parliament for failing to comply with the Constitution)[104] are unprecedented, and best illustrate this point. Although the transformative jurisprudence from the courts in the two jurisdictions are at different levels of development, it is clear that there is a shift in both towards a value-based approach to the interpretation and enforcement of rights, and the Constitution generally. This, obviously, signifies the courts' stronger commitment to uphold the rule of law, constitutionalism and the enjoyment of rights.[105] If the momentum set by the courts in these two jurisdictions is sustained and diffused elsewhere in Africa, the outcome would be what Prempeh has described as 'rights-friendly' jurisprudence.[106]

97 2003 (2) SA 198 (CC).
98 (CCT3/94) [1995] ZACC 3.
99 (CCT11/00) [2000] ZACC 19.
100 [2016] ZACC 11.
101 [2015] eKLR.
102 [2013] eKLR.
103 [2015] eKLR.
104 [2012] eKLR (HCK). This decision was later overturned on appeal, but the appointments made by the President and approved by the National Assembly were ineffectual for months while the appeal was pending. See also *Institute of Social Accountability & Another v National Assembly & 4 Others* [2015] eKLR in which the Court invalidated a popular law passed by the National Assembly and directed it to remedy its faults.
105 Mureinik (n 73 above) 32.
106 Prempeh (n 1 above) 504.

It has become clear that transformative constitutionalism relies on the law and courts as the final arbiters of the meaning of the law for the success of its objectives. The question that arises concerns the demands of transformative constitutionalism on judges and the judicial process. The next section answers this question by exploring transformative constitutionalism in the adjudicative context.

5 Transformative constitutionalism in the adjudicative context

Since World War II, many democracies around the world have embraced 'judicialism', the notion that courts bear the ultimate power to declare the meaning of the law such that all other state organs must submit to their determinations.[107] Since the 1950s judicial power has been on the rise, to a point where the courts often get involved in matters that can be regarded as political or having significant political implications, such as nullifying legislation and other political outcomes, and reviewing policy decisions or even getting involved in policy making.[108] Many democracies now have apex constitutional courts with the power to proclaim the meaning and demands of the constitution and fundamental rights in a fashion that binds and constrains the political arms of government, and heightens the age-old countermajoritarian difficulty.[109] Stone Sweet has described this phenomenon as 'judicialisation'.[110] Klug, for his part, sees this feature as an essential element of modern 'global constitutionalism'.[111] On Kenya in particular, Ojwang argues that judicialism and (transformative) constitutionalism are the two defining ideologies of the Kenyan Constitution, and notes that the judiciary is the greatest beneficiary of the changing political philosophy ordained under the 2010 Constitution.[112] This is because contrary to its previous weak form, the judiciary under the 2010 Constitution enjoys immense powers as the final arbiter of legal and constitutional matters, including some that are political in nature, thanks to the ideology of judicialism.[113]

What does transformative constitutionalism require of judges as the guardians of the socio-political transformation project? The answer to this question is likely to be highly contested given that the concept challenges the traditional position in common law jurisdictions that

107 JB Ojwang *Ascendant judiciary in East Africa: Reconfiguring the balance of power in a democratising constitutional order* (2013).

108 J Ferejohn 'Judicialising politics, politicising law' (2002) 65 *Law and Contemporary Problems* 41.

109 A Bickel *The least dangerous branch: The Supreme Court at the bar of politics* (1962).

110 AS Sweet *Governing with judges: Constitutional politics in Europe* (2000).

111 Klug (n 58 above).

112 Ojwang (n 107 above).

113 As above.

judges must always exercise restraint as they are not law makers.[114] As noted above, judicialism is at the core of transformative constitutionalism since the concept places faith in the law as an instrument of social and political change, and in the courts as the 'midwives' of the transformation since courts are legally mandated to interpret and apply the law. To succeed in this position of trust, it follows first and foremost that the judiciary must assume a more assertive position than in ordinary traditional contexts. This was acknowledged by the High Court of Kenya in *Trusted Society of Human Rights Alliance v Attorney-General & 2 Others*,[115] in which the Court described itself as a 'co-ordinate' and 'co-equal' arm of government with the mandate to interfere with the decisions of the political arms which offend or exceed the limits of the Constitution and the law generally.[116] In other words, courts can no longer view themselves as subordinate to the other arms in the scheme of government.[117] This, by extension, requires courts to liberate themselves from previously self-imposed restraints that undermined their position in the equilibrium of governmental power.[118] These restraints include legal culture, particularly how judges and lawyers appreciate the spirit of the Constitution and its purposes. In addition, it also entails how judges perceive their role to be in a democracy. As Klare notes, legal culture affects how lawyers and judges see the law and relate it to politics and society.[119] Thus, a failure by judges to appreciate the breadth of their role and that of the law could undermine transformative aspirations of the Constitution.[120] In the context of transformative constitutionalism, judges must commit to doing more with the law. They must be aware of the prominence that they enjoy and society's expectations of the courts. In *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*,[121] the Supreme Court of Kenya recognised that '[t]he judiciary

114 Langa (n 85 above) 351, contending that there is no single accepted and stable definition for transformative constitutionalism as the word 'transformation by itself has changeable features'. See also D Moseneke 'The fourth Brian Fischer Memorial Lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 315, stating that 'the meaning of transformation in juridicial terms is as highly contested as it is difficult to formulate'.

115 [2012] eKLR.

116 As above.

117 In Kenya's history, eg, there was a time when the judiciary was seen as a 'third arm' of government subservient to the political arms. See eg Mutua (n 34 above).

118 SB Pfeiffer 'The role of the judiciary in the constitutional systems of East Africa' (1978) 16 *Journal of Modern African Studies* 33.

119 As above.

120 *Mwaura & 2 Others v Republic* (Criminal Appeal 5 of 2008) issued in October 2013, where the Court of Appeal in Kenya refused to outlaw the death penalty arguing, among other things, that the power to do so lies with the legislature. This is to be contrasted with the decision of the South African Constitutional Court Africa in *S v Makwanyane* in which the court invalidated the death penalty. The material facts in the two cases are similar.

121 [2014] eKLR (Petition 14 as Consolidated with Petitions 14A, 14B and 14C of 2014).

has been granted a pivotal role in midwifing transformative constitutionalism and the new rule of law in Kenya'.[122] While the text of the Constitution is the vehicle for political, economic and egalitarian social transformation, the judiciary enjoys the powerful and influential position of being the driver of this vehicle. Thus, the potential of change through the Constitution cannot amount to much unless the courts live up to the task in the adjudication of rights and their enforcement in real cases.[123] This decision is also significant in that the highest court in Kenya formally recognised transformative constitutionalism as the ideology that undergirds the country's 'new' constitutional dispensation. In other words, the Constitution in its design and vision is transformative, and the courts have the duty to implement transformative constitutionalism.[124]

Klare contends that the judicial mindset founded on a particular legal culture must be 'examined and revised so as to reflect the transformative conception of adjudicative process and method envisaged by the doctrine of transformative constitutionalism'.[125] The High Court of Kenya in *The Very Right Rev Dr Jesse Kamau & Others v The Hon Attorney-General & Another*, quoting the former Chief Justice of The Gambia, EO Ayoola, observed that a 'timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document'.[126] On interpretation of rights in particular, the Court went on to note:[127]

> The provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.

This implies that rights and duties established by substantive post-liberal alterations to constitutional foundations cannot be interpreted according to, and therefore constrained by, past intellectual instincts and judicial mindset.[128] As noted above, an approach that transcends legal formalism and positivism is necessary. Additionally, Mureinik

122 As above.

123 For a similar argument in relation to the South African context, see E Christiansen 'Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice' (2010) 13 *Journal of Gender, Race and Justice* 575.

124 W Mutunga 'The 2010 Constitution of Kenya and its interpretation: Reflections from Supreme Court decisions' Inaugural Lecture Series, University of Fort Hare, 16 October 2014, http://www.judiciary.go.ke/portal/assets/files/Lectures/CJ%20LECTURE%20AT%20FORT%20HARE%20UNIVERSITY%20LECTURE,%20SA.pdf (in which the Chief Justice of Kenya (as he then was) remarked that the courts had the obligation under the Constitution to implement transformative constitutionalism).

125 Klare (n 51 above) 156.

126 Nairobi HCMCA 890 of 2004 (unreported).

127 As above.

128 Klare (n 51 above) 156.

suggests that 'an opening to transformation requires the changing of legal culture from a culture of authority to culture of justification'.[129] Consequently, under a transformative constitution, judges must as of necessity justify their decisions not only by reference to precedence and other legal authority, but by reference to certain overarching principles and values.[130] Similarly, any attempts by the legislature to restrict fundamental rights and freedoms must be strictly justified. The power to assess any measure restricting rights to determine whether it meets constitutional standards is vested in the judiciary. This is the essence of proportionality balancing discussed below.

The points noted above raise the question of the place of judicial deference to the political arms of government and the doctrine of separation of powers. To be clear, transformative constitutionalism does not dispense with judicial deference. Rather, as of necessity, it abhors hasty deference. It demands a deeper engagement to discover the deep meaning of values and the socio-political aims of the Constitution and a readiness to strike so as to safeguard them. This was noted by the High Court of Kenya in *Trusted Society of Human Rights Alliance v Attorney-General & 2 Others*,[131] where the Court emphasised that a review of the decisions of the political arms of government that do not meet constitutional standards does not violate the principle of separation of powers. Rather, the Court held, it is an incidence of separation of powers since the courts are the guardians of the meaning of the law. Relatedly, courts must reject undue attention to technicalities and a cursory approach to adjudication since, as noted above, substantive justice and real enjoyment of rights are the ultimate objectives of transformative constitutionalism.[132] As Brand has remarked, judicial deference becomes pernicious when it 'operates as an obstacle to effective judicial enforcement of rights'.[133] This argument is best captured in the Kenyan context by Musila when he notes that 'the judiciary must understand and appreciate the true nature of our Constitution and the multiple paradigm shifts it introduces'.[134] As part of the package, courts can no longer take shelter in the concept of 'judicial restraint',[135] or the age-old idea that common law judges do not

129 Mureinik (n 73 above) 33.

130 Langa (n 85 above) 353.

131 [2012] eKLR.

132 Klare (n 51 above). This requirement not to give undue attention to technicalities is enshrined in arts 22(3)(b) & (d) and 159(2)(e) of the Kenyan Constitution. However, it is important to note that procedural technicalities in criminal proceedings are intended to, and usually have the effect of, protecting the rights of the accused person.

133 D Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 22 *Stellenbosch Law Review* 637.

134 GM Musila 'Realising the transformative promise of the 2010 Constitution and new electoral laws' in GM Musila (ed) *Handbook on election disputes in Kenya: Context, legal framework, institutions and jurisprudence* (2013) 3.

135 As above.

make law.[136] Under the constitutional scheme judges, in addition to their traditional roles and powers, are also vested with the task of 'developing' the law. To put it differently, the judge is not merely a midwife; she is also a surgeon with the power to clip existing law to bring it in conformity with the aspirations of the Constitution. Discourses on transformative constitutionalism suggest that the change in the judicial attitude and approach advocated by the concept is beyond the traditional role of judges in Kenya and most other commonwealth common law jurisdictions. However, the contours of this enhanced judicial power and how it relates to the powers of other arms of government may be hard to define. Nonetheless, this power is constitutionally mandated, and a failure to exercise it the adjudication of human rights and constitutional issues generally is tantamount to an abdication of judicial duty contrary to the oath of office.

Another demand of transformative constitutionalism on the judge is what Klare describes as a 'historical self-conscious doctrine'[137] in adjudication. This means that it pays regard to the 'legal history, traditions and usages of the country concerned'.[138] It essentially recognises the injustices of the past and seeks to remedy them, thereby avoiding their repetition. The significance of this historical consciousness was effectively captured in the words of Chaskalson P in the South African Constitutional Court decision in *S v Makwanyane & Another,*[139] when he noted that while construing the Constitution, due regard must be paid to the legal system and also the history of the country.[140] The outcome of this approach was the invalidation of the death penalty in South Africa, first as a step of dismantling an instrument that had helped to advance the apartheid agenda and, second, in recognition of human dignity and human rights for all including those the majority would not favour, such as criminal convicts.[141] The Kenyan Supreme Court has also recognised the value of history in constitutional interpretation. In *Speaker of the Senate & Another v Attorney-General & 4 Others,*[142] Chief Justice Mutunga (now retired) in his concurring opinion observed that the Supreme Court Act[143] 'allows the Court to explore interpretive space in the country's

136 SB Sinha 'Creative interpretation of the Constitution: Role of the Supreme Court of India' (2004) *Delhi Judicial Academy Journal* 26.

137 Klare (n 51 above) 155.

138 *S v Zuma* 1995 (2) SA 642 (CC) para 15, per Kentridge J.

139 *Makwanyane* (n 98 above).

140 *Makwanyane* para 39, per Chaskalson P.

141 E Kibet 'Death penalty in Kenya: A call for conformity with international human rights law and the Constitution' (2011) 7 *Law Society of Kenya Journal* (on file with authors).

142 Advisory Opinion Reference 2 of 2013; [2013] eKLR.

143 Sec 3 of the Supreme Court Act provides that '[t]he object of this Act is to make further provision with respect to the operation of the Supreme Court as a court of final authority to, among other things … (c) develop rich jurisprudence that *respects Kenya's history and traditions and facilitates its social, economic and political*

history and memory … even beyond the minds of the framers ...' In other words, the struggles and hopes contained in history are a rich source of guidance in interpretation if the transformative ambitions are to be realised. This is because the socio-political situation of a country is often a product of its history. De Vos, however, cautions that the application of history as a guide in constitutional interpretation is a slippery path, especially if taken as a 'grand narrative'.[144] This, he argues, is because history is a 'profoundly subjective account of selected events in the past'.[145] To mitigate the dangers posed by this character of history, he suggests that history should be applied with an 'acknowledgment of its "open-ended" nature'.[146]

This far, it is clear that transformative constitutionalism is an 'activist' philosophy aimed at social and political emancipation through legally-mandated means. Inevitably, this calls for an 'activist' approach in the adjudication of rights.[147] To this effect, Rapatsa notes that since the doctrine 'envisages achieving legal and social change in broader terms', the 'adjudication process ought to explicitly adapt to an activist transformative approach'.[148] As already noted, the objective is substantive justice and substantive equality. This necessarily means that quite often the courts will have to scrutinise situations of hidden discrimination and take positions that advance equality even if such positions will go against prevailing social attitudes and prejudices. The decisions of the South African Constitutional Court cited above, such as invalidating the death penalty; striking down laws criminalising sex between consenting males; validating same-sex marriages; and affirming the right of a lesbian couple in a permanent relationship to jointly adopt a child; illustrate this point. As a matter of fact, these decisions and others have distinguished South Africa's jurisprudence in Africa and globally.[149]

Transformative constitutionalism aims to engender what the Constitutional Court of South Africa refers to as a 'culture of rights'.[150] This, as Langa explained, entails upholding '[a] culture of respect for

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growth; (d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, *to be determined having due regard to the circumstances, history and cultures of the people of Kenya*' (our emphasis).

144 P de Vos 'A bridge too far? History as context in the interpreting the South African Constitution' (2001) 17 *South African Journal on Human Rights* 1.

145 As above.

146 As above.

147 Fombad (n 50 above) 1069.

148 M Rapatsa 'Transformative constitutionalism in South Africa: Twenty years of democracy' (2014) 5 *Mediterranean Journal of Social Sciences* 889.

149 DB Maldonado '*Constitutionalism of the global south: The activist tribunals of India, South Africa and Colombia* (2004). Eg, South Africa is among a few countries in the world that allow same-sex marriages and have completely abolished the death penalty.

150 *Makwanyane* (n 98 above) 222 (Langa J concurring).

human life and dignity, based on the values reflected in the Constitution'.[151] The doctrine builds on the 'constitutional conception of democracy', recognising that 'democracy is not simply majoritarianism, since it constrains majority decision making consistently with the protection of rights'.[152] Therefore, the logic of 'engendering a culture of rights' demands a 'radical', meaningful and effective approach to the protection of rights. It demands individual rights and freedoms to be taken seriously and, therefore, 'when judges decide whether a limitation of a right is constitutional, they should not accept the decision maker's word for it, but should decide the question for themselves'.[153] Transformative constitutionalism mandates a principle of strict scrutiny where a constitutional right is alleged to have been breached. To achieve this, both the Kenyan and South African Constitutions have incorporated proportionality balancing as a tool for ensuring that rights are given effect to and are safeguarded from unjustified restriction, especially where the state has competing countering values or interests to uphold, such as national security, public morality, public safety, public order or the rights of others.[154] The criteria seek to maximise the protection of rights by constraining limitations in an objective fashion to allow only restrictions that pass strict scrutiny under the clause.

Pulido and other scholars see proportionality balancing as 'one of the most successful legal transplants' and a key feature of global constitutionalism.[155] With roots in German administrative law, the concept has found acceptance across Europe, Australia, New Zealand, Canada and South Africa.[156] The concept has most recently become entrenched in Kenya's human rights adjudication.[157] The test demands that restrictions of fundamental rights be 'reasonable and justifiable in an open and democratic society'.[158] The test is set in motion the moment it is established *prima facie* that a law in question interferes with a fundamental right. It is important to note that, to be legitimate, any purported limitation of rights must be grounded in

151 *Makwanyane* (n 98 above).

152 A Kaufman 'Rights and disagreement' (2013) 3 *Philosophy Study* 229.

153 P Lenta 'Judicial deference and rights' (2006) *Journal of South African Law* 456 463.

154 Art 24 Constitution of Kenya; sec 36 Constitution of South Africa.

155 CB Pulido 'The migration of proportionality across Europe' (2013) 11 *New Zealand Journal of Public and International Law* 483. The terms 'proportionality' or 'proportionality balancing' are not found in the instruments that incorporate limitation clauses. These were developed by the courts and scholarly literature to describe the test set under the limitation clauses.

156 AS Sweet & J Matthews 'Proportionality balancing and global constitutionalism' (2008) 47 *Columbia Journal of Transitional Law* 81. It has also found acceptance beyond public law, where it was first applied, to other areas of law, and in international tribunals such as the European Court of Justice, the European Court of Human Rights and the dispute settlement mechanism of the World Trade Organisation. For South Africa, see sec 36 of the Constitution of South Africa 1996.

157 See art 24 of the Constitution of Kenya and its application by the High Court of Kenya in the *CORD* case (n 103 above).

158 As above.

law, consistent with the idea of the rule of law as a mechanism to check arbitrariness. Although there are variations in the elements of the proportionality test, its most comprehensive version consists of four components.[159] The first component is the legitimacy of the objective that the state seeks to achieve through the limitation.[160] This means that the grounds for limitation are not open-ended.[161] The judge has to confirm that the state interest or countervailing value is constitutionally legitimate.[162] Legitimate goals include national security, public safety, public morality, and the rights and reputation of others.[163] The second step is an assessment of the suitability of the measure taken.[164] Under this component, the critical question is whether the step or measure taken is rationally connected to the stated objective.[165] There has to be a rational connection between the measures taken or sought to be taken with the overall objective.[166] The third is necessity.[167] Under this component, the assessment focuses on whether the government has imposed a greater restriction than is necessary to achieve the objective. The rule is that the least restrictive method must be preferred in the course of limiting rights.[168] As it is often put figuratively, 'one does not need a sledge hammer if a nutcracker can do the job'.[169] If a measure taken or proposed by the state does not pass these three tests, the outcome is that it is unconstitutional and therefore invalid.[170] However, if a restriction to a right passes the three tests, the inquiry proceeds to the next step. The fourth step is balancing in the strict sense or proportionality in the narrow sense.[171] The assessment here takes the form of a cost-benefit analysis. The government measure that is already found to be narrowly tailored and has passed the first three tests is subjected to a balancing. This balancing assesses the cost of the restriction measured against the competing right or the countervailing state interest or value.[172] This step weighs the anticipated benefit arising from the restriction against the weight of

159 Sweet & Matthews (n 156 above).
160 As above).
161 As above.
162 F Urbina 'A critique of proportionality' (2012) 57 *American Journal of Jurisprudence* 49.
163 As above.
164 As above.
165 As above.
166 As above.
167 As above.
168 As above.
169 As above.
170 As above.
171 As above.
172 As above.

the right that is sought to be limited to determine what is more constitutionally valuable and what should be upheld.[173]

The upshot of this test is that rights are important and must be taken seriously. Therefore, the political arms of the state may not arbitrarily limit them. Any attempts to do so will be thwarted by the courts in exercise of their judicial mandate. This approach has been criticised for failure to appreciate the principle of separation of powers to the extent that judges do not 'show appropriate deference to the judgments of the elected branches and administrative agencies'.[174] This criticism can be countered by the fact that in constitutional democracies, rights cannot be left entirely to the majoritarian wishes of either the people or their elected representatives. In other words, the essence of the Bill of Rights is to remove certain constitutional matters from the reach of the majoritarian premise. As Lenta points out, 'if the court thinks that the rights of individuals are being infringed and that the infringement is not justified by a sufficiently important competing public interest', the doctrine of transformative constitutionalism demands that the court should not defer.[175] Instead, it must take a stand to defend fundamental rights. While this appears to be inconsistent with democratic majoritarian premise, its justification is found within the Constitution itself. In other words, the realisation of transformative constitutionalism is a product of the judicial approach and enabling substantive constitutional provisions.

As already noted, Klare's idea of transformative constitutionalism is multi-faceted. It entails constitutional enactment and the design of the Constitution, as well as its interpretation, and enforcement. In this sense, substantive constitutional provisions in transformative constitutions such as those of Kenya and South Africa on interpretation of rights, elaborate bills of rights with limitation clauses to safeguard rights, and so forth, form the core of the idea of transformative constitutionalism. Similarly, judicial approaches in the interpretation and enforcement of the substantive provisions in a way that results in the highest realisation of rights and substantive justice are pivotal components of transformative constitutionalism.

In the final analysis, it is clear that despite some challenges, the transformative designs of the South African and Kenyan Constitutions have yielded better prospects for constitutionalism and the protection of fundamental rights. As noted above, the prospects of the rule of law, constitutionalism and the protection of rights in Kenya are better than at any other time in the country's history. The same may be said

173 As above. This cost-benefit inquiry is very political in nature as it seeks to reconcile competing political interests. The process is an analysis of policy considerations that is typical of the legislative process.

174 See, eg, C Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *South African Law Journal* 484. See also K O'Regan 'Breaking ground: Some thoughts on the seismic shift in our administrative law' (2004) 121 *South African Law Journal* 424.

175 Lenta (n 153 above) 463.

of post-apartheid South Africa. Many countries in Africa continue to wobble in the path of democracy, constitutionalism, the rule of law and the protection of human rights. Obvious examples in this regard are Zimbabwe, Burundi, Rwanda, the Democratic Republic of the Congo (DRC) and Uganda, where incumbent presidents have insisted on hanging on to power either in violation of the Constitution or through political manipulation of the Constitution to validate their stay. Others, such as Central African Republic, Libya, South Sudan and Somalia, are embroiled in war and a breakdown of constitutional order. Yet others, such as Zambia and Tanzania, although peaceful, have recently undergone political transition and are in the process of reviewing their Constitutions. These facts indicate that many countries in Africa are currently in or will soon be in a watershed moment for constitutional reform since the conclusion of the situations they currently face are likely to be mediated through constitutional change. While constitutions are domestic instruments reflecting and catering for local situations,[176] it is also a fact that modern constitutions are anything but *sui generis*.[177] Thus, the transformative Constitutions of Kenya and South Africa provide good models that could be tailor-made to fit the peculiar situations of these countries.

6 Conclusion

The article explores the concept of transformative constitutionalism in the context of Kenya and South Africa. Popularised in the South African context by Klare and other scholars, the article notes that the concept is the central ideology undergirding the Constitutions of the two countries. Using examples of cases from superior courts of record from the two jurisdictions, the article argues that transformative constitutionalism has resulted in better judicial adjudication and protection of fundamental rights and freedoms and yielded better prospects for democracy, constitutionalism and the rule of law. Therefore, the article concludes that transformative constitutionalism and the Constitutions of Kenya and South Africa provide good models that may be tailor-made to anchor these values in Africa, especially for those countries that are currently undergoing or will soon be undergoing constitutional and political reforms.

The article discussed past failures of constitutionalism and human rights abuses in post-colonial Africa, and noted that amidst the crises, courts were either complicit or too weak to stand up to the political arms of government. The article summarised the features of transformative constitutionalism generally and analysed its demands on judges and the adjudication of fundamental rights and freedoms. Transformative constitutionalism, simply put, aims at achieving social

176 Klug (n 58 above).

177 Klug 6-7 (arguing that constitutions in modern times are becoming more and more similar in core concepts).

and political transformation through the law. It focuses on attaining substantive justice and substantive equality and entrenching egalitarianism in social and political relationships generally. To achieve this, transformative constitutionalism embraces judicialism, giving the law and, by extension, the courts a prominent place in the transformation process. This requires a judicial consciousness of the historical background that informs the present social and political situations it seeks to redress. In addition, it necessarily demands less insistence on legal and procedural technicalities that quite often defeat the enforcement of substantive rights and duties under the law.

It is clear that in the context of transformative constitutionalism, the judiciary enjoys a pivotal position given the prominence of the law and its constitutional mandate to interpret and enforce fundamental rights. Given this prominence, the article argues, judges in the context of transformative constitutionalism must be prepared to do more with the law in order to realise its purposes. This includes a psychological shift to appreciate the high expectations placed upon their shoulders and assume a more confident position in the scheme of government. This necessarily requires the pursuit of 'rights-friendly jurisprudence', or a philosophy that favours the enjoyment of fundamental rights, and a preparedness to reject judicial deference to political arms where the law and the Constitution are violated or threatened with violation. The contours of this 'new' judicial attitude that transformative constitutionalism requires is bound to be difficult to define. However, this is an inevitable shift that must be made, and is likely to preoccupy judges and commentators for a long time to come.

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The right of access to information and national security in the African regional human rights system

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Summary

October 2016 marked the 35th anniversary of the adoption of the African Charter on Human and Peoples' Rights – the first two decades of which the meaning, normative content and scope of the right of access to information guaranteed by article 9 of the Charter were largely unexplored. However, the implementation bodies of the African Charter subsequently have whittled down challenges posed by the narrow formulation of article 9, its claw-back clause and the undemocratic practices of African regimes in relying on vague and widely-drafted laws to deny access to state-held information on grounds of state security. This article examines the methodologies adopted by the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to supplement and entrench a substantive right of access to information compatible with international standards in article 9. The article finds that an overhauled article 9 dictates that the right of access to information held by public and private bodies is a fundamental right, indispensable to the health of a democracy and a means of protecting other rights, especially socio-economic rights. The right may in recognised instances be restricted, including on grounds of national security, only as clearly provided by law to serve a legitimate purpose and as necessary in a democratic society. The article proposes that state parties to the African Charter engage with the logic and reasoning of its implementation bodies to adopt measures and align their constitutional frameworks with the fundamental principles of access to information.

Key words: *right of access to information; national security; democratic society; limitation of rights; public interest; article 9 African Charter; African Commission on Human and Peoples' Rights*

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1 Introduction

The right of access to information[1] is the hallmark of an effective constitutional democracy.[2] This right is a component of the broader right to freedom of expression recognised in basic instruments of the United Nations (UN)[3] and regional human rights systems.[4] The right of access to information has gained recognition as a stand-alone right guaranteed in constitutions and other laws.[5] The right imposes a duty on the state to facilitate access of everyone[6] to information held by public bodies[7] in any accessible form or retrieval systems, howsoever produced.[8] Nevertheless, international human rights law recognises the significance of varied backgrounds in which human rights – including the right of access to information – must be protected.[9] 'The African human rights system', which is the totality of human rights protection under the auspices of the African Union (AU),[10] is

1 T Mendel *Freedom of information: A comparative legal survey* (2008) iii, https://www.law.yale.edu/system/files/docume...ndel_book_%2528Eng%2529.pdf (accessed 7 October 2017). Freedom of information technically means and is 'commonly understood as the right to access information held by public bodies'. In this article, the 'right of access to information' is used throughout except as otherwise indicated.

2 J Fitzpatrick 'Introduction' in S Coliver & P Hoffman (eds) *Secrecy and liberty: National security, freedom of expression and access to information* (1999) xi.

3 Art 19(1) Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (III), 10 December 1948; art 19(1) International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200 A (XXI), adopted 16 December 1966, entered into force 23 March 1976.

4 Art 13(1) American Convention on Human Rights, adopted at San José, Costa Rica, 22 November 1969, OAS Treaty Series 36, entered into force 18 July 1978; art 10(1) European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, adopted 4 November 1950, entered into force 3 September 1953; art 9 African Charter on Human and Peoples' Rights, adopted at Nairobi, Kenya, 26 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, 21 ILM 58 (1982), entered into force 21 October 1986.

5 United Nations Development Programme *Right to information practical guidance note* UNDP (2004) 8.

6 The extent to which non-citizens or residents in a country have rights of access to information varies from one jurisdiction to another. However, this is the plain meaning of the right. See C Darch & PG Underwood *Freedom of information and the developing world: The citizen, the state and models of openness* (2010) 76.

7 Including private bodies executing public functions or utilising state funds. See A Roberts 'Structural functionalism and the right to information' in R Calland & A Tilley (eds) *The right to know, the right to live: Access to information and socio-economic justice* (2002) 28-46.

8 UN Special Rapporteur on Freedom of Opinion and Expression, 1997 Report to the UN Commission on Human Rights.

9 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, paras 2, 5, 8, 18, 19, 27 & 38.

10 Established to replace the Organisation of African Unity (OAU) through the Constitutive Act of the African Union, OAU Doc CAB/LEG/23.15, adopted by the OAU Assembly of Heads of State and Government at the 36th ordinary session of the OAU held on 11 July 2000 in Lomé, Togo, entered into force 26 May 26 2001 (CAAU), art 2.

one such system.[11] Significant similarities and marked differences exist in article 19 of the UN International Covenant on Civil and Political Rights (ICCPR), article 9 of the African Charter on Human and Peoples' Rights (African Charter) and corresponding provisions in comparative regional instruments.[12] The content, scope and extent to which the right of access to information in practice is respected also differ.[13] This necessitates an analysis of the guarantee of these rights in the African human rights system,[14] taking a cue from the emerging praxis in the older UN and Inter-American human rights systems.[15] For instance, the Inter-American Court has interpreted the right to seek and receive information in article 13 of the American Convention on Human Rights as encompassing the right of access to information subject to imminent threats to national security.[16] Article 13 differs slightly from article 10 of the European Convention, which protects the right 'to receive and impart information' *simpliciter*. By contrast,

11 See eg F Viljoen *International human rights law in Africa* (2012) ch 8; SA Yeshanew & S Alemahu *The justiciability of economic, social and cultural rights in the African regional human rights system: Theory, practice and prospect* (2013).

12 Art 13 African Charter; art 10 European Convention.

13 P de Vos '*Grootboom*: The right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 258 261-262. The European Court of Human Rights in *Leander v Sweden* ECtHR 26 March 1987 para 74; *Gaskin v United Kingdom* ECtHR 7 July 1989 para 52; and *Guerra v Italy* ECtHR 9 February 1998 para 53, and line of cases, continues to the maintain 'that freedom to receive information … basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. That freedom cannot be construed as imposing on a state, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.' See W Hins & D Voorhoof 'Access to state-held information as a fundamental right under the European Convention on Human Rights' (2007) 3 *European Constitutional Law Review* 114 117-118 (re-iterating that the words 'in circumstances such as those of the present case' connote that a positive obligation for the state might in certain situations exist).

14 The system's key instruments recognising access to information include the African Charter, art 9; the African Charter on Democracy, Elections and Governance, adopted 30 January 2007, entered into force 15 February 2012, art 19(2) (states' obligation to guarantee 'free access to information'); the African Charter on Values and Principles of Public Service and Administration, adopted 31 January 2011, entered into force 23 July 2016, art 6; the African Youth Charter, adopted 2 July 2006, entered into force 8 August 2009, art 3(d) (states' obligation to provide access to information for young people to learn their rights and responsibilities); the African Charter on Statistics, adopted 4 February 2009, entered into force 8 February 2015, art 2(1) (the Charter provides a policy framework for the collection of statistical data and information); the AU Convention on Preventing and Combating Corruption, adopted 1 July 2003, entered into force 5 August 2006, art 9 (mandating the adoption of 'legislative and other measures' to give effect to the right of access to information); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

15 CA Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law and Contemporary Problems* 359 361 (footnotes 8-10) (describing the background and some institutions associated with the earlier establishment of the American and European systems).

16 *Claude Reyes & Others v Chile* (19 September 2006) Series C 151, para 77 (Inter-American Court of Human Rights) https://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc (accessed 10 November 2016).

article 9(1) of the African Charter modestly guarantees 'the right to receive information'. The pertinent question then is to what extent the African human rights system respects the right of access to information. Can this right be restricted in the interests of national security of states? This article claims that the African human rights system recognises the right, particularly through article 9 of the African Charter, the exercise of which may not be restricted on national security grounds unless, as demonstrably justified by law, for a legitimate purpose and as necessary in a democratic society. To demonstrate the claim, part 1 sets out the discussion's context. Part 2 of the article appraises the development of the right of access to information standards and national security limitations thereto. Part 3 evaluates the right of access to information standards in the African Charter and national security exceptions, while part 4 evaluates legislative compliance by African countries with regional standards enunciated in part 3. Part 5 is the conclusion.

2 Right of access to information: Development, rationale and normative scope

The growing importance of the right to information in contemporary times[17] came about for several reasons. As Bovens argues, citizens' access to information on democratic governance enhances public control of government, which is likely to abuse public power when such access is lacking.[18] Moreover, the quality of democratic processes is strengthened by public participation in decision making by well-informed citizens.[19] Therefore, since democracy exists to safeguard the public interest,[20] a legally-enforceable right to information on how people are governed will boost public confidence in government and enhance accountability.[21] Furthermore, access to information is a vital tool to combat corruption by making government activities more transparent and the concealment of

17 By 28 September 2017, 117 counties had legislation on the right of access to information while many have adopted constitutions protecting the right. See freedominfo.org, 'FOI Regimes' https://www.freedominfo.org/regions/global/foi-regimes/ (accessed 4 October 2017).

18 M Bovens 'Information rights: Citizenship in the information society' (2002) 10 *Journal of Political Philosophy* 317-341.

19 AS Mathews *The darker reaches of government*: *Access to information about public administration in the United States, Britain and South Africa* (1978) 8.

20 A Downs 'The public interest: Its meaning in a democracy' (1962) 29 *Social Research* 1 20.

21 Preamble to Council of Europe Convention on Access to Official Documents http://www.conventions.coe.int/Treaty/EN/Treaties/Html/205.htm (accessed 25 August 2013).

illegalities more difficult.[22] This is predicated on the fact that official information actually belongs to the people. From another angle, Darch and Underwood posit that freedom of information is important as a leverage right,[23] a concept traceable to Jagwanth who argued that citizens' ability to enjoy socio-economic rights is enhanced by being able to utilise available information to compel government's performance of its obligations.[24] Thus, the force of the argument that democracy provides one of the philosophical foundations for human rights[25] has a greater impact to support the right to information, but the effective realisation of this right often depends on the reading of the relevant provisions.

2.1 International right of access to information standards

In 1946, the UN General Assembly initiated the future discourse on the right to information when it stated that '[f]reedom of information is … the touchstone of all the freedoms to which the UN is consecrated'.[26] Furthermore, article 19 of the ICCPR provides as follows:

> 1 Everyone shall have the right to hold opinions without interference.
>
> 2 Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Although article 19 of the ICCPR did not originally contemplate the right to information,[27] starting from 1995 UN bodies were able to draw on freedom of expression as encompassing the right to information. For instance, the UN Special Rapporteur on Freedom of Expression stated that '[f]reedom will be bereft of all effectiveness if the people have no access to information',[28] and has continued to emphasise the fundamental nature of the right to information.[29] In 1997, the UN Special Rapporteur acknowledged that the right to 'seek, receive and impart information' enshrined in article 19 of the Universal Declaration 'imposes a positive obligation on states to ensure access to information, particularly with regard to information

22 AS Cordis & PL Warren *Sunshine as a disinfectant: The effect of state freedom of information act laws on public corruption* http://workspace.unpan.org/sites/Internet/Documents/Sunshine%20as% 20disinfectant.pdf (accessed 14 October 2017).

23 Darch & Underwood (n 6 above) ch 2.

24 S Jagwanth 'The right to information as a leverage right' in Calland & Tilley (n 7 above) 3.

25 M Nowak *Introduction to the international regime for human rights* (2003) 46.

26 UNGA Resolution 59(1) of 14 December 1946.

27 Mendel (n 1 above).

28 1995 Report to the UN Commission on Human Rights (UNCHR), UN Doc E/CN.4/1995/32 para 35.

29 See ECOSOC Commission on Human Rights Report of the Special Rapporteur, UN Doc E/CN.4/1997/31, para 5 (4 February 1997).

held by the government in all types of storage and retrieval systems'.[30] In 1999, the UN Special Rapporteur and two other special mechanisms in their Joint Declaration on freedom of information stated:[31]

> Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.

In their 2004 Joint Declaration, the three special mechanisms elaborated further:[32]

> The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.

The Human Rights Committee (HRC) in General Comment 34 firmly located the right to information among civil and political rights by stating categorically that article 19(2) of the ICCPR embraces the right to information held by public bodies regardless of the form in which the information is stored, its source and production date.[33] Consequently, Article 19, an activist body, developed nine principles on states' obligations to enact right to information laws in its Principles on Freedom of Information Legislation.[34] These encapsulate the minimum standards for right to information laws. 'Maximum disclosure' confirms the obligation to release all official information except in clear and narrow exceptions. 'Obligation to publish' establishes the obligation to proactively publish public interest information. The 'promotion of open government' principle recognises states' obligations to tackle government secrecy. 'Limited scope of exemptions' prohibits exemptions that protect government from embarrassment or the exposure of wrongdoing by subjecting non-disclosure to a public interest override. Lastly, a right to information or freedom of information law has primacy over secrecy

30 Report of the Special Rapporteur, UN Doc E/CN.4/1998/40, para 14 (28 January 1998). The Commission on Human Rights welcomed the view in Res E/CN.4/1998/42, para 2 (17 April 1998).

31 International Mechanisms for Promoting Freedom of Expression Joint Declaration, adopted 26 November 1999 https://www.article19.org/pdfs/igo-documents/threemandates-dec1999.pdf (accessed 10 October 2017).

32 Adopted 6 December 2004 https://www.unhchr.ch/huricane/huricane.nsf/0/9A56F80984C8BD5EC1256F6B005C47F0?openocument (accessed 2 October 2017).

33 HRC, General Comment 34 para 18.

34 Drawing on international and regional standards, evolving state practice, and the general principles of law recognised by the community of nations.

laws. The UN Special Rapporteur has endorsed these principles,[35] but the Inter-American Court of Human Rights made the first regionally-binding judicial decision recognising the right to information as a stand-alone right inculcating these principles. *Claude Reyes & Others v Chile*,[36] the October 2006 landmark judgment of the Inter-American Court, pertains to the Chilean government's failure to document and respond to requests for documentary information on the environmental risks of a logging project, based on a textual interpretation and theoretical analysis of article 13(1), which reads:

> Everyone shall have the right to freedom of thought and expression. This right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers …

The Court declared that the rights to 'seek' and 'receive' information

> [p]rotect[s] the right of every person to request access to the information under the control of the state … and to receive the said information and the positive obligation of the state to provide it ... except in cases in which a legitimate restriction is applied.[37]

The decision significantly opens a vista for the enriching of inter-regional access to information jurisprudence because regional bodies, including those on the African continent, can draw inspiration from *Claude Reyes*.

2.2 African right of access to information standards

The African Charter provides in article 9:

> 1 Every individual shall have the right to receive information.
>
> 2 Every individual shall have the right to express and disseminate his opinions within the law.

According to the African Commission on Human and Peoples' Rights (African Commission), article 9 signifies that freedom of expression is a basic right vital to personal development and civic participation.[38] Beyond that, article 9 as narrowly phrased does not guarantee the right to obtain information which the state may not be willing to release.[39] Nevertheless, this harsh reality has been toned down drastically by the Commission. The Commission is mandated 'to promote human and peoples' rights and ensure their protection in Africa'[40] and to monitor the Charter's implementation particularly

35 A Hussain *Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* submitted in accordance with Human Rights Commission Resolution 1999/36, Doc E/CN.4/2000/63 (5 April 2000).

36 See https://www./justiceinitiative.org/db/resources2?res_id=103448 (accessed 4 October 2017).

37 *Claude Reyes & Others v Chile* (n 16 above).

38 *Media Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 54.

39 CE Welch Jr 'The African Charter and freedom of expression in Africa' (1998) 4 *Buffalo Human Rights Law Review* 112-113.

through its protective mandate,[41] which extends over state parties and persons subject to the African Charter.[42] The African Commission has adopted a creative interpretive approach based on the interrelatedness of rights,[43] positive obligations and implied rights to develop otherwise poorly-drafted Charter provisions, especially those on socio-economic rights.[44] As the African Commission rightly observed in *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (*SERAC*):[45]

> Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.

It would be appropriate to examine each of these three vital concepts further.

2.2.1 Positive obligations

Positive obligations emanate from article 1 of the African Charter, which provides:

> The member states of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Starting essentially with *SERAC*,[46] the African Commission has constantly maintained that article 1 places binding negative and positive obligations on states like comparable international treaties,[47] although it is sometimes inconsistent in the application of this principle.[48] The *SERAC* communication alleged that environmental pollution arising from oil exploration in Ogoniland by the Nigerian government and a foreign company, Shell Petroleum, contaminated food sources, occasioned the loss of livelihoods and risks to human health. SERAC claimed that the respondents refused to inform the Ogonis of the harmful effects of oil production or involve them in the

40 Art 30 African Charter.

41 Arts 45(1)(a), (b) & (c), (2), (3) & (4) African Charter; Viljoen (n 11 above) ch 8.

42 Viljoen (n 41 above) 204-205.

43 See the African Charter, 8th preambular paragraph; arts 1-13 & 14-26.

44 P de Vos 'A new beginning – The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples' Rights' (2004) 8 *Law, Democracy and Development* 1.

45 (2001) AHRLR 60 (ACHPR 2001) para 68.

46 As above.

47 *Association of Victims of Post-Electoral Violence and Another v Cameroon* (2009) AHRLR 47 (ACHPR 2009) paras 88, 122-130 (the extent of a state's responsibility for acts of non-state actors); *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (*COHRE* case) paras 191 & 248.

48 INTERIGHTS the International Centre for the Legal Protection of Human Rights 'Our cases' https//.www.interights.org/our-cases/26/index.html (accessed 5 October 2016).

development of their resources, but deployed military forces to destroy Ogoni houses contrary to Charter protections. The African Commission decided that all rights generate at least four levels of duties – 'the duty to respect, protect, promote, and fulfil these rights' which 'entail a combination of negative and positive duties'.[49] The duty to respect entails non-interference with rights.[50] The duty to protect requires taking appropriate measures to prevent rights violations.[51] The duty to promote requires the facilitation of rights enjoyment by relevant means.[52] The obligation to fulfil dictates the actualisation of rights through direct provision of basic needs and services.[53] Accordingly, the Commission found Nigeria to be in violation of its positive obligations in terms of article 16 (the right to enjoy physical and mental health) and article 24 (the right to a general satisfactory environment) to take steps, but which it failed to do, by

> [o]rdering 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.[54]

2.2.2 Implied rights

The African Commission boosted the enjoyment of expressly guaranteed rights by deciding that rights not expressly excluded may be implied or read into the Charter.[55] Accordingly, the Commission held that the respondents violated the right to housing by forcefully ejecting the Ogonis from their homes.[56] The Commission stated that '[p]rotection of the family forbids the wanton destruction of shelter' because 'when housing is destroyed, property, health, and family life are adversely affected' and the other way round.[57] Thus, the Commission read into articles 14, 16 and 18 (obligation to protect the family) a right to housing or shelter, which the African Charter does not expressly guarantee.[58] Similarly, the Commission found that Nigeria had violated the right to food implicit in the rights to life and health, articles 4 and 16, respectively:[59]

49 *SERAC* (n 46 above) para 44.
50 *SERAC* para 45.
51 *SERAC* paras 46 & 57.
52 *SERAC* para 46.
53 *SERAC* para 47.
54 *SERAC* para 53.
55 *SERAC* paras 59-66.
56 *SERAC* paras 60-62.
57 *SERAC* para 60.
58 *SERAC* paras 59-63.
59 *SERAC* para 65 (my emphasis).

> The right to food is inseparably linked to the dignity of human beings and *is therefore essential for the enjoyment and fulfilment of such other rights* as health, education, work and political participation … It [the Nigerian government] should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.

2.2.3 Interrelatedness of rights

SERAC demonstrated the parity of socio-economic and civil and political rights in the African Charter.[60] The African Commission found the rights to life and family life to be underscored by the protection of human health, the environment, food sources, property, and so forth.[61] The Commission particularly found that the violation of rights to development (article 24) and health was underscored by a violation of the Ogonis' 'right to be informed of hazardous activities', such as the oil exploration on their land, and laid down the applicable principles as follows: [62]

> Government compliance with the spirit of articles 16 and 24 of the African Charter must also 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.

Made in the context of a communication touching on the right to control resources (article 21), these principles presuppose an obligation on government and private bodies to proactively disclose information of public interest for participatory decision making. Fortunately, since *SERAC,* the African Commission has utilised its promotional mandate to explicitly recognise the right to information through a supplemental soft law to article 9.

3 Elaborations on the content and scope of the right of access to information in article 9

Mindful of the narrow scope of article 9 of the African Charter, the African Commission adopted a supplemental, albeit non-binding, Declaration of Principles on Freedom of Expression and Access to Information in Africa (Freedom of Expression Declaration).[63] The Declaration 'upholds the spirit of article 9' and signifies the

60 F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 784.

61 *SERAC* (n 45 above).

62 *SERAC* para 53.

63 Originally adopted as Declaration of Principles on Freedom of Expression in Africa at the 32nd ordinary session of the African Commission held in Banjul, The Gambia, 17-23 October 2002, but subsequently amended to include access to

acceptance in the African human rights system of the right to information as a stand-alone right.

3.1 Freedom of Expression Declaration

This Declaration synchronises article 9 with emerging international right to information standards and principles, and establishes the nexus between this right and the right to freedom of expression. The Declaration acknowledges that freedom of expression embraces the right to information necessary for transparency, accountability 'and the strengthening of democracy'.[64] The Declaration affirms the positive obligation of states to guarantee the right, subject only to clearly-defined rules established by law,[65] including information held by private bodies, which is necessary for the exercise of any right (Principle IV (2)). The Declaration preserves the principle of proactive disclosure by requiring public bodies actively to publish information of significant public interest 'even in the absence of a request', and protects public interest disclosures.[66] To remedy any infringement of the right to information, the 'refusal to disclose information' is made subject to appeal to an independent review.[67] Most importantly, the Declaration articulates the positive obligation of states to amend their secrecy laws to comply with 'freedom of information principles'. In furtherance of the commitment to ensure transparency in governance, the African Commission's Special Rapporteur on Freedom of Expression (Special Rapporteur) has developed a Model Law in tandem with right to information principles.

3.2 Model Law on Access to Information in Africa

The Special Rapporteur was established pursuant to the African Commission's promotional mandate, to *inter alia* monitor states' compliance with right to information (RTI) standards in general and the Declaration in particular.[68] The second Special Rapporteur, Pansy Tlakula, since her appointment in 2005[69] has facilitated the drafting[70] and adoption by the Commission of a Model Law on Access to

63 information through the African Commission's Resolution ACHPR/Res.122 (XXXXII) 07, adopted at the African Commission's 42nd ordinary session held 15-28 November 2007 in Brazzaville, Republic of Congo.

64 The Declaration, 4th Preambular Paragraph; Principle I (1).

65 As above, Principle IV (1).

66 As above.

67 As above.

68 Pursuant to Resolution ACHPR/Res.71 (XXXVI) 04, adopted by the African Commission at its 36th ordinary session held 23 November-7 December 2004 in Dakar, Senegal, but subsequently amended by Resolution ACHPR/Res.122 (XXXXII) 07, adopted by the African Commission at its 42nd ordinary session held 15-28 November 2007 in Brazzaville, Republic of Congo,

69 Appointed pursuant to ACHPR/Res 84 (XXXXV) 05: Resolution on Freedom of Expression in Africa, adopted at the 38th ordinary session of the African Commission held in Banjul, The Gambia, 21 November-5 December 2005.

70 ACHPR/Res 167 (XLVIII) 10: Resolution on Securing the Effective Realisation of Access to Information in Africa (mandating the drafting process), adopted at 48th

Information for Africa (Model Law).[71] The Model Law gives effect to states' related obligations under articles 1 and 9 of the African Charter[72] – to take legislative measures to perfect the right to information inclusive of information privately held and required for the protection of rights.[73] According to Viljoen:[74]

> [T]he Model Law aims to guide national legislators in 'converting' or 'transforming' the open-ended formulation in article 9 into detailed legislative provisions, allowing for an effective national system for accessing information, held primarily by the states, but also by private entities performing public functions.

Article 1 of the Model Law provides an all-embracing definition of 'information' covering documentary, audio-visual, tangible and intangible materials, and regardless of whether the information came into existence before the law's date of coming into operation. It embodies principles such as maximum disclosure and presumption of disclosure (article 2); proactive disclosure (article 7); primacy of right to information law (article 4); and limited exemptions (part III, sections 24-39).

4 National security exemption, public interest override and African right of access to information standards

Despite adopting right to information laws,[75] which are inoperable or deficient,[76] many African states still have Official Secrets Acts (OSAs) and national security statutes which criminalise the unauthorised disclosure of government information regardless of national security implications.[77] Furthermore, most of these laws have not been tested judicially for compatibility with African right to information standards.

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ordinary session of the African Commission held in Banjul, The Gambia, 10-24 November 2010. The Model Law was officially launched in April 2013.

71 African Commission on Human and Peoples' Rights Model Law on Access to Information for Africa (2013).

72 F Viljoen 'Statement at the launching of the Model Law on Access to Information for Africa' at the 53rd session of The African Commission, 12 April 2013 https://www.chr.up.ac.za/index.php/ati-news.html (accessed 9 October 2016).

73 Arts 3(a)(i)(ii) & 12(1) of Model Law.

74 Viljoen (n 72 above).

75 See Africa Freedom of Information website https://www.africafoicentre.org/index.php/foi-laws & freedom.org website https://www.freedominfo.org/regions/africa/ (accessed 17 October 2017).

76 ML Phooko 'An actionable constitutional right of ATI: The case of Southern Africa' in F Diallo & R Calland (eds) *Access to information in Africa: Law, culture and practice* (2013) 171-189.

77 Kenya's OSA; Uganda's OSA Cap 302 (1913), Defence Force Act (2004), Criminal Procedure and Evidence Code (1967), Preservation of Public Security Act (1960); Nigeria's OSA 1962, Cap O3 Laws of the Federation of Nigeria (LFN) 2004 and the National Security Agencies Act 1986, Cap N7 LFN 2004; Botswana's National Security Act, 1986, sec 4(1), Public Service Act, 2008, sec 27(3); Zimbabwe's OSA.

The starting point then to determine the scope of a right to information law's national security exemption are the applicable criteria under the relevant 'harm test' and the public interest override tests.[78] Accordingly, the Model Law and other Principles come in handy.

The Global Principles on National Security and the Right to Information 2013 (Tshwane Principles), adopted by international law experts in Tshwane, South Africa, in 2013, are relevant.[79] The Principles aim to ensure 'that information may only be withheld where the public interest in maintaining the information's secrecy clearly outweighs the public interest' in the right to information[80] and 'overriding public interest in disclosure' such that 'withholding on grounds of national security can never be justified'.[81] The public interest override calls for 'balancing the risk of harm [to national security] against the public interest in disclosure', taking due account of relevant factors. Where the public interest in disclosure outweighs the risk of harm, the information sought must be supplied. Furthermore, the non-disclosure of national security information must be prescribed by law, and be necessary in a democratic society for the protection of a national security interest.[82] Similarly, the Model Law recognises an exemption to the right to information to protect national security and defence (article 30), subject to a 'public interest override' against which to test an exemption's legitimacy (article 25), the threshold being 'substantial prejudice to the security or defence of the state' (section 30(1)). Section 30(2) of the Model Law admirably defines 'security or defence of the state' in narrow terms in five categories; that is, military tactics on subversive or hostile activities; defence intelligence or intelligence on subversive or hostile activities; defence intelligence methods or intelligence on subversive or hostile activities; the identity of a confidential source; and the capabilities or vulnerabilities of defence systems excluding nuclear weaponry. Section 30(3) further explains the terms 'subversive or hostile' activities to mean attacks from foreign elements, sabotage, terrorism and espionage. Explicitly defining national security in law is an important practice in democratic societies, but since the Model Law is only a guide, these categories could be further clarified, for instance, concerning nuclear weaponry. The latter would be better addressed by an appropriate national security law or provision enacted in accordance with democratic principles. Nonetheless, the above provisions provide a clear framework for analysis of a national security

78 JM Ackerman & IE Sandoval-Ballesteros 'Global explosion of freedom of information laws' (2006) 58 *Administrative Law Review* 101-102.

79 Tshwane Principles https://www.opensocietyfoundations.org/publications/global-principlesnational-security-and-freedom-information-tshwane-principles (accessed 7 October 2017).

80 Tshwane Principles (n 79 above), 15th Preambular paragraph & Principle 3.

81 Principle 10(A-H) (humanitarian law's violations, government structure, torture, etc).

82 Tshwane Principles (n 79 above), Principle 3.

exemption. I next examine the extent to which national security exemptions in African RTI laws comply with the region's standards and the relevance of article 9 jurisprudence in this regard.

4.1 National security exemption to the right to information in Africa: Overview of legislative frameworks

From merely five countries in 2002, 21 African countries have now adopted RTI or freedom of information (FOI) laws,[83] and not less than 16 countries have proposed laws[84] while 18 counties (excluding Morocco) had by 28 September 2017 given constitutional protection to RTI.[85]

Some RTI laws contain primacy provisions specifying the overriding role of the public interest. Starting from West Africa, Liberia's highly-rated Freedom of Information Act of 2010 guarantees to everyone the right to information subject only to the Constitution. The Act exempts documents or records the disclosure of which 'would cause injury or substantial harm to Liberia's security or defence (section 4(2)), and prescribes a public interest override (section 4(8)). Sierra Leone's Right to Access Information Act of 2013 guarantees the right to every person (sections 2(1) and (2)), but permits the non-disclosure of information which 'would or could reasonably be expected to seriously prejudice national security and the defence', while section 12(2) provides a public interest override test. Nigeria's Freedom of Information Act of 2011 provides a weak threshold for exempted national security and defence-related information (section 11(1)), which is what '*may* be injurious' while the public interest override is in section 11(2). Compared to Nigeria, Uganda's Access to Information Act of 2005, which gives effect to every citizen's constitutional right to information, recognises a slightly higher non-disclosure threshold where disclosure '*is likely* to prejudice' state security (article 5). However, it broadly defines 'security' to mean 'the protection of Uganda against … crime, criminals and attacks by foreign countries'

83 Freedominfo.org, 'country info' https://www.freedominfo.org/regions/africa/ (accessed 6 October 2017).

84 Art 19 'The right to know in Africa' https://www.article19.org/resources.php/resource/38889/en/the-right-to-information-around-the-world (accessed 7 October 2017).

85 Constitutions considered can be found in 'World constitutions illustrated' http://heinonline.org.ezproxy.uct.ac.za/HOL/COW?collection=cow (accessed 12 October 2017). Art 41 Constitution of the Democratic and People's Algerian Republic (1989) (as amended); art 8 Constitution of Burkina Faso (1991); art 21 Constitution of the Republic of Ghana (1992); art 55(1) Constitution of the Federal Democratic Republic of Ethiopia (1995); art 35 Constitution of Kenya (2010); sec 37 Constitution of the Republic of Malawi (1994); art 18 Tanzania (1977 Amended Constitution); art 34 Constitution of Rwanda; art 32(1)(a) & (b) Constitution of South Africa 1996; art 15(c) Constitution of the Republic of Liberia (1986); art 41 Constitution of the Republic of Uganda (1995); art 48 Constitution of the Republic of Mozambique (2004); art 24 Constitution of the Democratic Republic of the Congo (2006); Constitution of the Republic of Cameroon (1996); art 245(d) Constitution of the Republic of Cape Verde (2010); art 8 Constitution of the Republic of Senegal (2001); art 19(3) Constitution of Eritrea (1997).

(section 4).[86] Similarly, section 3(a) of Kenya's Access to Information Act of 2016 gives effect to every citizen's constitutional right to information, but provides that the right shall be constitutionally limited in respect of information 'likely to' undermine national security (section 6(1)(a)). Unfortunately, the Act's description of national security-related information[87] is infinitely elastic, covering not only economic matters and the conduct of government affairs, but any 'information whose unauthorised disclosure would prejudice national security' (section 6(2)(a)). A subdued public interest override thus exists in section 6(4) under which disclosure 'may be required … as shall be determined by a court'.

Angola's Law on Access to Documents Held by Public Authorities 2002 authorises the head of a public body to withhold national security or defence-related information or the existence or non-existence thereof upon certifying that its disclosure 'would be almost certain to cause serious harm to national security' (article 35(1)). However, such certification is not subject to any judicial review except by the House of Peoples' Representatives before which it must be tabled. Nevertheless, the Proclamation enjoins public officers to apply a public interest override before non-disclosure (section 28). Rwanda's Access to Information Law 4 of 2013 gives expansive rights to information to 'things intended to be published, facts, speeches in reports, mails, circulars, logbooks … and any other material of public interest by everyone' (article 3). The information withheld shall not be published if 'it may destabilise national security' (article 4(1)). Unfortunately, it still gives much discretion to the responsible Minister to issue an order determining which information could destabilise national security (article 5). As well, a public interest override exists in article 6. A person's right to information guaranteed in section 5(1) of the Malawian Access to Information Act of 2016 may be denied where disclosure would 'reasonably be expected' to damage the security or defence of Malawi, while any such refusal must satisfy the public interest override (section 38). South Sudan's Right to Information Act of 2013 protects every citizen's right to information to knowledge, facts or documents of public interest (section 4(3) and 4(4)), but allows the withholding of a record which 'is likely to jeopardise' national defence and security (section 30). It explicitly defines, in line with the Model Law, 'security of the defence of South Sudan' to mean military tactics, defence intelligence, identity of a confidential source, vulnerabilities of weapons, and so on (section 2(a)). Section 22 sets out a public interest override that specifically states that mere security classification is not an exemption category. South Africa's Promotion of Access to Information Act (PAIA) 2 of 2000 gives effect to constitutional protection for the right to information. PAIA is

86 The Ugandan Constitutional Court in *Paul Ssemogerere and Zachary Olum v Attorney-General* Constitutional Appeal 1 of 2000 affirmed the constitutional right in art 41(1).

87 See art 238(1) of the Constitution.

considered to be model legislation in Africa considering *inter alia* that information of which the disclosure 'could reasonably be expected to cause prejudice' to the defence and security, must be disclosed if 'the public interest in disclosure clearly outweighs the harm contemplated' (article 41(1)(a)(i)(ii)). Tunisia's Organic Law 2016-22 of 2016 exempts information prejudicial to national security or defence subject to the 'injury test' and public interest test taking into account relevant factors.

Some states have laws without a public interest override. Burkina Faso's Access to Public Information and Administrative Documents Law of 2014 exempts classified documents and data where disclosure is likely to cause serious damage to national defence and state security as determined by order of the Minister of Defence (articles 36-38), and not subject to any public interest override. Ethiopia's Freedom of the Mass Media and Access to Information Proclamation 590 of 2008 gives effect to citizens' rights to information (articles 11 and 12), but exempts information excluded by any other legislation (article 15), subject to unspecified 'justifiable limits based on overriding public and private interests'. Guinea's Organic Law L 2010/004/Cnt of 2010 protects the right of '[a]nyone, regardless of nationality or occupation' without disclosing any special interest to public information contained in minutes, statistics, directives, instructions, circulars, calls for tenders, and so on, in accordance with article 7 of the Guinea Constitution (article 1). It excludes 'information concerning institutions dealing with state security affairs or those held by them' 'the disclosure of which would seriously undermine the secrets protected by law', but specifies no public interest test. Zimbabwe's Access to Information and Protection of Privacy Act of 2002[88] has been severely criticised for impeding rather than enhancing the right to information.[89] For instance, it deprives non-citizens and holders of temporary resident, work and student permits of any right to information (section 5(3)). It has no public interest override, while its exemption categories are also overly broad. It debars access to information where disclosure would prejudice the defence and national security and the country's safety or interests (section 17(1)(b)), although it provides for the mandatory disclosure of 'any matter that threatens national security' (section 28(1)(ii)). Article 2 of Niger's Ordinance 2011-22 of 2011 on the Charter on Access to Public and Administrative Documents protects everyone's right to all publicly held data or knowledge existing in written, graphic, video, audio or audio-visual form. It prohibits disclosure of executive documents or information pertaining to national defence secrets, state security or security of persons. Togo's Freedom of Information Act of 2016 guarantees citizens' right to public information and documentation (article 1), excluding security and national defence-related information (article 2). The law has no

88 AIPP https://www.kubatana.net/html/archive/legisl/030611aippaamd.asp?sector=LEGIS (accessed 15 October 2917).

89 Darch & Underwood (n 6 above).

public override or harm test, but compels a public body to refuse to confirm the existence or to communicate any information that may affect the security of the state (article 38). Unauthorised disclosure of 'non-communicable information' is punishable by administrative penalties and other applicable sanctions.

Tanzania's Access to Information Act of 2016,[90] which gives rights to information accorded only to Tanzanian citizens (section 5), exempts information where the disclosure may undermine defence and national security (section 6(2)(a)). The Act disappointedly expands 'information relating to national security' to 'foreign relations or foreign activities' (section 6(3)(d)) and has no explicit public interest override. English translations of Mozambique's Access to Information Act of 2014 are not readily available, but an online article states that the law exempts 'state secrets defined by law'.[91] The existence of a public interest override in the law is not clear.

States without RTI laws include Algeria, Cameroon, Chad, Egypt, Eritrea, Ghana, Mauritius, Lesotho, Libya, Mauritania, Somalia, Zambia, Seychelles, and Democratic Republic of the Congo. Nevertheless, the African Commission and African Court can still give effect to RTI at the regional level in these states. The Commission can draw from international treaties and jurisprudence, such as the ICCPR and *Claude Reyes & Others*,[92] and the African Court can enforce international instruments binding on states that have ratified its Protocol and permit personal cases. Moreover, 54 African states have ratified the African Charter.[93] Notably, the constitutions of some of the countries concerned treat international agreements ratified by them as superior to domestic law[94] while some constitutions provide that treaties be incorporated into domestic law[95] or became operative by National Assembly Resolution.[96] The Constitutions of countries such as Burundi (article 292), Cape Verde (article 12), Egypt (article 151) and Gabon (article 114) provide that ratified treaties enter into force upon publication. In addition, the interpretation clauses of constitutions of the countries concerned also provide for the use of international treaties as interpretative aid. For countries like

90 Freedominfo.org 'Tanzania' https://www.freedominfo.org/wp-content/uploads/Tanzania-Access-to-Information-Act-2016.pdf (accessed 10 October 2017).

91 Freedominfo.org 'Mozambique President signs FOI legislation; 103rd nation' https://www.freedominfo.org/2015/01/mozambique-president-signs-foi-legislation-103rd-nation/ (accessed 18 October 2017).

92 According to arts 60 & 61 African Charter.

93 All states signed at least one of Africa's right to information instruments. See OAU/AU Treaties, Conventions, Protocols and Charters https://www.//au.int/en/treaties (accessed 2 October 2017).

94 'World constitutions illustrated' (n 85 above). Benin (art 147); Burundi (art 292); Cameroon (art 45); Central African Republic (art 69); Chad (art 222); Comoros (art 10); Congo (art 185); DRC (art 215); Djibouti (art 37); Guinea Bissau (art 79); Madagascar (art 82(3)); Mali (art 116); Mauritania (art 80); Senegal (art 98); Togo (art 140); and Tunisia (art 32).

95 AP Blaustein & GH Flanz (eds) *Constitutions of the Countries of the World* (2006).

96 As above.

Cameroon, Chad, Senegal, Burundi, the African Charter recited in the Preambles are explicitly made part of their Constitutions.[97] For Namibia, domesticated international agreements form part of its law.[98] The Swaziland Constitution provides that once approved by parliament, self-executing agreements become operative. African right to information standards thus can be enforced creatively through the opportunities provided by such constitutional provisions. Lastly, the Commission's copious and the African Court's incipient jurisprudence on national security restrictions to freedom of expression are also analytically useful.

4.2 Three-part test of national security restrictions in the African Commission's and African Court's jurisprudence

This section highlights the African Commission's and Court's jurisprudence on national security restrictions on article 9 rights with a view to showing how these institutions could deal with future RTI-restriction cases. Of course, it is worth noting that independent or judicial scrutiny of non-disclosure becomes relevant after a public or private body, as the case may be, might have applied the harm and public interest override tests, albeit objectionably.

The entire architecture of article 9 prescribes no explicit limitation criteria except the phrase 'within the law' in article 9(2) which *prima facie* gives leeway for open-ended qualifications to freedom of expression.[99] However, the Commission has admirably curtailed undue restrictions, and the exercise of unfettered discretion or attempts by states to avoid their article 1 obligations.[100] Hence, the Commission has acknowledged:[101]

> Though in the African Charter, the grounds of limitation to freedom of expression are not expressly provided as in other international and regional human rights treaties, the phrase 'within the law', under article 9(2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation.

Furthermore, based on the Commission's evolutionary jurisprudence on the nature of duties imposed by the African Charter, article 27(2) has become the general limitation clause of the Charter.[102] Article 27(2) provides that '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. Consequently, the totality of

97 As above.

98 Art 144 Constitution of the Republic of Namibia 1990.

99 Welch (n 39 above).

100 *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 78-82; *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995); *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) paras 70, 71.

101 *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) para 188.

102 C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Pennsylvania State Law Review* 679 692.

the Commission's jurisprudence and elaborations regarding restrictions to article 9 reveals that a restriction must be prescribed by 'law', serve a 'legitimate' public interest; and be strictly 'necessary' to achieve that legitimate interest. These are similar to those found in international human rights law and jurisprudence.[103] I now analyse each requirement in detail.

4.2.1 'Within the law' (principle of legality)

A key principle emanating from the Commission's decisions is that the phrase 'within the law' in article 9(2) accommodates only national law that conforms with international standards and does not allow African states to evade Charter obligations[104] or adopt laws inconsistent with binding international laws.[105] The Commission has set standards to the effect that

> competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.[106]

In *Good v Republic of Botswana*,[107] Botswana argued that states possess absolute national security prerogative under the Charter's articles 23(1) and 12(2) as applicable under Botswana's Immigration Act. A Presidential Order denied the applicant, a prohibited immigrant, reasons for expulsion and judicial review pursuant to the Act. The Commission held that the Order violated the Applicant's rights to information under article 9(1) and access to justice (article 7) and article 1.

Furthermore, 'within the law' implies that freedom of expression may be subjected only to national security restriction in a rule of law

103 Human Rights Committee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) paras 4-6.

104 *Constitutional Rights Project (in respect of Lekwot & Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995) para 11 concerned the Civil Disturbances (Special Tribunal) Decree, part IV, sec 8(1); *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995) para 10 concerned the Legal Practitioners' (Amendment) Decree 21 of 1993, sec 23A(1); and *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995) concerned the Constitution (Suspension and Modification) Decree 107 of 1993 and the Political Parties (Dissolution) Decree 114 of 1993, sec 13(1). In these decisions in respect of Nigeria, the African Commission found that relevant laws with ouster clauses that allowed the executive branch to operate without judicial check violated arts 7 and 26 of the African Charter.

105 *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000), para 102 (affirming that 'within the law' relate to FOE limitations permitted under international norms); *Law Office of Ghazi Suleiman v Sudan (I)* (2003) AHRLR 134 (ACHPR 2003) paras 37, 42-53, 56-67 (acknowledging Sudan's legitimate security concerns, but declaring Sudan's National Security Act 1994 claim to primacy and eroding of the core of internationally-protected rights as inconsistent with the Charter).

106 *Media Rights Agenda* (n 100 above) para 15.

107 (2010) AHRLR 43 (ACHPR 2010).

which gives clear notice of restrictions within its scope.[108] This excludes the exercise of unfettered discretion upon persons entrusted with the law's execution.[109] To meet the test, a limiting law, therefore, must be of general application.[110]

4.2.2 Legitimate purpose (principle of legitimacy)

To be legitimate, a restriction must apply in clearly-established circumstances and uphold a public interest. In *Constitutional Rights Project & Others v Nigeria*,[111] which concerned the three military decrees which proscribed certain named newspapers and sealed off their premises without trial for unsubstantiated security reasons, the Commission stated:[112]

> The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in article 27(2), that is, that the rights of the Charter shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Again, the African Commission has not applied the Model Law's definition of national security within the context of the right to information,[113] but has enjoined states not to conflate their national security with interests of public order, public safety and civil security or to excuse gross violations of people's rights in the interests of national security.[114] Hence, the Commission has repeated that

> [t]he 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.[115]

This brings to fore the third aspect of the test.

4.2.3 Necessity principle

'Necessity' relates to the concern for proportionality between the extent of the limitation measured against the nature of right involved,

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108 *Malawi African Association* (n 105 above) para 107 (a vague law that created a national security offence of belonging to a secret association without specifying the ingredients of the offence failed the test of legality).

109 *Media Rights Agenda* (n 100 above) paras 57-59.

110 *Constitutional Rights Project &nd Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 44 (*ad hominem* and retroactive decrees cannot be 'within the law'); *Scanlen and Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009) para 117 (*ad hominem* provisions of the Zimbabwean Access to Information and Protection of Privacy Act not 'within the law').

111 (2000) AHRLR 227 (ACHPR 1999).

112 *SERAC* (n 45 above) para 41; *COHRE* case (n 47 above) para 165.

113 However, see the *COHRE* case (n 47 above) para 171 (holding that 'national security examines how the state protects the physical integrity of its citizens from external threats such as invasion, terrorism, and bio-security risks to human health').

114 *Scanlen and Holderness* (n 110 above) paras 109-110.

115 *Legal Resources Foundation* (n 100 above) para 72.

and aims to prevent unreasonably excessive limitations.[116] The African Commission has consistently affirmed that restrictions must be as minimal as possible such that the right's infringement is not more than strictly necessary to achieve its desired objective.[117]

In *Media Rights Agenda*, the Commission held that barring the publication of information that creates a real danger to national security, the prohibition of criticisms of official policy violated article 9(2) and was non-compliant with article 27(2).[118] The Commission also upheld the standard that

> [t]he 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.[119]

In *Constitutional Rights Project & Another v Nigeria*,[120] Nigeria's State Security (Detention of Persons) (Amendment) Decree 14 of 1994 permitted indefinite detention for acts 'prejudicial to state security or the economic adversity of the nation', and conferred the sole discretion to determine the interest of state security on the executive. The law denied the right to *habeas corpus* and judicial remedy for the infringement of rights. These measures were held to be extreme to fulfil the objective of maintaining public peace and a violation of the Charter.[121]

Furthermore, any limitation on rights should be 'the least restrictive measures possible' to achieve that need,[122] and be rationally related with its purpose,[123] although the African Commission sometimes endorses the 'less restrictive means' approach of putting a limitation's legitimate aim into effect.[124] Notwithstanding these robust interpretations, the Commission's lacks power to implement its recommendations, often disregarded by states, prompting the setting up of an African Court.[125]

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116 *Scanlen and Holderness* (n 110 above) paras 94-98 (the Zimbabwean government's compulsory yearly licensing scheme for journalists aimed at preventing journalists from 'spreading falsehoods' was found to disembowel the right to receive information and excessive).

117 *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 80.

118 *Media Rights Agenda* (n 100 above) paras 73-75.

119 *Media Rights Agenda* para 69.

120 (2000) AHRLR 235 (ACHPR 1999).

121 *Constitutional Rights Project* (n 120 above) paras 33-35.

122 *COHRE* case (n 47 above) para 214.

123 *Interights & Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004) paras 64-75.

124 *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 235 (ACHPR 2009) paras 176-180; *Interights* (n 123 above) paras 64-75 (the dissolution of a newspaper and seizure of its properties found to be disproportionate to the nature of a national security offence committed when lesser punishments are available); *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) (a 'less restrictive means' required in the Constitution of the Republic of South Africa, 1996, sec 36).

125 EG Nalbandian 'The challenges facing African Court of Human and Peoples' Rights' (2007) 1 *Mizan Law Review* 75.

4.2.4 African Court's jurisprudence on restrictions to freedom of expression

The African Court was established under article 1 of its enabling instrument[126] to provide effective remedies,[127] to complement and re-inforce the protective mandate of the Commission.[128] The Court has jurisdiction concerning the interpretation and application of its Protocol, the African Charter, and other human rights instruments ratified by state parties,[129] including requests for legal advisory opinions by the AU or AU member states. The Court adjudicates cases from non-governmental organisations (NGOs) recognised by the AU in accordance with article 4(1)[130] and from individuals against state parties that have accepted its individual jurisdiction in terms of article 34(6) of its Protocol.[131]

Although the African Court is yet to definitively pronounce on the right to information and national security retractions thereto, it has shown an earnest desire to expand the scope of freedom of expression and constrain restrictions thereof,[132] which portend hope that it would apply analogous principles to the right to information determinations in future. For instance, in *Tanganyika Law Society, Legal and Human Rights Centre & Rev C Mtikila v Tanzania*,[133] the Court said:

> [T]he Commission has stated that the 'only legitimate reasons for limitations to the rights and freedoms of the African Charter' are found in article 27(2) of the Charter. After assessing whether the restriction is effected through a 'law of general application', the Commission applies a proportionality test, in terms of which it weighs the impact, nature and extent of the limitation against the legitimate state interest serving a particular goal. The legitimate interest must be 'proportionate with and absolutely necessary for the advantages which are to be obtained'.

126 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights OAU/LEG/MIN/AFCHPR/PROT(III), adopted in June 1998, entered into force 25 January 2004, reprinted in (1997) 9 *African Journal of International and Comparative Law* 953 (African Court Protocol).

127 Art 27(1) African Court Protocol.

128 Art 2 African Court Protocol.

129 Arts 3 & 7 African Court Protocol.

130 Request for Advisory Opinion by The Centre for Human Rights of the University of Pretoria and The Coalition of African Lesbians 002/2015 Advisory Opinion 28 September 2017 https://www.en.african-court.org/images/Cases/Judgment/002-2015-African%20Lesbians-%20Advisory%20Opinion-28%20September%202017.pdf (accessed 12 October 2017).

131 Art 5(3) African Court Protocol; Application 1/11 *Femi Falana v The African Union*, Report on the Activities of the African Court on Human and Peoples' Rights (21-25 January 2013).

132 Application 4/2013, *Lohé Issa Konaté v The Republic of Burkina Faso* (freedom of expression in art 9 of the African Charter extends to the publication of information critical of public officials, but criminal sanctions thereto are illegal and contrary to the spirit of art 9 and international law).

133 Applications 9/2011 & 011/2011 (judgment of 2013).

The African Court thus affirmed the African Commission's rights restrictions jurisprudence.

5 Conclusion

Through creative interpretations of the open-ended provisions of article 9 of the African Charter, the African Commission has succeeded in clarifying the normative content of the right to information as a basic right, and as instrumental to other rights' protection, particularly socio-economic rights. In deciding communications, and through its Special Rapporteur on Freedom of Expression and Access to Information in Africa, the Commission has elaborated the normative scope and permissible restrictions on the right to information in article 9 in declarations and other soft law instruments. Article 9 of the African Charter certainly permits states to adopt restrictive measures 'within the law' the normative requirements of which are not enumerated unlike comparative human rights provisions. Furthermore, national security protection is not expressly mentioned as a ground for restrictions on the right to information, and the African Charter nowhere requires limitations of rights to be necessary in a democratic society. Notably, the Commission has developed a notion of national security compatible with international human rights law. The Commission has established that the assertion of national security interests by states must be strictly scrutinised. The Commission has creatively laid down criteria comparable with those developed in international human rights law for permissible restrictions on access to information, including on grounds of national security. As can be deduced from its jurisprudence, the Commission has decided that restrictions on the right to information in the interests of national security must be within the law, serve a legitimate public interest and be proportionate for its objective.

The potential of the Commission's recommendations and declarations to protect the right of access to information is seriously hampered by their non-legally binding effect. Fortunately, since the African Court can provide effective remedies, it is hoped that it can effectively police wrongful denials of access to information if its current progress is anything to go by. Hopefully, state parties will now show a greater desire to comply with the Commission's promptings to adopt measures to implement its recommendations, ratify relevant treaties and adopt relevant laws or amend existing domestic laws in compliance with right to information principles as embodied in the Model Law and other relevant international standards. Furthermore, state parties to the African Charter are enjoined to seriously engage with the logic and reasoning of the African Commission and African Court to adopt measures and align their legal frameworks with the fundamental principles of access to information.

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Truth-seeking processes in Africa: Lessons from the South African Truth and Reconciliation Commission and the Ethiopian Red Terror trials

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Summary

This article demonstrates the significance of truth-telling to post-conflict and post-authoritarian societies in coming to terms with their violent past and building a better social and political system. It argues that the truth not only enables individuals and communities to understand and properly address the past, but also contributes towards building social harmony and lasting peace. In order to achieve its objective, the article engages in a comparative study of transitional truth-seeking processes by focusing on the experiences of the South African Truth and Reconciliation Commission and the Ethiopian Red Terror trials. The article utilises both primary and secondary sources, and critically analyses existing literature, relevant national and international law, official and non-official reports and other relevant information. A closer examination of the experiences of South Africa and Ethiopia demonstrates that, irrespective of differences in local contexts, truth or truth-telling is an essential element of justice during transition. Hence, the article recommends truth to be pursued as a critical condition of reconciliation and social and political transformation.

Key words: *transitional justice; truth; truth-telling; reconciliation; Ethiopia; South Africa*

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1 Introduction

The article discusses the significance of truth-telling processes in post-conflict and post-authoritarian societies in coming to terms with the past and enabling a better future. A truth-seeking (or truth-telling) process simply refers to a process of search for and establishing the truth about past violence. The article critically examines the experiences of South Africa and Ethiopia, two countries that emerged out of repressive authoritarian regimes almost at the same time. Irrespective of the difference in approaches and institutions, both countries recognised truth as an essential element of transitional justice. While the work of the South African Truth and Reconciliation Commission (TRC) is widely known, the Ethiopian Red Terror trials remain rarely addressed in academic literature. Hence, it would be useful to mention a few points about the Ethiopian transitional justice context and process.

Violence and violations have been part of the political history of Ethiopia. One of the dark sides of the history of Ethiopia is that its population suffered under the absolute power of successive imperial and military regimes. The popular uprising against the last emperor, King Haile Selassie, eventually led to its demise in 1974 through a *coup* orchestrated by a military junta called the Derg, meaning 'committee'.[1] The military regime of the Derg, under the leadership of Colonel Mengistu Haile-Mariam, ruled the country based on an asserted socialist ideology until 1991.[2] Its era of violence commenced with summary executions of top officials of the imperial regime and the secret killing of the emperor and the patriarch of the Ethiopian Orthodox Church.[3] In 1976, the Derg launched what was called the Red Terror Campaign to eliminate opposition groups characterised as 'counter-revolutionaries'. This resulted in the killing, detention, torture and disappearance of many thousands of people.[4]

Opposition political groups were also involved in violence and violations. Some declared the 'white terror' as a response to the red terror, and others raised arms against the Derg. Various political groups, in the context of their confrontational opposition to the Derg and to each other, committed violations. In May 1991, the military regime was overthrown by a coalition of armed political forces, especially by the Ethiopian People's Revolutionary Democratic Force

1 See B Zewde *A history of modern Ethiopia, 1855-1991* (1991).
2 Zewde (n 1 above) 229.
3 Zewde 238.
4 Zewde (n 1 above). See also A de Waal *Evil days: Thirty years of war and famine in Ethiopia* (African Watch Report) (1991) http://www.hrw.org/sites/default/files/reports/Ethiopia919 (accessed 31 July 2017).

(EPRDF). Subsequently, the Transitional Government of Ethiopia (TGE) was established, which began preparing to deal with past violations.[5]

In 1992, the TGE established the Special Prosecutions Office (SPO) with a mandate to investigate and prosecute former Derg officials, members of the military and security forces and their 'auxiliaries'.[6] The aim of this office was to bring perpetrators to trial; to record the history of past violations (establishing the truth); as well as to educate the public and make them aware of the past and, thereby, preventing its recurrence.[7] The process took almost two decades. A document issued by the SPO provides details of the number of victims, witnesses and documentary evidence, suspects prosecuted, convicted or otherwise acquitted.[8] Of the 16 496 alleged victims, 12 733 were established in court; 16 107 witnesses were documented; of these 8 047 testified. The SPO submitted 15 214 pieces of documentary evidence. Among the suspects, 5 119 were prosecuted and tried (some *in absentia*); of these 3 583 were convicted and sentenced while 1 539 were acquitted. This illustrates the scale of the process of administration of justice, which also had the mandate to seek and record the truth.

While the South African process is the subject of extensive research, there are only a few works in existence on the Ethiopian Red Terror trials. In response, the article is a comparative study of the Ethiopian and the South African processes focusing on truth-telling. It considers truth-telling as a tool for reconciliation and social harmony.

The article adopts an interdisciplinary and multidisciplinary research approach and uses both primary and secondary data. It critically reviews existing literature on transitional justice, truth or truth-telling, and reconciliation. It also analyses relevant international and national laws, court cases, and state and non-state reports. It argues that truth is an essential element of justice during transition and, hence, should be pursued as a critical condition for social and political reconstruction. The article first discusses the meaning and significance of transitional justice and truth, and the different modalities of uncovering truth. Thereafter, it deals with a comparative study of the South African and Ethiopian experiences based on relevant themes of analysis. Finally, it provides concluding remarks and lessons drawn.

5 K Tronvoll 'A quest for justice or the formation of political legitimacy? The political anatomy of the Red Terror trials' in K Tronvoll et al (eds) *The Ethiopian Red Terror trials: Transitional justice challenged* (2009) 1.

6 Proclamation for the Establishment of the Office of Special Prosecutor, 1992 Proclamation 22/1992, *Federal Nagarit Gazette* 8 August 1992.

7 Proclamation (n 6 above) para 5.

8 See SPO Report (January 2002 EC); *Dem Yazele Dose* (Amharic word translated as 'a file containing blood'); Addis Ababa SPO Chart III.

2 Transitional justice and truth: A general overview

This section discusses the meaning and significance of transitional justice in general and truth or truth-telling in particular. The different ways of truth-telling are also presented as background.

Post-conflict or post-authoritarian societies face the fundamental challenge of dealing with past violence, a question comprising two broader and interrelated components. The first is the backward-looking demand to settle the past. The second is the forward-looking need for social and political transformation into a harmonious and peaceful society that embraces the rule of law, human rights and democracy. Indeed, the way in which a society deals with its past affects its transition to sustainable peace, stability, the rule of law and democracy.[9] There is a general tendency to consider both judicial and non-judicial responses to violations of international human rights and humanitarian law.[10] This tendency may be termed a 'revolution in accountability' or a 'justice cascade'.[11] More commonly, it is called 'transitional justice'. The United Nations (UN) offers a broad definition of the term as

> the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, reparations, truth-seeking, institutional reforms, vetting and dismissals, or a combination thereof.[12]

Societies in transition may want to achieve various objectives, which includes punishing perpetrators; establishing the truth; reparation; paying respect to victims; deterrence; promoting reconciliation; and highlighting the commitment for human rights and winning the favour of the international community.[13] The most common objectives include justice; truth; reparation; and reconciliation. According to Louis Joinet, the first three have evolved into rights – a 'right to justice', a 'right to know' and a 'right to reparations' – implying that states should adopt various measures to fulfil them.[14] Reconciliation also constitutes an essential goal.[15] In a transitional context, justice encompasses 'a plurality of complementary ways of

9 J Sarkin 'Promoting justice, truth and reconciliation in transitional societies: Evaluating Rwanda's approach in the new millennium of using community-based *Gacaca* tribunals to deal with the past' (2000) 2 *International Law Forum* 112.

10 LM Olson 'Provoking the dragon on the patio. Matters of transitional justice: Penal repression vs amnesties' (2006) 88 *International Review of the Red Cross* 276.

11 ONT Thoms et al *The effects of transitional justice mechanisms: A summary of empirical research findings and implications for analysts and practitioners* (2008) 15.

12 UN Security Council 'The rule of law and transitional justice in conflict and post-conflict societies' S/2004/616 3 August 2004.

13 PB Hayner *Unspeakable truths: Transitional justice and the challenge of truth commissions* (2001) 10.

14 See Olson (n 10 above) 282.

15 Sarkin (n 9 above) 115.

reaching continued stability, peace and reconciliation'.[16] Arguably, reconciliation constitutes the culmination of transitional justice processes as it is with healing and reconciliation that harmony and peace can be sustained, embracing all the virtues of modern, democratic and inclusive society. Reconciliation, therefore, arguably is the outcome of the proper conduct of truth, justice and reparation processes.

Exposing the truth is extremely important to societies in transition: Individuals and society at large need to understand the past in order to construct a better future. How we see and articulate our past also determines the transitional framework of settling our past. For example, the designation of a particular group as the sole perpetrators or wrongdoers may lead to their incarceration or elimination. However, the African conception of justice, embedded in *ubuntu,*[17] calls for a different approach. Despite cultural and contextual differences, the way in which a society understands, constructs and deals with its history determines its transformation. The truth or history shapes our lives in complex ways, be it at the level of individual, family, community or nation.[18] It shapes the way in which we view the present and, thereby, dictates the answers we offer to existing problems.[19] History offers people and society the opportunity to know and learn from the past and, thereby, determines future actions. Hence, it is imperative to devise mechanisms that enable the widest possible narration of memory and truth-telling and, thus, the establishment of a shared truth and history.

Truth is not only about facts; it is also about justice in its broadest sense – perhaps as reparatory justice. Truth is about knowing and about the official acknowledgment of past human rights abuses, thus forming what is termed 'historical justice'.[20] Arguably, victims or their relatives and the public have the right to know the truth. The question remains: What is 'truth'?

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16 E Mobbek *Transitional justice in post-conflict societies: Approaches to reconciliation* 279 http://www.bmlv.pv.at/pdf-pool/publikationen/10_wg12_psm_100.pdf (accessed 31 August 2017).

17 *Ubuntu* is an African ethic and humanistic philosophy entrenched in cultures of African societies. It embodies the notion of human interconnectedness and offers an alternative to the dominant Western conception of justice. *Ubuntu* emphasises the restoration of social relations and social harmony. As Nussbaum noted, African culture and principles of justice are founded in supposition of companionship, reciprocity, dignity, harmony and humanity in the interests of building and maintaining a community characterised by justice and mutual caring. Perhaps '[t]he primary goal of the African indigenous justice systems is the restoration of victims, the community, and also the offender'. See MA Schoeman 'Philosophical view of social transformation through restorative justice teachings: A case study of traditional leaders in Ixopo, South Africa' (2012) 13 *Phronimon*.

18 L Jardonova 'How history matters now' (2008) http://www.historyandpolicy.org/papers/policy-paper-80.html (accessed 31 August 2017).

19 D Crabtee 'The importance of history' Institute of Gutenberg College (1993) http://msc.gutenberg.edu/2001/02/the-importance-of-history/ (accessed 31 August 2017).

20 RG Tietel *Transitional justice* (2000).

Notwithstanding attempts by successive generations to answer the question as to what truth is, it remains a subject of theoretical disagreement. Nevertheless, in a transitional context, truth is a social matter and may be understood as 'the agreement of the mind with reality'.[21] An associated complex question relates to the nature of truth – whether it is objective or subjective. Following the Aristotelian conception of truth as a comparison of propositions with reality, Kiraly observes:[22]

> Truth is objective in the sense that it expresses reality, that it has a content independent of the cognising subject; this is a content of our knowledge, which does not depend on the subject. The recognition of objective truth is closely connected with the reflection theory on the reflective capacity of reality, and with the view that man is capable of perceiving the truth; these capacities practically materialise in objective truth.

This is an expression of faith in the objectivity of truth and that there is no truth without objectivity.

However, others challenge the notion of objective truth. According to Derrida '[t]here is nothing outside the text; all is textual play with no connection with original truth'.[23] This view implies that the truth as an official account of the past may or may not correspond to past events.[24] The central argument here is that truth is not objective. The subjectivity of interpretation of the past and truth is encapsulated in the words 'history is exploring historical truths of the past out of a present interest'.[25]

For post-modernists, truth is 'the construct of the political and economic forces that command the majority of power within the societal web'.[26] This contests objectivity, viewing truth as a product of power relationships in the sense that the truth is what the speaker of power says is so.[27] Thus, Foucault argues that truth 'is produced only by virtue of multiple forms of restraint' and is to be conceptualised as 'a system of ordered procedures for the production, regulation, distribution, circulation and operation of statements'.[28] This subjective post-modernist account of truth and power may be critical and relevant in the context of the 'propositions' that set out a public truth or memory where the whole process of 'truth-telling' (voices and silences) is controlled by one group. Nevertheless, extreme relativism hinders a common understanding and shared history, perpetuating conflict over the past and preventing transformation. The problem is

21 Y Naqvi 'The right to truth in international law: Fact or fiction?' (2006) 88 *International Review of the Red Cross* 250.
22 T Kiraly *Criminal procedure, truth and probability* (1976) 96.
23 J Derrida, cited in Naqvi (n 21 above).
24 Naqvi (n 21 above) 250-251.
25 J Derida, cited in Naqvi (n 21 above) 251.
26 Naqvi (n 21 above) 252.
27 M Foucault, cited in Naqvi (n 21 above).
28 As above.

that such a philosophy will lead to the rejection of truth and extreme relativism.[29]

The meaning and nature of truth certainly are debatable. The article uses the commonly-accepted definition of truth, namely, the correspondence between a proposition and reality. Therefore, truth in a transitional context relates to the search for and establishment of what happened in the past, more precisely to the determination of the perpetrators and victims of past abuses and the circumstances surrounding them. This requires an impartial and comprehensive mechanism for disclosure of the truth. This pursuit about the past is informed by a present need to settle the past and build a better future.

According to Naqvi, there is a right to truth with a corresponding obligation on states.[30] Similarly, Henkin stresses that

> [s]uccessor governments have an obligation to investigate and establish the facts so that the truth be known and be made part of the nation's history. There must be both knowledge and acknowledgment: The events need to be officially recognised and publicly revealed. Truth-telling ... responds to the demand of justice for the victims and facilitates national reconciliation.[31]

Exposure of the truth prevents the recurrence of past violations and contributes to the reinstatement or maintenance of peace. It also gives victims a sense of satisfaction and justice. Knowledge of the truth can also lead to reconciliation by allowing divided societies to re-establish their relationships. As emphatically noted, 'only upon a foundation of truth will it be possible to meet the basic demands of justice and create the necessary conditions for achieving true national reconciliation'.[32] Reconciliation requires victims' knowledge of the past and acknowledgment, particularly on the part of the wrongdoer, and, therefore truth may be viewed as a prerequisite for reconciliation.[33]

In addition, public exposure to past atrocities and their perpetrators also constitutes a form of accountability. Because of the significance of truth to ensure accountability and fight impunity, some argue 'truth reports should replace trials'.[34] Moreover, truth can also facilitate the

29 Naqvi (n 21 above) 252.

30 As above.

31 AH Henkin (ed) *State crimes: Punishment or pardon* (1989) 4-5, cited in Tietel (n 20 above) 69.

32 The Chilean National Commission on Truth and Reconciliation Supreme Decree 355, cited in Naqvi (n 21 above) 247.

33 Nevertheless, there are controversies on the relationship between truth, peace and reconciliation.

34 Olson (n 8 above) 278, citing C Krauthammer 'Truth not trials: A way for the newly liberated to deal with the crimes of the past' *Washington Post* 9 September 1994 A27.

'[reconstruction] of national identities because it unifies [people] through dialogue about shared history'.[35] Similarly, the truth may contribute to 'the settling down of a historical record'.[36] Knowledge about the past is also a form of reparatory justice for victims. Finally, the pursuit of truth enables victims, relatives and the public to access public documents which otherwise may have been kept secret.

The UN Commission on Human Rights recognised the right to truth by adopting Resolution 2005/66. This Resolution underlines 'the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights'. Joinet, at the time UN Special Rapporteur on the Impunity of Perpetrators of Violations of Human Rights (Civil and Political Rights), has unequivocally affirmed this right in his 1997 final report, which states as follows:[37]

> Every people have the inalienable right to know the truth about past events and about circumstances and reasons, which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future.

The right to truth is not merely an individual right – it is a right to which individual victims, their families and society as a whole are entitled.

States have a duty to create conditions that enable truth to flourish, and a 'duty to remember'.[38] The principles enshrined in Joinet's report were updated by Professor Orentlincher, appointed for this purpose by the UN Commission on Human Rights in 2004. These updated principles incorporate the inalienable right to know the truth and guarantee to give effect to the right to know.[39] Naqvi argues as follows:[40]

> The right to truth has emerged as a legal concept at the national, regional and international levels, and relates to the obligation of the state to provide information to victims or to their families or even society as a whole about the circumstances surrounding serious violations of human rights.

Having investigated and clarified the meaning and significance of truth, I now turn to the modalities of enabling truth.

A closer examination of transitional justice processes reveals two main modalities. One is the institution of truth commissions or truth and reconciliation commissions. Irrespective of differences in

35 Naqvi (n 21 above) 247.
36 As above.
37 Naqvi (n 21 above) 259.
38 As above.
39 UN Commission on Human Rights Report of the Independent Expert Diane Orentlincher 'Updated set of principles for the protection and promotion of human rights through action to combat impunity' 8 February 2005 E/CN.4/2005/102/Add.1.
40 Naqvi (n 21 above) 252.

nomenclature, various such commissions have been created in different parts of the world with a mandate to discover the truth. Mobbek observes that 'the demand for truth and truth-telling after conflict has grown and the international community has sought to strengthen the emphasis on truth commissions'.[41] Perhaps this derives from a belief that truth commissions, as their name indicates, are best suited to establishing the truth.[42]

The other modality is the pursuit of truth through criminal trials. This may be referred to as judicial or legal truth as it results from legal proceedings and is pronounced upon by courts. Such a mechanism was adopted in some transitional contexts, including that of Ethiopia, with courts having the dual mandate of trying the case and recording the truth. A case study into whether and how these mechanisms enable the truth becomes essential to understanding society's transition and to draw lessons for the future.

3 Comparative analysis

This section undertakes a critical examination of the South African and Ethiopian truth-telling processes. Irrespective of historical, social, legal and institutional differences, truth has been set as an objective of the two transitional justice processes. Considering the essentiality of truth, it is important to understand the way in which both countries dealt with truth by critically analysing both experiences based on relevant thematic issues. Hence, the following analysis is based on (i) transitional context and institutional setup for truth-telling; (ii) inclusiveness of the truth-seeking process; (iii) procedural flexibility; (iv) victim participation; (v) offender participation; (vi) time frame; and (vii) outcome. The objective is to understand their relative strengths and weaknesses and to draw lessons for future transitional justice processes in Africa.

3.1 Transitional context and institutional setup for truth-telling

Despite South Africa's long history of violence and discrimination, the country's transitional justice focused on contemporary history dating from 1960 – the crimes committed during apartheid.[43] All forms of violations and crimes were committed, including racial oppression; torture; massacres; forced disappearances; and economic

41 Mobbek (n 16 above) 264.

42 The very complexity of truth creates serious problems in disclosing the truth through truth commissions. However, it creates similar, if not worse, problems in other mechanisms.

43 See the Promotion of National Unity and Reconciliation Act 34 of 1995. See also B Leah & C Villa-Vicencio *Truth commissions: A comparative study* (2011). See also the Report of the Truth and Reconciliation Commission, Vol 1 paras 1 & 2.

deprivation.[44] To deal with this past, South Africa established the Truth and Reconciliation Commission (TRC) with the underlying philosophy of national unity and reconciliation contained in the epilogue to the Constitution.[45] The transition itself resulted from political negotiations that commenced in the late 1980s, as opposed to the radical revolution in Ethiopia. In negotiated transitions, the different parties may hold different conceptions of justice and present themselves as struggling for justice.[46] In such cases, 'the question of how to see that justice is done is itself usually a matter of political negotiation and compromise'.[47] In explaining the different choices available to society, Sarkin observed:[48]

> The type of justice that is pursued is dependent on the type of transition of which there are three broad types: overthrow, reform and compromise. Being overthrown is the fate of a regime that has refused to reform: opposition forces become stronger and finally topple the old order. When reform is undertaken, the old government plays a critical role in the shift to democracy. In countries where change is the result of compromise, the existing regime and opposing forces are equally matched and cannot make the transition to democracy without each other. Such was the case in South Africa.

Hence, the TRC resulted from South Africa's negotiations. The TRC was formally established by a democratically-elected parliament through the Promotion of National Unity and Reconciliation Act.

The objective of the TRC was to promote

> national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past by establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights … including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings.[49]

The TRC had a further mandate of

> establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are

44 E Stanley 'Evaluating the Truth and Reconciliation Commission' (2001) 39 *Journal of Modern African Studies* 525-546.

45 See Promotion of National Unity and Reconciliation Act (n 43 above).

46 D Pankhurst *Conceptualising reconciliation, justice, and peace in issues of justice and reconciliation in complex political emergences* (1999) 239-256.

47 As above.

48 J Sarkin 'Transitional justice and the prosecution model: The experience of Ethiopia' (2011) 3 *Journal of Law, Democracy and Development* 252-266 http://www.ldd.org.za/images/stories/Ready_for_publication/V32_Transitional_justice_prosecution_model.pdf (accessed 31 August 2017).

49 Sec 3(1)(a) Promotion of National Unity and Reconciliation Act (n 43 above).

> the victims, and by recommending reparation measures in respect of them.[50]

The TRC also had the power and duty of 'compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission … and which contains recommendations of measures to prevent the future violations of human rights'. To facilitate truth-telling, the TRC was empowered to grant amnesty to people involved in political violence upon fully disclosing their participation.[51] This power drew some criticism. Unconditional amnesty has lost legitimacy in the contemporary international legal order and also lost favour at national level.[52] It is considered a refutation of justice, and only a few scholars defend this in a restricted and qualified way and when the public supports it.[53] According to the TRC Act, the granting of amnesty exonerates a suspect from criminal and civil liability in respect of an act, omission or offence subjected to amnesty.[54] It also exonerates the state and other organisations that may have been vicariously liable. This was not acceptable to many victims and relatives, and its constitutionality was seriously challenged in light of access to justice (section 22 of the Constitution).[55] Nevertheless, the Constitutional Court in its decision of 1996 upheld the constitutionality of the amnesty-granting power of the TRC, by invoking that the Preamble to the Constitution (national unity and reconciliation) limits the right of access to courts.[56] The underlying reasoning is that truth was essential for building national unity and reconciliation and that without amnesty, offenders would not disclose the truth about past violence. The Constitutional Court also noted the negotiated nature of the transition, and that the Constitution itself would not have been possible without such amnesty. The Court recognised the dissatisfaction of victims at seeing offenders go free. However, in its judgment, the Court noted:[57]

> The result, at all levels, is a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement to wrongdoers to help in the discovery of the truth and

50 Sec 3(1)(c) Promotion of National Unity and Reconciliation Act. The TRC was also tasked with the power and duty of 'compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission … and which contains recommendations of measures to prevent the future violations of human rights'.

51 Sec 3(1)(b) Promotion of National Unity and Reconciliation Act.

52 J Dugard 'Dealing with crimes of a past regime: Is amnesty still an option?' (1999) 12 *Leiden Journal of International Law* 1001.

53 Thoms et al (n 11 above) 25.

54 Sec 20(7) Promotion of National Unity and Reconciliation Act, read with secs 20(8), (9) & (10)

55 *Azanian Peoples Organisation (AZAPO) & Others v President of the Republic of South Africa & Others* 1996 CCT 17/96.

56 As above.

57 *AZAPO* (n 55 above), para 21 of the judgment.

> the need for reparations for the victims of that truth; between a correction in the old and the creation of the new.

The victims' interests were thought to be addressed through the compensatory benefit of discovering the truth and state reparation processes. The argument in South Africa is that amnesty was conditional and was decided on an individual basis; it did not allow perpetrators simply to go free, unlike the blanket amnesty in countries such as Chile. Neither did South Africa opt for prosecution, which basically embraces the Western conception of retributive justice; instead, it adopted the 'third way' of dealing with its past.[58]

At this juncture, it is interesting to highlight a few points about the *Gacaca* system in Rwanda for its unique approach of dealing with the past and establishing the truth. Rwanda demonstrates the co-existence of different levels of transitional processes involving the International Criminal Tribunal for Rwanda (ICTR), the formal courts of Rwanda, and the *Gacaca* courts. The latter had their roots in Rwandan tradition and were later reinvented as distinct quasi-judicial institutions of addressing past violence. The *Gacaca* system was launched as a response to the logistical and other challenges of bringing many thousands of suspects to justice. It has been noted:[59]

> Based on traditional practices of communal reconciliation, the *Gacaca* hearings were officially instituted as an elaborate and sustained exercise of transitional justice in local settings with grass-root participation … the *Gacaca* hearings took place in local Rwandan communities.

Therefore, in Rwanda, one finds a mixture of transitional justice processes operating at different levels and emphasising different elements of transitional justice. The *Gacaca* represents a community truth-telling and reconciliation process.[60]

The TRC has been described as

> the most ambitious and organised attempt to deal with crimes of a past regime through a concept of truth … A political strategy to acknowledge past suffering whilst promoting a future based on the concerns of social justice, the rule of law and reconciliation.[61]

Nevertheless, certain limitations of this model should be noted. One problem, as discussed above, was the amnesty itself which was viewed as the refutation of natural justice. It may, however, be said that South Africa adopted a different conception and process of justice. The

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58 The Commission's investigative mandate relates to gross violations of human rights, defined as 'the killing, abduction, torture, or severe ill-treatment of any person'. The TRC also had the mandate of 'restoring the human and civil dignity of … victims … by recommending reparation measures in respect of them', and provided a broad definition of reparation. See Promotion of National Unity and Reconciliation Act (n 43 above).

59 F du Toit 'Reconciliation and transitional justice: The case of Rwanda's *Gacaca* courts' Institute of Justice and Reconciliation Africa Programme Occasional Paper 2 (2011) 15 http://www.ijr.org.za (accessed 31 August 2017).

60 Du Toit (n 59 above) 15-16.

61 Stanley (n 44 above).

truth-finding process had further limitations. These included the mandate of the TRC (restricted to certain crimes only); the need for objectivity and the absence or inadequacy of cross-examination; the lack of corroboration of amnesty statements; and the inability to reach apartheid beneficiaries.[62]

Many commentators believe that 'the TRC had contributed to the healing process in South Africa. It gave people a voice to be heard and it was a vehicle to peaceful co-existence in South Africa.'[63] Despite its limitations, the TRC has offered a unique opportunity of dealing with a legacy of violence by placing truth-telling at the centre of social healing and reconciliation.

As in South Africa, the people of Ethiopia throughout their history had witnessed extreme atrocities under different forms of government. However, Ethiopian's transitional justice process dealt only with the recent past. Spearheaded by the SPO, the process was introduced by the transitional government (TGE), following the defeat of the repressive military regime. The TGE was not an elected government and its legitimacy may be questioned. However, it may derive its legitimacy from being a representative of various political groups; a case of truncated democracy pending elections. Nevertheless, critics argue that some political groups deliberately were excluded from the transitional government, rendering it flawed.[64]

The SPO had a mandate to investigate and institute criminal proceedings against Derg officials and their affiliates.[65] Retribution was the dominant motive and formed the transitional justice process. This resulted from the nature of the transition: the revolutionary overthrow of a repressive military regime as opposed to a negotiated transition as in South Africa. However, the issue remains not whether prosecution was possible, but whether it was desirable.

Nevertheless, the importance of truth and truth-recording was recognised in the legal framework. The law states:[66]

> It is in the interest of a just historical obligation to record for posterity the brutal offences ... perpetrated against the people of Ethiopia and to educate the people and make them aware of these offenses in order to prevent the recurrence of such a system of government.

62 V Jardine 'The Truth and Reconciliation Commission: Success or failure' MHCS dissertation, University of Pretoria, 2010 4 http://repository.up.ac.za/bitstream/handle/ 2263/23111/dissertation.pdf?sequence=1&isAllowed=y (accessed 27 August 2017).

63 As above.

64 AG Selassie 'Ethiopia: Problems and prospects for democracy' (1992) 1 *William and Mary Bill of Rights Journal* 212 http://scholarship.wm.edu/cgi/viewcontent.cgi?article=1542&context=wmborj&sei (accessed 31 August 2017).

65 SPO Proclamation (n 6 above) art 6. See also para 4 of the Preamble. It also states the 'historic mission of EPRDF', implying the role of EPRDF in shaping the transitional justice process.

66 SPO Proclamation (n 6 above) para 5 of the Preamble.

This conforms to Tietel's term 'historical justice', namely, that the truth must be known and recorded. Interestingly, the proclamation describes the wrongdoings that are to be recorded and made known. This recording is a matter of historical obligation rather than preference, suggesting the existence of a rights holder. The truth so discovered and recorded was thought to advance public education and public awareness and, in so doing, deterring the recurrence of further violations. Hence, the Ethiopian framework recognises the importance of truth and history to individual victims, family and relatives as well as the public – both current and future generations. As will be discussed, truth-telling through the adversarial judicial process is problematic. In addition, the process excluded reconciliation and the role truth plays in it. For some, reconciliation should have offered the ultimate solution for Ethiopian society, which had experienced deep divisions and polarisation, a lack of trust and animosity.[67]

3.2 Inclusiveness of the truth-seeking process

Societies in transition should provide an inclusive general framework for the operation of the transitional process. The truth or history, though essential to coming to terms with the past and building a better future, remains a contested issue during transition. It is argued that 'there is frequently little consensus even among family members on the key stories and their interpretation, and there may not be a shared account about the nature and time of key events'.[68] The argument goes on that just as in families, so in large groups, there can be little consensus on major events, their meanings and any actions they might imply.[69] How can a truth-telling process overcome this problem – of contested truth? In transitional societies, there may not be a consensus about the history of past violence – the nature and magnitude of violence, its duration, the perpetrators, the victims and the reasons behind past violence. Individual experiences and emotions coupled with myth provide various presentations of what happened. It has been said that 'in all cases of transition from a repressive regime to a non-authoritarian system, the interpretation of history has been an important and disputed subject'.[70] This speaks to both the necessity and the difficulty of providing a general and impartial narration within which the transitional justice process should operate.

67 For a detailed analysis, see DS Reta 'National prosecutions and transitional justice: The case of Ethiopia' PhD thesis, Warwick University, United Kingdom, 2014 166-178. An example of this view is that 'there were many requests for all round reconciliation within the country with the victims of the Red Terror, between perpetrators of these crimes and victims if they are alive or their relatives; and the conflict has been going on for a long time in Ethiopia now. So, it is a society which is living in conflict to this day because of lack of reconciliation, because no effort has been made on reconciliation.'

68 Jardonova (n 18 above).

69 As above.

70 Tronvoll (n 5 above) 94.

Consequently, it can be said that non-discriminatory transitional justice processes allow 'all parties to be treated justly irrespective of the side they come from'.[71] Therefore, society should formulate a comprehensive framework to enable the various narrations and interpretations about the past.

The South African truth-telling framework was all-inclusive, that is, no individual or group was exempt. The mandate of the TRC was broad enough to investigate violations committed by both the previous government and the different freedom-fighting groups, such as the African National Congress (ANC), the Pan-Africanist Congress (PAC) and the Afrikaner Weerstandsbeweging or Afrikaner Resistance Movement (AWB).[72] This made it possible to expose more truth. The Commission noted that '[a] gross violation is a gross violation, whoever commits it and for whatever reason. There is thus legal equivalence between all perpetrators. Their political affiliation is irrelevant.' [73] In fact, this even-handedness is reflected in the findings of the TRC.[74]

However, the Ethiopian framework provided a selected narration of historical violence and, therefore, an incomprehensive truth-telling and recording framework. It provides that 'the people of Ethiopia have been deprived of their human and political rights and subjected to gross oppression under the yoke of fascistic rules of the Dergue-WPE regime for the last seventeen years'.[75] It also states that

> heinous and horrendous criminal acts which occupy a special chapter in the history of the peoples of Ethiopia have been perpetrated against the people of Ethiopia by officials, members and auxiliaries of the security and armed forces of the Dergue-WPE- regime.[76]

These provisions embody the official and legislative declaration of the past. Is it then logical to claim that one is pursuing truth while the truth has already been declared? And if this is the truth and therefore known, what else is there to be discovered and recorded? This predetermination, perhaps, was possible because of the nature of the transition itself and thus may be viewed as a victor's justice and truth.

The contestation about this narration is not so much about the designation of the Derg as a violator or the nature of its crimes. The fact that the Derg was a killing machine is undeniable.[77] It relates to

71 Y Sooka 'Dealing with the past and transitional justice: Building peace through accountability' (2006) 88 *International Review of the Red Cross* 313.

72 DP Willemien 'The South African Truth and Reconciliation Commission: "The truth set you free"' in M-C Foblets & T von Trotha (eds) *Healing the wounds. Essays on the reconstruction of societies after war* (2004) 170.

73 TRC Report (n 43 above) 12 para 2.

74 Leah & Villa-Vicencio (n 43 above).

75 SPO Proclamation (n 6 above).

76 As above.

77 For details, see De Waal (n 4 above). B Zewde 'The history of the Red Terror: Contexts and consequences' in Tronvoll et al (n 5 above) 56. See also Y Haile-Mariam 'The quest for justice and reconciliation: The International Criminal

the role of other political groups in past violence. Historical accounts indicate that various opposition groups committed human rights violations in the course of their violent opposition to the Derg and to each other. In the course of these conflicts, opposition political groups also committed violations irrespective of whether these violations are comparable to those of the Derg or not.[78] The Ethiopian People's Revolutionary Party (EPRP) and Me'ison (the All-Ethiopian Socialist Movement) are just two examples. The EPRP-Derg urban clash in the name of white terror/red terror claimed the lives of thousands of Ethiopians. Zewde has observed that 'the labels "white terror" and "red terror" … [were] intended to condemn one form of terror and justify another'.[79] For example, it was alleged that in Addis Ababa alone the EPRP killed 1 319 people believed to be Derg members or supporters.[80] What is the truth about this? The EPRP and Me'ison were not the only opposition political groups involved in past abuses. The most radical account unequivocally concludes that '[all] armed groups which opposed and eventually overthrow the Dergue, killed [as] deliberately, indiscriminately and ruthlessly as the Dergue did'.[81] If so, why were these political groups excluded from the transitional justice process?[82] What is the implication of this exclusion for victims, relatives and society? De Waal noted that '[t]here is no impartial history of Ethiopia; every presentation of historical facts is laden with modern-day political implications'.[83] However, this is exactly what the transitional justice process should have addressed and clarified by adopting some process of truth-telling.

The incomprehensiveness of the framework, first, questions the impartiality and legitimacy of the process. Second, it limits the exposure and recording of the truth, thus limiting society's prospect of coming to terms with its past and transforming to a better future.

3.3 Procedural flexibility

A transitional justice process may be analysed based on the flexibility it allows for uncovering the truth. In fulfilling its mandate, the TRC opened many offices and devised various mechanisms and procedures to reach as many citizens as possible.[84] The techniques employed included, but were not limited to, taking statements from victims and

Tribunal for Rwanda and the Ethiopian High Court' (1999) 22 *Hastings International and Comparative Law Review* 676. See also A Matsuoka & J Sorenson *Ghosts and shadows: Construction of identity and community in an African diaspora* (2001).

78 E Kissi *Revolution and genocide in Ethiopia and Cambodia* (2006) 82. See also Zewde (n 2 above) 25.

79 Zewde (n 1 above) 25.

80 A preliminary objection presented against SPO charges, SPO File 62/85.

81 Kissi (n 78 above) 112.

82 The author believes that the Chief Special Prosecutor was in fact a former member of the EPRP.

83 De Waal (n 4 above) 19.

84 Leah et al (n 43 above) 19.

establishing the forensics for dealing with factual truths.[85] An interesting aspect of the TRC's operation was its transparency. It held public hearings that gained extensive media coverage, enabling it to reach as many people as possible.[86] It was noted that 'establishing a public awareness and record of the TRC's work was important to reach the goal of societal acknowledgment of the country's past, which created space for healing and restorative truth'.[87]

In contrast, uncovering and recording the truth in Ethiopia was part of a criminal justice process. We may concur with Tibor that the exposure of the truth is an essential element of criminal justice.[88] However, the suitability of courts to establish the truth is debatable, especially in a transitional context of dealing with atrocities committed in a relatively distant period. Truth as a by-product of a criminal justice process, contained in court judgments and sentences, can be contested because of the inherent procedural restrictions. While the TRC was more flexible in its approaches, the Ethiopian judicial approach involved too formal and less flexible processes that made it difficult to enable the widest search for truth.[89] Moreover, an adversarial justice process requires the parties to establish their case or truth while the judge acts as a neutral arbiter. The limited role of judges and the adversarial nature of the process restrict the disclosure of the truth through a court.[90] In addition, the credibility and legitimacy of a transitional justice process depend on the independence and impartiality of the institution undertaking such task. This is true of the credibility and legitimacy of truth-telling through Ethiopian courts.

3.4 Victim participation

Victims should be at the centre of all efforts of a society in dealing with the past.[91] Hence, one may question the extent to which victims are identified and recognised as central subjects of truth-telling processes. The TRC process offered victims the opportunity to narrate their sufferings and experiences. This was believed to 'facilitate a cathartic experience for victims who were finally able to tell their stories, establishing a personal and narrative truth'.[92] The victims' perception of what happened to them forms part of the public report

85 As above.
86 As above.
87 As above.
88 Kiraly (n 22 above).
89 WL Kidane 'The Ethiopian "Red Terror" trials' in MC Bassiouni (ed) *Post-conflict justice* (2002) 688, cited in FK Tiba 'The trial of Mengistu and other Derg members for genocide, torture and summary executions in Ethiopia' in C Murungu & J Biegon (eds) *Prosecuting international crimes in Africa* (2011) 176.
90 Kiraly (n 22 above) 93.
91 D Bloomfield et al (eds) *Reconciliation after violent conflict: A handbook* (2003) 54.
92 Leah et al (n 43 above) 19.

and also needs to be respected.[93] The ability to tell one's story in public without fear of reprisal is symbolic of the end of violence and the beginning of a new system. It also invites acknowledgment on the part of the offender. Therefore, victim narration contributes to the establishment of the truth, acknowledgment, forgiveness and reconciliation.

Compared to the TRC, Ethiopian's prosecution process focused on perpetrators and, therefore, did not allow victims to tell their stories. With this, the cathartic effect of truth-telling was lost. Victims were able to relate their experiences only if they had been introduced as witnesses. The SPO tried to use the witness hearing process as a means of achieving two things. The first was to produce evidence against the accused, while the second was to enable victims to tell their stories although the story may not have had relevance to establish individual guilt. Firew noted:[94]

> It appears that the SPO, by choosing this strategy wanted to create a forum for witnesses, most of whom were affected in some way, to vent their sorrow and testify in public against leaders who were responsible for some of the most atrocious crimes. In a sense, it is like trying to 'kill two birds with one stone' at the expense of a speedy trial.

The defence counsel objected to this strategy by arguing that a victim's narration would better suit a truth commission than an adversarial courtroom.[95] In one of the trials, the prosecutor had called 500 witnesses and promised to call another 500, in addition to adducing physical evidence.[96] Expressing displeasure, one defence counsel noted that 'if what SPO is trying to do is record keeping, it could be done more effectively by a truth commission; it need not be done in a court room'.[97] Even when called as witnesses, because of the judicial nature of the proceedings and due process requirements, victims were procedurally restricted in their narration. For example, they were limited to the issues framed at the criminal trial, which did not allow for investigation into the causes of the conflict, the political environment that enabled the violations or institutional failures. This denied victims the personal satisfaction of telling a personal story and prevented the uncovering of the truth.

3.5 Offender participation

The voluntary participation of offenders in the truth-telling process is essential to the process of healing and reconciliation. Though discomforting and agonising to many,[98] the TRC's power to grant

93 Bloomfield et al (n 91 above) 65.
94 Tiba (n 89 above) 175-176.
95 Tiba 176.
96 Haile-Mariam (n 77 above) 679.
97 Kidane (n 89 above) 688.
98 *AZAPO* case (n 55 above).

amnesty to perpetrators also expedited the truth-telling process. As Leah et al note:[99]

> Truth-telling was further promoted through amnesty hearings at which applicants for amnesty were required to make full disclosure of the gross human rights violations they had committed, their motives and perspectives, and evidence of the authorisation of such violations as required in the TRC Act.

Perpetrators had the incentive of voluntarily disclosing the truth as the amnesty hearing was not a process intended to determine guilt or punishment. In Ethiopia, the process basically involved determining the guilt or innocence of individuals following strict procedures and the satisfaction of the standard of proof. Wrongdoers, therefore, had no incentive to disclose the truth. The system depended on the ability to produce evidence, which evidence was 'contested, put into question, or interpreted in different ways to win a case'.[100] The confrontational nature of criminal trials highly restricts, if not prevents, perpetrators' voluntarily disclosing the truth about the past. As is often said, 'in court you win a case, not the cause'. Interestingly, 33 high-level former officials wrote to the Prime Minister of the country requesting a forum whereby they 'beg the Ethiopian public for their pardon for the mistakes they have done knowingly and unknowingly'. This forum never realised, and with it was lost the partial opportunity for disclosure, acknowledgment and reconciliation.[101]

3.6 Time frame

Transitional justice may be viewed as a continuous process. Nevertheless, the time frame within which the major tasks are completed determines its relevance and significance to society. Accordingly, the TRC completed its tasks within a relatively short period, with the result that its findings were relevant to both victims and society. It took the TRC three years to finalise its work and issue its interim and final reports. In contrast, as noted previously, at the outset the Ethiopian trials took more than 15 years (closer to two decades), rendering it less useful. This delay led the late Ethiopian Prime Minister, Meles Zenaw, to acknowledge that 'the exercise became more and more irrelevant'.[102]

3.7 Outcome

A final point worth considering is the outcome of truth-telling processes: To what extent did the TRC and the Red Terror trials uncover the truth? This question is too complex to answer in this

99 Leah et al (n 43 above) 19.

100 Naqvi (n 21 above) 246.

101 GA Aneme 'Apology and trials: The case of the Red Terror trials in Ethiopia' (2006) 6 *African Human Rights Law Journal* 67.

102 Interview with Prime Minister Meles Zenawib by Kjetil Tronvoll, 16 January 2002 in Tronvoll et al (n 5 above) 69.

article. The TRC has produced several reports about its working procedures and findings. It is noted:[103]

> The Commission found that the majority of gross human rights violations were committed by the state through its security and law-enforcement agencies … At the same time, however, the Commission found that the liberation forces were guilty of acts of human rights violations.

As the TRC operated openly and publicly, many of these findings were already in the public domain.

Clearly, in uncovering and recording the truth, the TRC undertook a far-reaching enterprise.[104] Although this story may not be complete, it uncovers a broader narration of 'truths' that allows society to come to terms with its past and move forward. As the Chairperson of the Commission noted:[105]

> [The report] is not and cannot be the whole story; but it provides a perspective on the truth about a past that is more extensive and more complex than any one commission could, in two and a half years, have hoped to capture … We hope that many South Africans and friends of South Africa will become engaged in the process of helping our nation to come to terms with its past and, in so doing, reach out to a new future.

The TRC has been subjected to various criticisms relating the negotiated nature of the transition itself that restricted its mandate to uncover the truth about human rights violations.[106] Apart from these issues relating to truth, the South African transitional justice process has been criticised for not incorporating the ideas of criminal justice and social justice in its mandate and procedures.[107] While the issue of social justice is too broad to be covered in this article, one may note the importance of taking appropriate measures, including those recommended by the TRC, to ensure social and economic justice and tackle the structural problems of inequality. This, of course, highlights the importance of adopting a holistic and continus approach.

There is also the matter of prosecution, the significance of which remains controversial. The pro-prosecution argument is consequentialist, based on the need to deter similar violations and counter impunity. Thus, Professor Orentlicher expresses the opinion that 'the fulcrum of the case for criminal punishment is that it is the most effective insurance against future repression'.[108] Because of these benefits associated with prosecution, we now have the controversial notion of a duty to prosecute under international law – especially under international humanitarian and human rights law. On the other hand, the anti-prosecutionists reject prosecution as an

103 Leah et al (n 43 above) 19.
104 TRC Report (n 43 above).
105 As above.
106 Stanley (n 44 above) 526.
107 As above.
108 DF Orentlicher 'Settling accounts: The duty to prosecute human rights violations of a prior regime' (1991) 100 *Yale Law Review* 2537.

inappropriate modality because of its emphasis on retribution. Thus, Asmal argues that 'given the complexity of justice in transitional situations, the simplifications insisted up on by penal law fundamentalists are helpful neither to South Africa, nor to transitions elsewhere'.[109] It is useful to note that the TRC process did not entirely preclude prosecution. The Ethiopian experience also suggests that prosecution – wholesale prosecution – is neither possible nor desirable. Some critics point out the 'limited value' of the truth uncovered, which does not entirely dismiss the TRC's work.[110] Despite these criticisms, the TRC has uncovered and recorded the widest possible truth. The TRC's extensive and successive reports, widely available to the public, demonstrate its achievements.

In Ethiopia, whether there was successful truth-telling is a subject of intense debate. For some, the process was a success. Recognising the limitation but emphasising the success, a former Supreme Court judge noted:[111]

> Many people were convicted in both Federal and regional courts. At least as far as these people are concerned the facts were established. I guess there might be facts we have not discovered. Did we reveal the whole account, the whole picture of every individual crime? The courts were presented with detailed accounts of what happened … Well, according to estimates, about 500 000 people were killed. I do not think we have an account of each of the 500 000. However, I think a fairly good picture of what happened has been discovered.

These points, while appreciative of the process, also reveal limitations. The judicial process is even presented as superior to truth commissions in establishing genuine or real facts.[112] Nevertheless, critics dismiss the judicial process for not yielding the truth. An exemplary view is that

> [t]here is no truth. Truth is indivisible. You cannot be partial to the truth and be just … right from the beginning, they [those in power] were not interested in being truthful, they were not interested in being just, and they were interested in expedient process by which they could establish themselves in this country. To this day, there is no truth.[113]

This view questions the very motivation and legitimacy of the Ethiopian process because of its partiality and failure to deliver the truth. In addition, there were problems arising from the inadequacy of courts to establish the truth. Moreover, there is a lack or inadequacy of publication of the findings. A former special prosecutor noted:[114]

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109 K Asmal 'Truth, reconciliation and justice: The South African experience in perspective' (2000) 63 *Modern Law Review* 13.

110 Stanley (n 44 above) 525.

111 Anonymous respondent in Reta (n 67 above) 222. For more on pro-prosecution arguments, see 221-230.

112 Reta (n 67 above) 225.

113 Reta 231 231-239.

114 Reta 226.

> Publication is very important … there is a publication problem; we have not made our discoveries public. These efforts and works should not all remain secret. Today, I speak about it. Maybe no one speaks tomorrow ... A lot of work was done. But it is not known much ...

Hence, the truth established and embedded in judicial documents remains unpublicised and, even worse, kept secret.[115] Thus, the truth loses its significance to the victims or relatives and its potential to transform society.

4 Conclusion

The article shows that societies emerging out of conflict or from an authoritarian regime should confront the legacy of past conflicts and atrocities. Although transitional justice processes are context-dependent and partly determined by the nature of transition, society should seek not only what is possible but also what is desirable. The article asserts that truth should be pursued as an essential element of promoting healing and reconciliation. A society cannot move forward on the basis of an unknown past. The exposure of the truth is meant to promote unity and reconciliation, not to sustain division and vengeance. Indeed, reconciliation and social harmony should be the ultimate goal of transitional justice processes.

Despite its significant limitations, the South African truth and reconciliation processes have revealed a more comprehensive story about the past. This is attributable to the specific mandate given to the TRC, the inclusiveness and procedural flexibility of the process, as well as victims' and offenders' participation in truth-telling. The transparent and public nature of the truth-telling process has contributed to some form of shared history and social transformation. However, the article cannot claim that the truth has necessarily led to healing. Nevertheless, one will never know what would have happened without such a process.

The article has shown that the Ethiopian Red Terror trials tried to establish the truth as part of the judicial process of meting out justice. The two objectives – truth-telling and criminal punishment – are difficult to achieve and the first has been relegated to secondary importance. The dual mandate of the process, the selectiveness of the framework, the emphasis on retribution, the unsuitability of adversarial and formalistic nature of the court process for truth-telling, the limited or lack of participation of victims and offenders in truth-telling, and the lack of publication have limited the exposure of the truth. Another problem with the Ethiopian process is the exclusion of healing and reconciliation, which should be the ultimate goal of societies in transition. The article also shows that the truth-telling process should be impartial, public, transparent as well as timeous.

115 Reta 238-239.

Hence, a close examination of the South African TRC and the Ethiopian Red Terror trials demonstrates that a more holistic approach is likely to succeed in uncovering the truth and promoting accountability, healing and reconciliation. In some cases, justice demands the prosecution of perpetrators. However, we also learn from the Ethiopian experience that full-scale prosecution may not be desirable or even possible. Hence, a truth-telling process before commissions should generally be pursued to disclose the truth and promote healing and reconciliation. Nevertheless, prosecution must be retained to deal with the most serious crimes and offenders. In addition, telling the bare truth cannot lead to true healing, reconciliation and sustainable peace. Hence, a holistic approach recommends reparation for victims. It is also necessary to undertake institutional reforms to deal with social, economic and political structures of inequality and injustice. Finally, societies in transition need to articulate and address the demands for truth-telling and reconciliation taking a holistic approach of addressing other complementary objectives of justice and institutional reform.

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Implementation of the right to social security in Nigeria

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Summary

The article examines the constitutional provision on the justiciability of the right to social security as well as other legislation on social security in Nigeria with a view to determining the extent to which the right is actualised in the country. It is argued that, apart from the issue of the prima facie non-justiciability of the right, the various Nigerian laws on social security are inadequate in their content and scope of application. The article further argues that the various national/state programmes on social protection are not stricto sensu social security schemes as they are not anchored in any legislation and do not create any enforceable rights for citizens. It concludes that there is a need for Nigerian policy makers to demonstrate greater commitment to the due implementation of this right in Nigeria by enacting an all-encompassing social security law and making appropriate budgetary provision for the sector.

Key words: *social security; right; justiciability; Nigerian Constitution 1999*

1 Introduction

Guaranteeing to everyone the right to social security is pivotal if we must significantly reduce poverty in society and enhance the socio-economic development of a nation. Social security refers to the schedule of reliefs, benefits, entitlements and facilities that are accessible to and obtainable by citizens in any given community in terms of the relevant municipal laws, and under the auspices and control of the state. These are usually deployed as viable and formidable palliatives to the endless social and economic risks to which the strong and young, as well as the feeble and old members of the community are exposed. Social security is defined as

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> the social protection, organised collective protection of the individual against want, poverty, destitution, disease and idleness, which may be thrust upon him by the varied hazards and vicissitudes of social life, notably loss or suspension of income or means of sustenance resulting from sickness, maternity, accident injury, invalidity, old age, death of breadwinner or unemployment.[1]

The concept of social security is rooted in welfarism, which is generally thought of as an application of social justice which entails that all persons, apart from their conduct or choice, have a claim to an equal share in all those things (advantages) which are generally desired and are in fact conducive to their wellbeing.[2] This principle is not identical to the demand for equal treatment of all persons; it rather requires preferential treatment for the underprivileged who lack advantages possessed by others.[3]

The relevance of social security in modern societies cannot be under-estimated in view of its enormous benefits. In communities where there is in existence a viable and functional social security scheme, it has served as goal-oriented programmes, such as the alleviation of want and sub-standard living. Also, on a general note, social security has served as a fixed, firm and effective programme which is not only viable, but which impact is deeply felt by all. Furthermore, in all communities, albeit to a larger extent in more developed communities, social security has served as a socio-economic programme with positive cyclical effects, such as the enhancement of a high standard of living and, ultimately, life expectancy, the promotion of good life and the eradication of squalor and other social menaces, such as corruption and other criminal activities.

Moreover, social security is now universally recognised as a human right. This is attested to by the number of international instruments that have affirmed the right as one of the socio-economic rights to which every human being is entitled. Social security was first established as a basic human right in 1944 in the Declaration of Philadelphia of the International Labour Organisation (ILO), wherein the International Labour Conference recognised the ILO's obligation concerning 'the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care'. This Declaration was pivotal to the ILO Income Security Recommendation 67 of 1944[4] and the subsequent drafting of the ILO Social Security (Minimum Standards) Convention 102 of 1952. The right to social security is also given recognition in the Universal

1 BO Nwabueze *Social security in Nigeria* (1989) 1.

2 AM Honore 'Social justice' in RS Summer (ed) *Essays in legal philosophy* (1968) 61 62.

3 As above.

4 See para 17 which provides that 'social insurance should afford protection, in the contingencies to which they are exposed, to all employed and self-employed persons, together with their dependants'.

Declaration of Human Rights, 1948 (Universal Declaration);[5] the International Covenant on Economic, Social and Cultural Rights (ICESCR);[6] the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);[7] and the Convention on the Rights of the Child (CRC).[8]

At the regional level, particularly in Africa, there is the African Charter on Human and Peoples' Rights (African Charter).[9] While not directly providing for the right to social security or to an adequate standard of living as contained in the ICESCR, the African Charter contains specific provisions that have a bearing on social security.[10] A number of policy activities, statements and recommendations have also been developed to enhance the right to social security in the region.[11] These include the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights;[12] the African Common Position on Human and Social Development in Africa 1994;[13] the Ouagadougou Declaration and Plan of Action on Employment Promotion and Poverty Alleviation 2004;[14] the Social Policy Framework for Africa 2008;[15] the Yaounde Tripartite Declaration on

5 See arts 22, 23 and 25. It is worth noting that the provisions of the Universal Declaration are not legally binding on states except to the extent that some of the rights have attained the status of customary international law. See D Olowu 'The right to social security in Nigeria: Taking up the gauntlet' (2007) 1 *Review of Nigerian Law and Practice* 97.

6 See art 9(1).

7 See arts 11(1)(e) and 14(2)(c).

8 See art 26.

9 Adopted in 1981 by African Heads of State and Government, and eventually entered into force on 21 October 1986.

10 See eg art 18 on the right of the aged and the disabled to special measures of protection in keeping with their physical or moral needs, and art 16, which guarantees to every individual the right to enjoy the best attainable state of physical and mental health and the obligation imposed upon state parties to take the necessary measures to protect the health of their people and to ensure that they achieve medical attention when they are sick.

11 In the other regions, there is the European Social Charter 1961, aimed at granting to Europeans certain minimum standards concerning housing, health, education, employment, social protection, free movement and non-discrimination. See Part II of the European Social Charter. The Charter was revised in 1996 and the Additional Protocol providing for a system of collective complaints was adopted. There is also the European Code of Social Security, 1964 as well as the San Salvador Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, 1988. Furthermore, in 2009, the European Union adopted the Charter of Fundamental Rights of the European Union aimed at expanding the frontiers of protection of social rights in Europe.

12 http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_ rights_eng.pdf (accessed 5 September 2017).

13 A/CONF.166/PC/10/Add.1 http://www.un.org/en/africa/osaa/pdf/au/cap_socialdev_1994.pdf (accessed 5 September 2017)

14 EXT.ASSEMBLY/AU/4(III)Rev 4 http://www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_ababa/documents/meetingdocument/wcms_234814.pdf (accessed 5 September 2017).

15 CAMSD/EXP/4(1) http://www.un.org/esa/socdev/egms/docs/2009/Ghana/au2.pdf (accessed 5 September 2017).

the Implementation of the Social Protection Floors 2010;[16] the Intergovernmental Regional Conference of the African Union on Social Protection 2006 (Livingstone Call for Action 2006);[17] and the Report of the Follow-up on the Ouagadougou 2004 Extraordinary Summit of the African Union on Employment, Poverty Eradication and Inclusive Development in Africa 2014.[18] At the micro level, the right to social security has been entrenched in the constitutions of several nations, either directly as an explicit justiciable right in the Bill of Rights,[19] or indirectly as part of the Directive Principles of State Policy.[20]

In Nigeria, the right to social security remains illusory to a large majority of the citizenry as social security laws are targeted mostly at workers in the formal sector of the economy. Thus, poverty in the country has continued to worsen due to socio-economic challenges.

The aim of the article is to examine the range and scope of the right to social security in Nigeria within the context of the Nigerian Constitution and ancillary legislation. The scope of the enquiry includes relevant auxiliary programmes concerning social security. Attention is paid to areas of possible reform.

The article consists of six parts. The next and the third sections consider the justiciability of the constitutional provision on social security as well as other legislation with a special focus on the key policy areas of social security, namely, coverage, financing and benefit structure. The fourth section focuses on the extent of Nigeria's compliance with international instruments on social security, while section five is devoted to a discussion of both national and state governments' initiatives to alleviate poverty. The sixth and final section charts a way forward to improve the level of implementation of social security in Nigeria. I suggest the institutionalisation of tax-financed, non-contributory schemes to address the needs of the informal sector of the economy. In furtherance thereof, it is necessary to first examine the legal foundation for social security in the country.

16 http://www.socialsecurityextension.org/gimi/gess/RessourcePDF.do?ressource.ressourceId=25521 (accessed 5 September 2017).

17 http://www.ipc-undp.org/doc_africa_brazil/Livingstone-call-for-action.pdf (accessed 5 September 2017).

18 Assembly/AU/20 (XXIV) https://au.int/web/sites/default/files/newsevents/workingdocuments/32162-wd-assembly_au_20_xxiv_e.pdf (accessed 5 September 2017).

19 See eg art 20(1) of the Basic Law of Germany; sec 27 of the Constitution of the Republic of South Africa, 1996; art 17 of the Constitution of Egypt 2014; art 43(1) of the Constitution of São Tomé and Principe, 1975; art 43 of the Constitution of the People's Republic of Bulgaria, 1971; art 165 of the Constitution of the Federal Republic of Brazil, 1982; art 50 of the Constitution of the People's Republic of China, 1978; and art 19 of the Constitution of the Republic of Columbia 1886 (as amended in 1981). In these countries, social security is no longer regarded as a policy option but as an enforceable fundamental right.

20 See eg the Constitution of the Federal Republic of Nigeria 1999 (as amended) and the 1991 Constitution of Sierra Leone.

2 Legal basis for social security in Nigeria

The right to social security is given recognition in section 14(2)(b) of the Constitution of the Federal Republic of Nigeria, 1999,[21] which provides that 'the security and *welfare* of the people shall be the primary purpose of government'.[22]

This section is included in Chapter II of the Constitution entitled 'Fundamental Objectives and Directive Principles of State Policy'.[23] Chapter II of the 1999 Constitution also contains provisions on the right to suitable and adequate shelter; suitable and adequate food; a reasonable national minimum living wage; old age care and pensions; unemployment benefits; sick benefits and welfare of the disabled;[24] the right to adequate medical and health facilities;[25] and the right to education.[26] These provisions are key components of a viable social security scheme. However, they are *prima facie* non-justiciable by virtue of the provisions of section 6(6)(c) of the Constitution which has generally ousted the jurisdiction of the court in respect of

> any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.[27]

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21 As amended.

22 My emphasis.

23 Generally, Directive Principles are fundamental in the governance of a country. They have been likened to the instruments of instructions which were issued to the Governor-General and the Governors of Colonies and to those of India by the British government under the 1935 Government of India Act. The only difference is that they are instructions to the legislature and the executive. Whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these instruments of instructions, which are called Directive Principles. See DD Basu *Commentary on the Constitution of India* (1965) 311-312. A similar view has been expressed by a Nigerian legal luminary, Nwabueze, that, although the Directive Principles are not legally enforceable, they provide a yardstick for the critical assessment of government actions. See BO Nwabueze *Constitutional law of the Nigerian Republic* (1964) 408. Although the Nigerian Constitution 1963 did not contain provisions on directive principles, Nwabueze addressed and commented on directive principles as a concept when he published his work in 1964. Yet, the penetrating force of that commentary has shed some light on the debate about the viability of the same concept when, eventually, it manifested in the 1979 Nigerian Constitution and, subsequently, in that of 1999, in such a way that we have seen it as a credible authority to sustain our discourse. It has not been cited as authority for the 1979 or 1999 Constitutions *per se,* which it predated.

24 Sec 16(2)(d) 1999 Constitution.

25 Sec 17(2)(d) 1999 Constitution.

26 Sec 18(1) 1999 Constitution.

27 In *Badejo v Federal Minister of Education* (1990) LRC (Const) 735, the Court of Appeal affirmed the decision of the trial court which declined to assume jurisdiction in an action challenging the government's university admission policy on the ground that the action sought to establish a right to education, and held that education was not a right but a Directive Principle, unenforceable under the Constitution. See also *Archbishop Anthony Olubunmi Okogie & Others v Attorney-General of Lagos State* (1981) 2 NCLR 337; *Uzuokwu v Ezeonu II* (1991) 6 NWLR (Pt 200) 708.

In essence, therefore, the rights enunciated in Chapter II of the Constitution are not binding legal entitlements, but mere aspirational goals. The non-justiciability of these rights is said to have been informed largely by fiscal constraints.[28]

Nevertheless, the Fundamental Objectives and Directive Principles of State Policy are not without juridical value in the sense that the qualification precluding judicial review of the provisions of Chapter 11 of the Constitution, itself, is subject to the other provisions thereof.[29] Also, under the Exclusive Legislative List on which the National Assembly has power, by virtue of section 4 of the Constitution, 'to make laws for the peace, order and good government of the Federation or any part thereof', the National Assembly is empowered to establish and regulate authorities for the Federation or any part thereof 'to *promote and enforce* the observance of the Fundamental Objectives and Directive Principles contained in this Constitution'.[30] Therefore, while individuals may not have the *locus standi* to bring an action to court for the infringement of any of the provisions of the Directive Principles of State Policy of which social security forms a part, these are clear constitutional provisions of which the National Assembly may take advantage, through legislative *fiat*, to ensure that government and its agencies carry out their obligations in respect thereof.

Furthermore, in *Attorney-General of Ondo State v Attorney-General of the Federation & Others,*[31] the Supreme Court reiterated the fact that, while the Fundamental Objectives and Directive Principles of State Policy remain mere declarations and cannot be enforced by legal procedure, it would be seen as a failure of duty and responsibility of state organs if they acted in clear disregard of them. According to the Court, the nature of the consequences of such failure depends on the aspect of the infringement and, in some cases, the political will of those in power to redress the situation. It was further held that the

28 See eg Nwabueze (n 23 above) where he argues that it would be inappropriate to compel the government by way of a judicial *fiat* to allocate resources which it does not have towards the actualisation of socio-economic rights. Other challenges to the implementation of these rights have been identified as *locus standi,* justiciability and dualism. See S Ibe 'Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities' (2010) 10 *African Human Rights Law Journal* 203.

29 In *Federal Republic of Nigeria v Anache & Others* (2004) 14 WRN 1 61, Justice Niki Tobi stated that the non-justiciability of sec 6(6)(c) of the Constitution is neither total nor sacrosanct as the subsection provides leeway by the use of the phrase 'except as otherwise provided by this Constitution'. According to the judge, if the Constitution otherwise provides in another section, which makes a section or sections of Ch II justiciable, it will be so interpreted by the courts.

30 See para 60(a) of Part I of the Second Schedule to the 1999 Constitution. See also sec 13 of the Constitution which imposes a duty on all organs of government and all authorities and persons exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of Ch II and sec 224, which requires the programme, aims and objects of a political party to conform with the provisions of Ch II of the Constitution.

31 (2002) 9 NWLR (Pt 772) 222 SC.

Directive Principles (or some of them) could be made justiciable by legislation and that the purpose of including these Directive Principles of State Policy within the Exclusive Legislative List under item 60(a) was to show that they can be turned into enactments by the National Assembly should the need arise.[32] According to the Supreme Court, section 16(2)(d), for instance, could be legislated upon to ensure that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wages, old age care pensions, unemployment and sick benefits and welfare of the disabled are provided for all citizens.

At a comparative level, the right to social security in the Constitution of the Republic of South Africa, 1996 is directly enforceable in cases of violations. According to section 27(1)(c) of the 1996 Constitution, everyone has the right to have access to social security including – if they are unable to support themselves and their dependants – appropriate social assistance. Under section 27(2) thereof, the state is obliged to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to social security. 'Other measures', in this context, has been interpreted to mean 'financial, administrative, judicial, economic, social and educational measures'.[33] In this regard, in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,*[34] the Constitutional Court has noted that the socio-economic rights contained in the Constitution are justiciable even though the inclusion of the rights may have direct implications for budgetary matters.

It has been noted that the significance of this decision is that the Court has declared a 'floor' of minimum justiciability and will not permit government interference with access to the social rights in question, nor discrimination in the provisioning of such rights.[35] Thus, in *Khosa & Others v Minister of Social Development,*[36] a law that excluded permanent residents and their children from access to social assistance was successfully challenged and found to be unreasonable and inconsistent with the provisions of section 27(1), which

32 The Fundamental Objectives and Directive Principles of State Policy contained in Ch 11 of both the 1979 and 1999 Constitutions have lain dormant since 1979. The Corrupt Practices and Other Related Offences Act, 2000, Cap C 31, LFN, 2004 was the first effort to activate just one aspect of them – sec 15(5) – in order that there may be good and transparent government throughout Nigeria.

33 See Child Health Policy Institute and the South African Federal Council on Disability *Social security policy options for people with disabilities in South Africa: An international and comparative review* http://www.ci.org.za/depts/ci/pubs/pdf/poverty/resrep/polopt4ds.pdf. (accessed 19 April 2015).

34 1996 (4) SA 744 (CC) paras 76-78. See also *Government of Republic of South Africa v Irene Grootboom & Others* 2001 (1) SA 46 (CC).

35 See CE Christiansen 'Adjudicating non-justiciability rights: Socio-economic rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 321 359.

36 2004 (6) SA 505 (CC). See also *Grootboom* (n 34 above); *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).

guarantees to everyone the right of access to social security and social assistance, as well as with section 9(3), which prohibits unfair discrimination.

In similar vein, although the 1992 Ghanaian Constitution does not have an explicit provision on social security similar to the South African Constitution, the few provisions thereon, including article 28, which gives protection to the rights of children, and article 29, which protects the rights of disabled persons, are contained in the Bill of Rights and not as policies or principles as is the case of Nigeria. Therefore, the justiciability of these rights in Ghana is certain. However, the right to health, as in Nigeria, is recognised as one of the Directive Principles of State Policy. Unlike Nigeria, however, article 33(5) of the 1992 Ghanaian Constitution further makes provision for other socio-economic rights, which are not expressly contained in the Bill of Rights, to be included therein in appropriate circumstances. Furthermore, there are safeguard provisions in the Ghanaian Constitution to ensure that the provisions on the Directive Principles are duly implemented.[37] It is worth noting that the judicial power to enforce socio-economic rights is not confined to those listed under the Bill of Rights, but extends to those laid out in the Directive Principles of State Policy. In *New Patriotic Party v Attorney-General*,[38] it was held that, although the Directive Principles of State Policy are not in themselves legally enforceable by the courts, there are exceptions to this principle in that, where the Directive Principles are read together with other enforceable parts of the Constitution, they may become enforceable.

In India, the relevant constitutional provisions on social security as well as other socio-economic rights, as is the case in Nigeria, are contained under the Directive Principles of State Policy and are also declared to be non-enforceable.[39] Nevertheless, through judicial activism,[40] the Indian Supreme Court, over the years, has held that these principles are essential in interpreting the content of fundamental rights. Accordingly, it has gradually widened the definition of rights held to be constitutionally justiciable, such as the right to life guaranteed in article 21 of the Constitution, to include the right to a livelihood and the basic necessities of life.[41] Also, it has applied a more substantive conception of equality to uphold socio-

37 See eg arts 34(1) & (2) of the Ghanaian Constitution.

38 (1996-97) SCGLR 729 788.

39 Indeed, there is a general belief that the concept of Fundamental Objectives and Directive Principles of State Policy was borrowed from India. The relevant provisions are similar to those of Part IV of the Indian Constitution 1950.

40 Judicial activism, it has been said, can mean many things, ranging from scrutiny of legislation to determine constitutionality, the creation of law to the exercise of policy prerogatives normally reserved for the executives. See PB Mehta 'India's unlikely democracy: The rise of judicial sovereignty' (2007) 18 *Journal of Democracy* 70 79.

41 See *Rathinam v United Sharma* (1994) 3 SC 394. In *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 2 SCR 516, the Supreme Court held

economic rights, such as the right to health, education and shelter.[42] The rationale behind the pro-active stance of the Indian judiciary to directive principles may be gleaned from the powerful dissenting judgment of Justice Bhagwati in *Minerva Mills Ltd v Union of India*, where he stated:[43]

> There are millions of people in the country who are steeped in poverty and destitution and for them, these civil and political rights have no meaning. It was realised that to a large majority of people who are living in almost sub-human existence, in conditions of abject poverty and for whom life is one long broken story of want and destitution, notions of individual freedom and liberty, though representing some of the most cherished values of a free society would sound as empty words bandied about only in the drawing rooms of the rich and well-to-do and the only solution for making these rights meaningful to them was to remake the material conditions and usher in a new social order where socio-economic justice will inform all institutions of public life so that the preconditions of fundamental liberties for all may be secured.

In the context of the present discussion, some fundamental clarification regarding the integrity of the relevant legal order governing social security in Nigeria is provided next.

3 Some concerns about the current Nigerian laws on social security

The Social Security (Minimum Standards) Convention 1952 of the ILO provides for minimum standards in nine distinct branches of social security, namely, medical care; sickness; unemployment; old-age; employment injury; family; maternity; invalidity; and survivorship.[44] The Convention also introduces the idea of a general level of social security that should be attained progressively everywhere since the system can be adapted to the economic and social conditions prevailing in each country, whatever the degree of its development. A state is required to, at least, accept three of these branches and, at least, one of which must be of a long-term nature (that is, old age, invalidity, unemployment, employment injury or survivors' benefits) to ratify the Convention and before it can be given recognition as a state providing social security to its citizenry.[45]

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that the right to life guaranteed under art 21 of the Indian Constitution included the right to live with human dignity and all that goes with it.

42 See eg *Tellis & Another v Bombay Municipal Corporation & Others* (1987) LRC (Const) 351; *Shantistar Builders v Narayan Khimalal Totame & Others* (1990) 1 SCC 520; *Consumer Education and Research Centre (CERC) v Union of India* (1995) 3 SCC 42; *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & Others* (1997) AIR SC 152; *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) AIR SC 2426; *Jain v State of Kamataka* (1992) 3 SCC 666; *Krishnan v State of Andhra Pradesh & Another* (1993) 4 LRC 234.

43 (1980) AIR SC 179 186.

44 See Parts II, III, IV, V, VI, VII, VIII, IX and X respectively of the Social Security (Minimum Standards) Convention 1952 (No 102).

45 See art 2 of the Social Security (Minimum Standards) Convention 102 of 1952.

The laws regulating social security in Nigeria include the Pension Reform Act (PRA) of 2014, which regulates, *inter alia,* the provision of retirement benefits as and when due to every person who worked in the formal employment of either the public service of the Federation, the federal capital territory, states, local governments or the organised private sector,[46] as well as the payment of disability benefits in appropriate cases and survivors' benefits to dependant(s) of a deceased employee.[47] The National Health Insurance Scheme (NHIS) Act of 1999[48] establishes a contributory health insurance scheme to which every employer who has a minimum of ten employees, together with every person in his employment, pay contributions, which entitles insured persons and their dependants to the benefits of prescribed good-quality and cost-effective health services. The Employees' Compensation Act of 2010 regulates the provision of an open and fair system of guaranteed and adequate compensation for all employees or their dependants for any death, injury, disease or disability arising out of or in the course of employment.[49] It is worth noting that, although all the prescribed branches of social security are included in the Directive Principles of State Policy, only five of those branches, namely, old age, disability, survivors, medical and work injury benefits, have been directly legislated, while there is limited provision for sickness and maternity benefits under the Labour Act of 1974.[50] As yet there is no provision for unemployment, non-occupational disability and family benefits in Nigerian law. It should be noted that, in countries like South Africa, the Social Assistance Act of 2004, in sections 6 and 9, makes provision for the payment of means-tested tax-financed child support and disability grants respectively to citizens and residents who satisfy the prescribed qualifying conditions, while the Unemployment Insurance Act of 2001 makes provision for a contributory scheme that pays out sickness and maternity as well as unemployment benefits to contributors.[51]

Moreover, although Nigeria could be regarded as a country which provides social security for her citizens, the various afore-mentioned Nigerian laws are too limited in their coverage as they all are essentially employment-related. Thus, contrary to the provisions of paragraph 29 of the Income Security Recommendation 67 of 1944

46 See secs 1, 3, 7, 8, 9 & 10 of the Pension Reform Act 2014.

47 See secs 16 & 8 respectively of the Pension Reform Act 2014.

48 See sec 1 of the National Health Insurance Scheme Act 1999.

49 The Nigeria Social Insurance Trust Fund Act 73 of 1993 is another legislation which hitherto has regulated the payment of retirement, disability and survivors' benefits for contributors to the Fund who work in the private sector of the economy. Although the Act has not been repealed, the benefit structure of the Fund has been harmonised with that of the public sector under the defined contribution scheme of the Pension Reform Act 2004, which has been re-enacted as the Pension Reform Act 2014.

50 Secs 16 & 54 respectively of the Labour Act 1974.

51 See secs 20, 24 & 16 respectively of the Unemployment Insurance Act 2001 (as amended).

that 'invalids, aged persons and widows who are not receiving social insurance benefits because they or their husbands, as the case may be, were not compulsorily insured, and whose income does not exceed a prescribed level', should be provided with a special maintenance allowance at prescribed rates, the vast majority of the Nigerian population, such as the aged, the disabled, the orphaned and the self employed who, more often than not, do not have any form of assistance from any quarters, are left without any form of a social safety net.[52] The best that these laws have offered those not ordinarily covered by them is to join the various schemes as voluntary members.[53] Indeed, among the positions covered in the organised private sector, these laws exclude positions where the number of employees is fewer than a particular number. For example, the Pension Reform Act in section 2(2) limits private sector participation to employees who are in the employment of an organisation in which there are 15 or more employees. Similarly, section 16 of the NHIS Act restricts coverage to positions in which the employer has a minimum of ten employees, and enrolment is even at the discretion of the employer. It is only under the Employees' Compensation Act that coverage has been extended to all employers and employees in the public and private sectors in Nigeria, including apprentices, casual workers and domestic servants who are not members of the families of their employers.[54] Notwithstanding, coverage under the law is not wide enough when compared to the laws of some other African countries like Algeria, Benin, Cameroon, Côte d'Ivoire, Tunisia and Senegal, where coverage for work injury compensation practically extends to all employees including the self-employed, students in technical schools, prisoners and wards of juvenile courts.[55] The self-employed, whether in the agricultural or manufacturing sector, are in the majority in Nigeria and are exposed daily to accidents on duty.

It is also worth noting that the formal sector covered by the available schemes represents only about 20 to 25 per cent of the Nigerian population. Thus, general coverage for social security in Nigeria is not in compliance with the classes of employees prescribed, constituting not less than 50 per cent of all employees, and also their wives and children.[56] While acknowledging the fact that many developing countries, especially in Africa, limit coverage for social

52 Para 17 of the Income Security Recommendation also provides that social insurance should afford protection, in the contingencies to which they are exposed, to all employed and self-employed persons, together with their dependants, in respect of whom it is practicable.

53 Sec 17(3) NHIS Act; sec 2(3) Pension Reform Act 2014 and Regulation 13 of the NSITF (General) Regulations) 1994 (Nigeria).

54 Secs 2(1) & 73 of the Act.

55 Social Security Administration and International Social Security Association *Social security programmes throughout the World: Africa, 2015* (2015) file:///C:/Users/MRS%20ANIFALAJE/Downloads/MagazineSSPT8.pdf (accessed 5 September 2017).

56 See eg arts 9, 15 & 27 of the Social Security (Minimum Standards) Convention 102 of 1952 in respect of medical care, sickness and old age benefits respectively.

security protection to only employees in the formal sector of the economy, it is remarkable that others, such as South Africa, Swaziland, Botswana, Mauritius, Namibia, Seychelles, Lesotho and Cape Verde, do have institutionalised schemes to provide protection to all their citizens, at least, for the contingency of old age, while some also have extended most of the other social security schemes to the self-employed.[57] Limiting social security coverage to those in the formal sector of the economy is clearly a vestige of colonialism which must be jettisoned by an independent Nigerian state. However, it is worth noting that a Bill which seeks to improve on the existing coverage of the NHIS is currently being considered by the National Assembly. The Bill, if passed into law, would repeal the NHIS Act and enact the National Health Insurance Commission Act. One of the reforms envisaged by the Bill is to make enrolment in the health insurance scheme mandatory for employers who have, at least, five employees in their employ.[58]

Another area of concern about the Nigerian laws on social security is the financing of the available schemes. The guiding principle on the share of the cost of benefits to be borne by the state, the employer and the employee is laid down in ILO Income Security Recommendation 67 of 1944 which stipulates that the cost of benefits, including the cost of administration, should be distributed among insured persons, employers and taxpayers, in such a way as to be equitable to insured persons and to avoid hardship to insured persons of small means or any disturbance to production.[59] Specifically, it requires that employers should be made to bear the entire cost of compensation for employment injury, that they should contribute not less than half the total cost of the other benefits and that the community should bear the cost of benefits which cannot be met by contributions, for example, contribution deficits resulting from bringing persons into insurance when they are already elderly; contingent liability involved in guaranteeing the payment of basic invalidity, old-age and survivors' benefits and the payment of adequate maternity benefit; liability resulting from the extended payment of unemployment benefits when unemployment persists at a high level; and subsidies to the insurance of self-employed persons of small means.[60] Similarly, article 71(1) of the Social Security (Minimum Standards) Convention of 1952 requires that the cost of benefits, including the cost of administration, should 'be borne collectively by way of insurance contributions or taxation or both in a manner which avoids hardship to persons of small means and takes into account the

57 See sec 10 of the Social Assistance Act 13 of 2004 (South Africa); Social Security Administration and International Social Security Association (n 55 above).

58 N Popoola 'FG set to make health insurance compulsory for employers' (2017) http://punchng.com/fg-set-to-make-health-insurance-compulsory-for-employers/ (accessed 5 September 2017).

59 See para 26 of the Income Security Recommendation 67 of 1944.

60 As above.

economic situation of the member and of the classes of persons protected'. Also, ILO Medical Care Recommendation 69 of 1944 stipulates that medical care may be provided by a social insurance medical care service or a public medical care service.

However, a distinction is drawn between the two services in terms of the way in which they are financed. On the one hand, as regards the social insurance medical care service, which normally is financed by means of contributions, the instrument stipulates that persons whose income does not exceed subsistence level should not be required to pay an insurance contribution and that the cost of the medical care service not covered by contributions should be borne by the tax payers. On the other hand, the cost of the public medical care service is required to be met out of public funds. Where the whole population is covered, it is recommended that the service be financed out of general revenue or by a special progressively-graded tax from which persons whose income does not exceed subsistence level should be exempted.

In Nigeria, with the exception of compensation for work injury under the Employees' Compensation Act which, traditionally, is financed exclusively by employers,[61] all available social security schemes are financed by means of contributions by employers and employees without any form of financial assistance from the government, contrary to the foregoing stipulated guidelines. For instance, section 4 of the Pension Reform Act makes prescribed contributions, payable by employees and employers, the major source of funding of the Retirement Savings Account (RSA) of each employee.[62] Also, the NHIS Act, in section 16, requires the payment of contributions by employers and employees, at such a rate and in such a manner as may be determined from time to time by the scheme's governing council. The sickness and maternity benefits that are available under the Labour Act are based on employer-liability schemes as opposed to social insurance schemes that are generally prescribed by international standards.[63] There is no government subsidy to any of these schemes, not even by way of subvention, to cover administration costs. Regrettably, whatever financial commitment the government has in respect of these schemes has been in its capacity as employer of specified employees, just as any other employer. It is also worth noting that Nigeria is yet to ratify the Social Security (Minimum Standards) Convention of 1952 or any of the ILO Conventions on social security. The government's perception of and response to unambiguous international instruments on social security in Nigeria are addressed below.

61 See para 26(5) of the Income Security Recommendation 1944 which provides that the entire cost of compensation for employment injuries should be contributed by employers.

62 Sec 4(3) of the PRA 2014, however, permits an employee to make voluntary contributions into his Retirement Savings Account if he or she so desires.

63 See eg art 8 of the Maternity Protection Convention 183 of 2000.

4 Nigeria's compliance with international legal instruments on social security

Nigeria is a state party to a number of international instruments which require state parties to protect and promote the right to social security. For example, on 29 July 1993 Nigeria ratified the ICESCR, which in article 9(1) requires state parties to assume a legal obligation to recognise 'the right of everyone to social security, including social insurance'. State parties are generally required to provide some form of social insurance scheme to protect people against the risks of sickness, disability, maternity, employment injury, unemployment or old age, to provide for survivors, orphans and those who cannot afford health care and to ensure that families are adequately supported. Benefits from such a scheme must be adequate, accessible to all and provided without discrimination.[64]

Also, with respect to medical benefits, Nigeria is a state party to a number of international and regional instruments wherein the right to health is recognised.[65] According to article 12(1) of the ICESCR, for example, state parties to the Covenant 'recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. Of particular note also is the African Charter, which Nigeria has not only ratified, but domesticated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[66] Article 16 of the Charter provides:

> (1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.
>
> (2) State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

In essence, medical benefits, in the context of the ILO's Social Security (Minimum Standards) Convention of 1952, ought to be provided to all. It is admitted, however, that the ICESCR has not conceptually defined what is meant by 'the highest attainable standard of physical and mental health, including the specific measures expected to be adopted by state parties to protect the health of their citizens, nor has the African Charter 'the best attainable state of physical and mental health' with any particular certainty. This, arguably, may constitute some hindrance to the enforcement of the right as enshrined in both instruments. Nevertheless, having ratified the ICESCR, Nigeria is to be guided by General Comment 14 of the Committee on Economic,

64 See ESCR Committee General Comment 9 'The right to social security' 4 February 2008 http://www.ohchr.org/english/bodies/cescr/discussion.htm (accessed 18 February 2015).

65 See eg art 25(1) Universal Declaration; arts 11(1)(f) and 12 CEDAW; art 24 CRC.

66 Cap A 9, LFN 2004, art 16.

Social and Cultural Rights (ESCR Committee)[67] which has given some clarification and operational guidelines to the provisions of article 12 of the Covenant. According to the Committee, the right to health encompasses not only the usual health care, but also a wide range of socio-economic factors that promote conditions in which people can lead a healthy life. This extends not only to timely and appropriate health care, but also to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water, and adequate sanitation, safe and healthy occupational and environmental conditions and access to health-related education and information, including sexual and reproductive health.[68] It is submitted, therefore, that although the African Charter is not superior to the Nigerian Constitution,[69] the constitutional provision concerning non-justiciability of the right to medical benefits in Nigeria could be overcome by taking into consideration the provisions of article 12 of the ICESCR and the interpretation guideline contained in General Comment 14 and other socio-economic rights in general, and through purposive judicial interpretation of the provisions of article 16 of the African Charter (Ratification and Enforcement) Act in particular.

Indeed, in *Abacha v Fawehinmi,*[70] the Supreme Court referred to its earlier decision in *Ogagu v State*,[71] and held that since the African Charter had become part of domestic law, the enforcement of its provisions, like all our other laws, falls within the judicial powers of the courts as provided for by the Constitution and laws relating thereto. It was held that the rights enumerated in the African Charter are enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court.[72] It is to be noted that, apparently, due to some pangs of conscience, successive Nigerian governments have

67 See ESCR Committee General Comment 14 'The right to the highest attainable standards of health' 11 August 2000 UN Doc E/C.12/2000/4, http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En (accessed 15 December 2014).

68 General Comment 14 (n 67 above) paras 4 & 11.

69 See, however, *Abacha & Others v Fawehinmi* (2000) 6 NWLR (Pt 660) 228, where the Supreme Court held that the African Charter was a special genus of law in the Nigerian legal and political system and that it had some international flavour and, in that sense, cannot be amended, watered down or sidetracked by any Nigerian law. It was further held that if there is a conflict between the African Charter and another statute, its provisions will prevail over those of that other statute for the reason that the legislature does not intend to breach an international obligation.

70 As above; see also *Ohakosim v COP* (2009) 15 NWLR (Pt 1164) 229 CA, where the Court of Appeal held that by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, LFN 2004, the Charter constitutes part of the laws of Nigeria and must be upheld by all courts in the country. The Court further held that Nigeria had given due recognition to the Charter by enshrining most of the rights and obligations guaranteed therein in Ch IV of the 1999 Constitution; see also sec 1 of the Act.

71 (1994) 9 NWLR (Pt 366) 1 SC.

72 See eg *Jonah Gbemre & Others v Shell Petroleum Development Company of Nigeria Ltd & Others* FHC/CS/B/153/2005, Federal High Court, Benin City, judgment of 14 November 2005 (unreported), where it was held that the right to life and dignity of the person as recognised in secs 33(1) and 34(1) of the 1999

taken a number of social welfare steps which are explicated upon below.

5 Social security as poverty alleviation and social protection programmes

Ideally, social security is a permanent social welfare structure which aims at a piecemeal and steady incremental improvement in the quality and standard of living of the citizenry. There is no gainsaying the fact that, in most developing communities such as Nigeria, there is a causal relationship between the absence of social security on the one hand, and poverty, on the other. However, the government initiatives which focus on temporary or permanent poverty eradication, are not social security measures, but are *transient* steps taken to form a suitable foundation on which social security programmes may be based. For example, in 2004 a survey of policies and interventions of various administrations on issues of poverty revealed 28 federal projects and programmes with poverty-reduction aims.[73] These include community banks; the Family Support Programme; the National Directorate of Employment; the Peoples' Bank; Better Life for Rural Women; and the Directorate of Food, Road and Rural Infrastructure. These are some of the programmes that were established to address various manifestations of poverty, such as unemployment, lack of access to credit and rural and gender dimensions of poverty.

Also, since 1999 the federal government has undertaken a series of initiatives aimed at addressing poverty and other socio-economic challenges confronting the country's population. These include the National Economic Empowerment and Development Strategy (NEEDS), replicated in the various states and local governments as the State Economic Empowerment and Development Strategy and Local Economic Empowerment and Development Strategy respectively; and the National Poverty Eradication Programme (NAPEP).The principal goals of NEEDS include reorienting values, reducing poverty, creating wealth, and generating employment.[74] The NAPEP focuses attention on co-ordinating all the poverty eradication programmes or activities of other arms of government, as well as people's economic empowerment, especially vulnerable groups, such as women and the young unemployed graduates of universities or other vocational

Constitution and arts 4, 16 and 24 on the right to life, health care and satisfactory environment respectively of the African Charter Act inevitably include the right to clean, poison-free, pollution-free and healthy environment, thereby invariably upholding the right to a healthy environment contained in section 20 of the 1999 Constitution, which is a Directive Principle.

73 National Planning Commission *National economic empowerment and development strategy* (2004) 33.

74 National Planning Commission (n 73 above) IX.

institutions.[75] In 2002 alone, the Poverty Eradication Fund[76] allocated to the core poverty-eradication ministries and agencies a total of ₦ 132 47 billion ($1,10 billion).[77]

Also, in 2008, the Yar'Adua-led administration distributed the sum of ₦ 1 billion ($8,47 million)[78] to a total of 12 000 poor households for investment in micro–businesses under a presidential pet project known as In Care of the People (COPE) Programme, Poverty Reduction Accelerator Investment (PRAI). The project was implemented by NAPEP, in conjunction with the former office of the Millennium Development Goals and the Small and Medium Enterprises Development Agency.[79] The project was said to be Nigeria's own Conditional Cash Transfer (CCT) initiative aimed at reducing vulnerabilities and intergenerational poverty amongst extremely poor households.[80] However, one could hardly find any equity in or justification for distributing ₦1 billion ($8,47 million) to only 12 000 poor households out of the then estimated 70 million

75 See M Oloja & M Onuorah 'NAPEP is creating a new class of self-employed' *The Guardian* 19 June 2005 27.

76 See Central Bank of Nigeria *Central Bank of Nigeria Annual Report and Statement of Accounts 2002* Abuja: Central Bank of Nigeria 54.

77 The official average US dollar exchange rate to naira in 2002 was ₦ 120 http://www.indexmundi.com/facts/nigeria/official-exchange-rate (accessed 6 September 2017).

78 The official average US dollar exchange rate to naira in 2008 was ₦ 180.

79 Editorial 'How not to alleviate poverty' *The Guardian* 11 January 2008 14.

80 The Conditional Cash Transfer (CCT) programme provides regular cash benefits to all families, or to poor families in particular, and have been found to have a strong impact on various dimensions of human development whether they are explicitly linked to health and education-related conditions or not. The idea of the CCT programme was first introduced in Mexico with the establishment of the *Progresa/Oportunidades* programme; ILO *World Social Protection Report 2014/15. Building economic recovery, inclusive development and social justice* www.Ilo.org/publns. 46 (accessed 21 December 2015). In Africa, the Livingstone Call for Action 2006, *inter allia,* called on African governments to utilise the option of developing national social protection frameworks and cash transfer programmes that would provide social pension and social transfers to vulnerable children, older persons and persons with disabilities and households. At present, a number of CCT programmes have been established in some African countries. These include Cameroon's Social Safety Net Project which targets close to 65 000 rural and urban households in five regions of the country, including 5 000 urban households in the cities of Douala and Yaounde. The project includes a cash transfer programme and it also co-ordinates income-generating activities for the poorest. See O Hegba 'A cash transfer programme improves the lives of Cameroon's poorest families' (2016) http://www.worldbank.org/en/news/feature/2016/03/03/a-cash-transfer-program-improves-the-lives-of-cameroons-poorest-families (accessed 5 September 2017); the Tanzania's cash transfer programme, a part of the country's Productive Social Safety Net Project which aims to increase food security among vulnerable groups, improve access to health and education services, and enhance and protect the human capital investment in children. See World Bank Group 'Tanzania's conditional cash transfer programme helps reduce extreme poverty' (2016) http://www.worldbank.org/en/news/feature/2016/11/18/tanzanias-conditional-cash-transfer-program-helps-reduce-extreme-poverty (accessed 5 September 2017); the Ghanaian Livelihood Empowerment Against Poverty Programme (LEAP) currently implemented in about half of Ghana's districts; and Mozambique's *Programa Subsidio de Alimentos* cash transfer programme; ILO *World Social Protection Report 2014/15.*

poor people. Such a programme was not a social security measure and could not be said to have achieved its primary objectives, as it was targeted at only a negligible few of the potentially-qualifying households.

The Jonathan-led administration also inaugurated a number of programmes, such as the Youth Enterprise With Innovation in Nigeria (YouWin), funded in part from the ₦ 50 billion ($326 million)[81] Job Creation Fund, which was set aside in the 2011 budget. The YouWin was an innovative business plan targeted at owners of existing formal and informal businesses and geared towards harnessing the creative energies of young people between the ages of 18 and 35 years. The programme was expected to create between 80 000 and 110 000 sustainable jobs over a four-year period.[82] Another programme was the Subsidy Reinvestment and Empowerment Programme (Sure-P) aimed at creating employment for the unemployed, particularly the youth, through public work schemes. One of the objectives of the Sure-P was to enhance the employability of at least 50 000 unemployed graduates in the 36 states of the Federation by improving their skills through job placement.[83] As of 2014, the YouWin programme was said to have had 3 600 winners, among whom 2 400 winners were said to have created 27 000 jobs, while the SURE-P was said to have created 120 000 jobs.[84]

In the 2016-2018 Medium-Term Expenditure Framework and Fiscal Strategy Paper presented to the National Assembly, the Buhari-led administration proposed to spend ₦500 billion ($1,63 billion)[85] on social services to cater for the needs of the youth and other vulnerable groups. In the proposal, which has been approved by the National Assembly, the Social Welfare Programme, which is planned to be executed in phases, is to take care of the school-feeding programme initiative where 5,5 million children are to be fed for 200 school days, and the Conditional Cash Transfer under which a ₦ 5 000,00 ($16,39) monthly stipend would be paid to one million beneficiaries considered to be the most vulnerable and poor, and a post-NYSC grant.[86]

State governments, in conjunction with their respective local governments, have acted *in tandem* through a number of policy initiatives to bring government activities to bear at the sub-national

81 The official average US dollar exchange rate to naira in 2011 was ₦ 153.

82 O Adetayo & J Onuba 'Jonathan unveils initiative to create 110 000 jobs' *The Punch* 22 October 2011 19.

83 S Aborisade 'Unemployment: Sure-P boss decries firms' response to GIS' *The Punch* 21 August 2013 38.

84 See Anon '1.8 million graduates enter job market yearly – FG' *The Punch* 2 April 2014 2.

85 The official average US dollar exchange rate to naira in 2016 was ₦ 305 https://www.cbn.gov.ng/rates/exrate.asp?year=2016 (accessed 6 September 2017).

86 See J Ameh & S Aborisade 'FG to spend N500 bn on poor Nigerians in 2016' *The Punch* 9 December 2015 3.

level. The focus has been on issues relating to the socio-economic development of the poor, marginalised sections of society and vulnerable groups, such as the aged and children. Several programmes, geared towards social protection, especially in the area of health care services and old age benefits, have thus been instituted. For instance, a health programme tagged *Gbomoro* aimed at increasing the access of low-income pregnant women to basic health care, and a contributory community-based health insurance scheme tagged *Araya,* that provides healthcare services to those within the ages of five and 69 who are not covered under the NHIS, have been established by the Ibikunle-led administration in Ogun state. The latter scheme also provides free health care services to vulnerable members of the community, such as pregnant mothers, children under five, and the aged above 70 years of age.[87] A similar scheme was established in Oyo state by the Ajimobi-led administration in 2014 in four local government areas of the state, including Ibadan South-West, Ibadan South-East, Saki-West and Ogbomoso East local governments and by the Ondo state government in 2011, where about 12 local governments were said to be beneficiaries.[88] An unemployment assistance scheme, called a Youth Empowerment Scheme, was initiated in 2005 in Kogi state to provide unemployment benefits to over 5 000 youths.[89]

While it cannot be disputed that most of the afore-mentioned programmes are laudable in their objectives, the number of beneficiaries still remains an insignificant fraction of the whole, and most of the programmes have not had any visible impact on the suffering masses. In a World Bank Country Programme Portfolio Review for 2013, the country director for Nigeria, Marie Francoise Marie-Nelly, disclosed that about 100 million out of the 1,2 billion people in the world that live in destitution are Nigerians.[90] Nigeria's Human Development Index for 2014 was 0.514, which positioned the country in the low human development category and also occupied 152 out of 188 countries and territories considered for that year.[91] This status was still maintained by the country in 2016.[92] Although revenue from crude oil increased for decades before it plummeted in

87 S Awoyinfa 'Amosun boosts maternal, child health with incentives' *The Punch* 30 April 2014 63.

88 See Anon 'Ondo health care' *The Punch* 3 November 2011 11.

89 R Agbana 'Kogi to pay jobless youths ₦ 4 500 monthly' The *Guardian* 29 April 2005 5.

90 Special Feature 'A nation and its many faces of destitution' *The Guardian* 28 November 2013 26.

91 See UNDP *Human Development Report* (2015) http://www.hdrstats.undp.org/images/explanations/NGA,pdf (accessed 2 April 2016).

92 L Nwabughiogu 'Nigeria still ranked 152nd in 2016 human development index by UNDP' www.vanguard.com/2016/08/nigeria-still-ranked-152nd-2016-human-development-index-undp-2/ (accessed 5 February 2017).

2015,[93] and Nigeria has had impressive growth performance over the years, which accounted for its being rated as the largest economy on the continent of Africa ahead of South Africa and 26th globally,[94] this has not translated into prosperity for its people in terms of *per capita* income and individual living standards as the majority of Nigerians have continued to fall deeper into poverty.

In the same vein, the level of unemployment in the country has worsened over the years. For the first quarter of 2016, the National Bureau of Statistics puts the percentage of the unemployed at 12,1 per cent, up from 10,4 per cent in the fourth quarter of 2015. Underemployment is said to have increased from 18,7 per cent to 19,1 per cent in the same period.[95] The current figures represent not only wasted personal opportunities and squandered national resources, but also provide an environment where idle hands can create mischief for society.

Furthermore, experience has shown that none of the afore-mentioned national or state programmes instituted by successive administrations has had a lasting and sustainable positive effect. Most of the programmes have either been completely abrogated or whittled down by successive governments, mostly because there was no legal framework to support them. In this respect it is gratifying to note that Jigawa, a state that has adopted the contributory pension scheme of the PRA 2014, has modified the provisions of the law to include participation of people in the informal sector, such as commercial motorcycle operators, artisans and craftsmen. This state also provides for a disability allowance to the disabled.[96] Similarly, Ekiti state has specifically enacted the Social Security Law of 2012 according to which free health care services and old age benefits of ₦ 5 000,00 ($31,64)[97] are provided monthly to persons aged 65 years who are residents of the state.[98] The programme, which started in 2011, was said to have benefited about 25 000 elderly persons by the end of 2014.

93 Eg, in 2007 the African Development Bank put the nation's oil wealth in the preceding 45 years at N84 trillion ($666.67 billion). See Editorial 'Improving the quality of life in Nigeria' *The Guardian* 8 January 2007 12.

94 According to the National Bureau of Statistics, after rebasing the economy, the nation's gross domestic product stood at $510 bn ahead of South Africa's $370 bn. In the first quarter of 2014, real GDP growth was put at 6.21 per cent, which was higher than the corresponding quarter of 2013. See J Onuba & O Abioye 'Nigeria, now Africa's biggest economy, overtakes S Africa' *The Punch* 7 April 2014 27.

95 See S Aborisade & O Adetayo 'Nigeria in volatile situation, says Buhari' *The Punch* 26 May 2016 2.

96 Anon 'Jigawa amends contributory pension scheme' *The Guardian* 22 February 2005 51.

97 The official average US dollar exchange rate to naira in 2014 was ₦ 158.

98 S Salawudeen 'Ekiti: The journey to welfare state' (2014) http://www.thenationonlineng.net/ekiti-the-journey-to-welfare-state/ (accessed 5 September 2017).

Moreover, while social security benefits are founded on the notion of individual rights,[99] which are recognised and protected by the law and may be claimed as an individual entitlement, none of the services or benefits available under any of the afore-mentioned poverty alleviation programmes can as of right be claimed by anyone as they are not anchored in any legislation. There is no gainsaying the fact that legislation is indispensable for the protection of all human rights, including socio-economic rights such as social security. A sound legislative foundation provides a firm basis to protect such rights and to enforce them in case of violations. This is one reason why some of the proposed welfare programmes of the Buhari-led administration should be rooted in legislation validly promulgated by the National Assembly. This will move these programmes from the realm of political commitment to a legal obligation on the part of government and ensure their long-term sustainability. However, there is a need to collaborate with state and local governments for effective implementation.

6 Conclusion

The provision of social security is a responsibility owed by the government to all citizens and not to a particular segment of society. 'People', as used in section 14(2)(b) of the 1999 Nigerian Constitution, are not limited to people working in the formal economy but, indeed, applies to all Nigerian citizens. The preferential protection given in Nigerian law on social security to workers in the formal sector cannot be justified in a country professing to uphold the rule of law, which basic components have gone beyond the subordination of every person to the law and separation of powers, to include the guarantee of rights and the principle of social justice.[100] Social security organised on the basis of rights established through formal wage employment will do nothing for those who cannot earn a living or the poor majority who, at most, have only a marginal place in the formal wage economy. It is evident that the working class in Nigeria constitutes a small percentage of Nigeria's population – the self-employed, the physically and mentally-disabled persons, women outside the labour force caring for children or other dependants, low and irregular earners, such as farmers, artisans and the unemployed – who are yet to be provided with any social safety net and who would suffer hardship or require public support or both when contingencies requiring income support arise. As such, paragraph 5 of the ILO Social Protection Floors Recommendation of 2012[101] enjoins member states

99 A 'right' has been defined as 'something that is due to a person by just claim, legal guarantee, or moral principle; a legally enforceable claim that another will do or will not do a given act; a recognised and protected interest, the violation of which is a wrong'. See BA Garner *Black's law dictionary* (2009) 1436.

100 Sec 14(1) of the 1999 Nigerian Constitution provides that '[t]he Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice'.

to establish social protection floors comprising a basic social security guarantee that includes access to essential health care and basic income security for children and for persons who are unable to earn a sufficient income, particularly in cases of sickness, unemployment, maternity and disability as well as for older persons.[102] Therefore, there is a dire need for the due implementation of the right to social security in the country in order to guarantee the necessary support to all, not only in the event of loss of earning, but also against all forms of eventualities that could lead to widespread economic deprivation.

In this respect it is important to fully embrace the concept of social and economic rights which include not only the right to economic welfare and security, but also the right to share to the full in the social heritage and to live the life of civilised beings, according to the standards prevailing in society.[103] The cardinal objective of socio-economic rights is distributional equity, that is, the increasing diffusion of benefits of growth to the population, which is the fulcrum of social security.[104] Thus, in addition to the legislative *fiat,* which the Nigerian Supreme Court has ruled could be used to enforce the provisions of Chapter II of the Nigerian Constitution, the Nigerian courts, through a pro-active interpretation of the relevant constitutional provisions, in appropriate cases, can make the rights contained in the Directive Principles justiciable rights. The approach of the Ghanaian and Indian courts to Directive Principles of State Policy is commendable and should be emulated by Nigeria to further the ends of liberty, equity and justice in Nigeria and to ensure that government performs its obligation of providing social security to the people.[105] What is generally required is for the Nigerian policy makers

101 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R202 (accessed 6 September 2017).

102 See also, eg, the Yaounde Tripartite Declaration on the Implementation of the Social Protection Floor 2010 which, *inter alia,* enjoins member states to promote social security mechanisms adapted to the informal economy (n 16 above).

103 TH Marshall *Sociology at the crossroads* (1963) 74.

104 J Donnelly 'Repression and development: The political contingency of human rights' in D Forsythe (ed) *Trade-offs, human rights and development: International views* (1989) 307; see also CJ Friedrich *The philosophy of law in historical perspectives* (1963) 21; L Lloyd & MDA Freeman *Lloyd's introduction to jurisprudence* (1985) 566.

105 The approach of the Indian courts to Fundamental Objectives and Directive Principles, it has been noted, should commend itself to the Nigerian judiciary, not only because its concept of Directive Principles originated from the Indian Constitution, but more so because of the striking similarity in prevailing socio-economic conditions in both countries, particularly in terms of oligarchic insensitivity to human suffering, wanton deprivations and widening disparity in life expectancy between the less-privileged and affluent individuals. See O Nnamuchi 'Kleptocracy and its many faces: The challenges of justiciability of the right to health care in Nigeria' (2008) 52 *Journal of African Law* 1 10.

to muster enough political will to commit a sufficient budgetary allocation to the institutionalisation and 'progressive realisation'[106] of a viable all-inclusive social security scheme in our laws. If there is no public or constitutional provision compelling government to provide social services, such as social security, the only measure of the utility of such services, presumably, would be their ultimate economic cost. There is a compelling need, therefore, to establish non-contributory tax-financed schemes that would provide a social safety net to those in the informal sector. Also, as a crucial step towards ensuring the due implementation of the right to social security in Nigeria, it is essential for Nigeria to ratify and domesticate key ILO conventions on social security, especially the Social Security (Minimum Standards) Convention 102 of 1952 which five other African countries, namely, the Democratic Republic of the Congo, Libyan Arab Jamahiriya, Mauritania, Niger and Senegal have ratified.[107]

It is indisputable that the only viable option for the immediate and rapid socio-economic emancipation in Nigeria and the renaissance of virtue and patriotism lies in the implementation of the right to social security with seriousness of purpose. To delay this will be at the peril of the country.

106 See art 2(1) of the ICESCR. The 'progressive realisation' formulation, it has been explained, connotes that the state's obligation is dynamic and it should increase over time. It is a recognition of the fact that the full realisation of rights, such as the socio-economic rights contained in the ICESCR, will generally not be able to be achieved in a short period of time. Thus, a state may not merely assert a lack of available funding as justification for doing nothing to advance a social right, such as social security. See Christiansen (n 35 above); M Ssenyonjo 'Reflections on state obligations with respect to economic, social and cultural rights in international human rights law' (2011) 15 *International Journal of Human Rights* 969 977.

107 *Social protection* http://www.social-protection.org/gimi/gess/ShowTheme.do?tid=722 (accessed 6 September 2017).

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Correct but wrong: A critical analysis of recent jurisprudence on the proper test for release pending appeal applications in Malawi

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Summary

In Kumuwa v Republic*, the High Court of Malawi held that the Constitution did not distinguish between release before and after conviction. Relying on section 42 of the Constitution, which provides for the right to be released from detention with or without bail unless the interests of justice require otherwise, the Court reasoned that there was one test for release: the interests of justice. This position was rejected by the same Court in* Uche v Republic*. The Malawi Supreme Court of Appeal in* Kumwembe v Republic *upheld the correctness of Uche, and reiterated that the Constitution had not changed the traditional test of exceptional circumstances for release pending appeal. This article argues that Kumuwa rightly identified the test as the interests of justice, but erred in finding that the constitutional premise was the right in section 42. Consequently,* Uche *and* Kumwembe *miss the point when they discard the test advanced in Kumuwa solely on this faulty constitutional premise. The article aims to discuss the Court's reasoning and evaluate it in light of the law and jurisprudence on the proper test for granting release pending appeal.*

Key words: *Malawi;* Uche v Republic*;* Kumuwa v Republic*; bail; release pending appeal; interests of justice*

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1 Introduction

Malawian courts have always distinguished between release pending trial and release pending appeal. The test for release pending trial is derived from the right of all accused persons to be released from detention with or without bail unless the interests of justice require otherwise.[1] This means that before conviction, release is automatic unless the state discharges its onus of showing that the interests of justice require the further detention of the suspect. Accordingly, an accused need not apply for release, but a court must, on its own motion, release the accused. However, after conviction, the legal status of an offender changes and the consideration for release has been held to hinge on whether there are exceptional and unusual circumstances warranting release pending appeal, with the onus at this stage cast on the offender to persuade a court to release him or her from custody.

In *Kumuwa v Republic*,[2] the High Court of Malawi held that this approach to release an applicant pending appeal was fundamentally flawed as it did not take cognisance of the Constitution, particularly section 42, which guarantees the right to be released from detention unless the interests of justice require otherwise. The Court reasoned that the Constitution, therefore, dictated the interests of justice as the proper test for release both before and after conviction. This decision is significant, as it not only upsets the settled approach to release pending appeal, but also raises complex issues about the onus of proof in applications for release pending appeal and the legal status of a trial court's sentence. *Kumuwa* was later rejected by the High Court in *Uche v Republic*[3] and by the Malawi Supreme Court of Appeal (MSCA) in *Kumwembe v Republic*.[4] Both decisions reiterated that the Constitution had not changed the traditional test of exceptional circumstances for release pending appeal.

The article seeks to highlight the soundness of the Court's reasoning in *Kumuwa*, and to assess whether the conclusion reached is legally tenable. It also examines the premise on which *Uche* and *Kumwembe* differed from *Kumuwa*. The article argues that *Kumuwa* rightly identified the proper test for granting release pending appeal as the interests of justice. However, it erred in its conclusion that the justification for this test springs from section 42. Consequently, *Uche* and *Kumwembe* miss the point when they discard the test advanced in *Kumuwa* solely on this faulty constitutional premise. It is apposite to begin with a brief overview of case law in Malawi on the release of an applicant pending appeal leading up to *Kumuwa*.

1 Sec 42(2)(e) 1994 Malawian Constitution.
2 Bail Application Case 107 of 2012.
3 Criminal Appeal 110 of 2015.
4 MSCA Criminal Appeal 13 of 2015.

2 Test for release pending appeal

There is no statutory guidance on the test applicable to release pending appeal. Section 118 of the Criminal Procedure and Evidence Code (CPEC)[5] and the Bail Guidelines Act[6] are limited to pre-trial release. However, there is no gap in the law because judicial precedent provides ample instruction on how a court must approach the question of release pending appeal. In the 1971 case of *Pandirker v Republic*,[7] Justice Chatsika held that release pending appeal should be granted only when the accused shows that there are exceptional circumstances warranting it.[8] Over 20 years later, the judge reinforced this position in *Chihana v Republic*:[9]

> In an application for bail pending an appeal, it has to be borne in mind that, upon conviction, the applicant lost his freedom of movement. In essence, conviction is followed by punishment. The authorities have a duty to restrict, as one of the forms of the punishment, his freedom, on the basis of the conviction. He is no longer a free man. Therefore, in order to grant freedom to such a person whose fundamental freedom has been lost by the conviction, there must exist some 'exceptional and unusual circumstances'. In other words, the case must be so exceptional and unusual that having regard to all the circumstances surrounding it, the court will be justified in overlooking the order for his imprisonment and make a counter order that he be released, at least until his appeal has been determined.

This test has survived the constitutional era as confirmed in several cases by the Malawi Supreme Court of Appeal (MSCA). In *Suleman v Republic*,[10] Justice of Appeal Tembo stated that the test espoused in *Chihana* was an 'authoritative enunciation' of the law applicable to applications for release pending appeal. The threshold for 'exceptional and unusual circumstances' is high. In *Kaliati v Republic*, it was held that release pending appeal

> is the exception rather than the norm. Put slightly differently, the law presumes the sentence passed on a convict by any court of law to be right, and to remain right and deserving to be undergone until such time as a superior court has had a chance to look at it and to pronounce it otherwise. The law accordingly only allows interference with such sentence by way of staying its operation, whilst awaiting an appeal if and only if the convict succeeds to dispel the applicable presumption by bringing to the attention of the court he is applying to for bail, circumstances that are visibly and convincingly 'special' or 'exceptional'.[11]

5 Ch 8:01 Laws of Malawi.
6 Ch 8:05 Laws of Malawi.
7 [1971-72] 6 ALR Mal 204 (HC).
8 See also *Nyirenda v Republic* [1975-1977] 8 ALR Mal 273 (HC).
9 *Chihana v Republic* [1992] 15 MLR 71 (HC).
10 *Suleman v Republic* [2004] MLR 398 (SCA) 401. See also *Mpunga v Republic* [1995] 2 MLR 528 (SCA).
11 Miscellaneous Criminal Application 236 of 2006.

What amounts to an 'exceptional circumstance' has not been the subject of much legal debate in Malawi. The difficulty of precisely defining this phrase has correctly been described as a 'legal headache'.[12] It stands to reason that if the test is 'exceptional and unusual circumstances', then it is impossible to have an exhaustive list of exceptional circumstances as each case will turn on its own facts, and a court will have to exercise its discretion in deciding whether the test is met or not. Indeed,

> [i]f the court takes into account factors already on the case roll they might be exhaustive, but with the changing world, they may not. There is the likelihood of new exceptional circumstances resurfacing as and when social and mankind behavioural changes occur in the present world.[13]

Case law indicates that exceptional circumstances include the following: the possibility that the appeal will be successful;[14] a missing court record;[15] delays in the appeal process, for instance, due to the preparation of the court record;[16] poor health of the accused;[17] a real possibility that the accused will raise money to pay a fine while on bail;[18] the unavailability or inaccuracy of the court record;[19] the likelihood that the appeal cannot be concluded within a reasonably short time;[20] the risk that the sentence will be served by the time the appeal is heard;[21] and whether a conviction on a lesser offence would be competent.[22] Unless 'exceptional', the fact that the accused person's family will suffer hardship as a result of imprisonment does not constitute an exceptional circumstance.[23] Good character of the

12 M Kufa 'Cry the beloved bail: Exceptional circumstances in interlocutory proceedings in the magistrate's court' 31 October 2012 http://macgregorkufa.blogspot.co.za/2012/10/cry-beloved-bail-exceptional.html (accessed 9 April 2016).

13 *Chikwewa v Republic* [1995] 1 MLR 65 (HC) 68.

14 *Manuel & Others v Republic* (Ruling) [2017] MWHC 92; *Chimbanga v Republic* (Ruling) [2017] MWHC 59; *Willard v Republic* [2016] MWHC 621; *Republic v Kumwembe & Others* (Bail Pending Appeal) [2016] MWHC 570; *S v Mkandawire; In Re: Application for Bail under s 355(1) of the Criminal Procedure and Evidence Code* [2008] MWHC 160.

15 *Mila v Republic* Criminal Appeal 16 of 2005.

16 *Chikwewa* (n 13 above).

17 See bail pending appeal application in Mwawa v Republic Criminal Appeal 50 of 2006 3 (referring to the fact that the accused had been granted release pending appeal on account of his poor health).

18 *Goode v Republic* [1971-1971] 6 ALR Mal 357 (HC).

19 *Sumaili v R* [1961-1963] 2 ALR Mal 552 (HC), where the accused may be released on bail where the record of the lower court's record had been questioned, necessitating the submission of affidavits from the court itself. This was done independently of the likelihood of success.

20 *Pandirker* (n 7 above).

21 *Sadar v Republic* [1995] 1 MLR 233 (HC).

22 *Pandirker* (n 7 above).

23 *Nathebe v Republic* Miscellaneous Criminal Application 90 of 1997 (HC). This flows from the fact that domestic problems are considered irrelevant to sentencing: See *Republic v Mutawo* Confirmation Case 237 of 1999; *Republic v Eneya* Criminal Case 53 of 2000.

applicant is also irrelevant.[24]

It is worth noting that the courts have not been consistent in their approach to these factors. While it is understandable that a factor may be considered exceptional in one case and not in another in view of the facts of the case at hand, it is disturbing when a factor is accepted as sufficient in one case and rejected out of hand in another. This is well exemplified by factors such as ill-health,[25] a missing court record[26] and the likelihood of a sentence being served before the appeal is concluded.[27]

Exceptional circumstances are not examined in isolation. Once an exceptional circumstance has been proved, some considerations applicable to release pending trial come into play *mutatis mutandis*. The primary consideration is whether the accused will attend the appeal hearings.[28] Release, therefore, will not be granted unless the court is satisfied that the accused will not abscond. In deciding this question, a court may take into account the fact that the accused was earlier released on and honoured his bail pending trial.

However, as rightly observed by the MSCA, the jurisprudence indicates 'that generally courts are loath, and indeed very reluctant, to admit new instances or categories of exceptional and unusual circumstances outside and beyond the parameters' of the likelihood that the appeal will succeed or because of the risk that the sentence will have been served by the time the appeal is heard.[29] In fact, courts tend to emphasise the existence of exceptional and unusual circumstances as the requirement and not the interests of justice. In *Chihana*, Justice Chatsika went a step further to add a concurrency requirement:[30]

> It seems that where it appears, prima facie, that the appeal is likely to be successful or where there is a risk that the sentence will be served by the time the appeal will be heard, the test will have been satisfied. I think that

24 See *Goode v Republic* [1971-1972] 6 ALR Mal 357 (HC).

25 This factor was rejected outright in *Suleman* (n 10 above) and *Osman v Republic* Miscellaneous Criminal Appeal 65 of 2004. However, the suggestion in *Nwangwu v Republic* Criminal Appeal 104 of 2007 and *Chitapa v Republic* Miscellaneous Criminal Application 190 of 2001 is that ill health is exceptional unless there is adequate medical treatment in prison.

26 This factor was rejected outright in *Kaliati v Republic* Miscellaneous Criminal Application 236 of 2006; *Denja v Republic* Miscellaneous Criminal Application 191 of 2001; *Mila* (n 15 above); and *Chitapa v Republic* Miscellaneous Criminal Application 190 of 2001, but accepted in *Mponda v Republic* Criminal Appeal 11 of 2005.

27 This factor was rejected outright in *Chikwewa* (n 13 above) but accepted in *Nomale v Republic* Criminal Appeal 178 of 2008; *Mkandawire v The State* Miscellaneous Criminal Application 175 of 2008; and *Mussa v Republic* Criminal Cause 65 of 2008.

28 *Republic v Allen* [1966-1968] 4 ALR Mal 549 (HC); *Njoloma v Republic* [1971-1972] 6 ALR Mal 393 (HC).

29 *Suleman* (n 10 above) 402, citing *Chihana* (n 9 above).

30 *Chihana* (n 9 above)

> the two factors must exist concurrently in order for the condition to be satisfied.

This was reiterated by Justice Unyolo in *Kamaliza v Republic*.[31]

The major problem with this reasoning is that it fails to recognise that the likelihood of success and undue delay are only examples of exceptional and unusual circumstances.[32] This raises many difficulties in determining how to deal with various factors in release pending appeal applications. Indeed, the case law suggests that these two factors often are overemphasised, such that other potential circumstances are overlooked. In *Nathebe* it was held that '[t]he only matter to consider is whether *prima facie* there is a likelihood that the appeal here will succeed'.[33] This leads to release being denied where it should have been granted, such as where the court record is missing.

A second problem with the concurrency requirement is that it inhibits a court's ability to independently deal with the likelihood of the sentence being served, yet this factor goes to the root of release pending appeal which is to avoid the execution of a sentence of imprisonment until it has been confirmed by a higher court. Moreover, the success of the appeal is obviously not considered fully during the bail application.[34] Here again, requiring that the likelihood of success should be the overriding consideration becomes problematic.

In view of these challenges arising from the concurrency requirement, the decision of the MSCA in *Suleman* should be welcomed to the extent that it clarifies the fact that this requirement is erroneous. However, the decision is a source of greater dissatisfaction about what the meaning of the exceptional and unusual circumstance test is. The Court in *Suleman* correctly pointed out that the concurrency requirement was not supported by case law, let alone the case law cited in *Chihana* itself:[35]

> It is submitted that the expression 'exceptional and unusual circumstances' in that context [of applications for release pending appeal] means circumstances where, on the one hand, it appears prima facie that the appeal is likely to be successful or, on the other hand, where there is a risk that the sentence will have been served by the time the appeal is heard. Where either of these factors exist, the court may grant an application for bail pending appeal. Thus, it must be fully and clearly appreciated that the existence of either of those factors, standing on its own, sufficiently constitutes a requisite condition precedent for the granting of such application by the courts.

31 [1993] 16(1) MLR 196 (HC). See also *Nomale* (n 27 above).

32 *Alfred v Republic* Miscellaneous Criminal Application 6 of 1993.

33 *Nathebe* (n 23 above) 1.

34 Courts do at times go into greater detail in determining the likelihood of success, such as in *Nomale* (n 27 above) 9-13.

35 *Suleman* (n 10 above) 401.

The Court then, quite unexpectedly, went on to hold that there were but two exceptional and unusual circumstances:[36]

> To begin with, it must be pointed out that [an application for release pending appeal] ought to be considered and determined on the basis of the existence of exceptional and unusual circumstances in the case; that is to say in the light, and within the parameters, of either of the factors, which courts have prescribed as conditions precedent to the granting of application for bail pending appeal. In the view of case authorities on the point, all the arguments made in support of the application, on the one hand, on the basis of the applicant's status and financial commitments, as a very successful businessman and, on the other hand, respecting his ill-health are matters which do not constitute exceptional and unusual circumstances. It is so held in that regard. Whilst heeding the above mentioned caution in the matter, I must nonetheless ask myself the following questions. Thus, having read the judgment in the case, including the relevant court record, do I hold the impression that the appellant's appeal has a fair chance of being successful? If my response is not in the affirmative, and only then alternatively, do I hold the view that the sentence will have expired by the time the appeal shall have been determined?

Granted, this disjunctive approach in *Suleman* is a slightly more flexible approach than the concurrency requirement in *Chihana* and *Kamaliza*, and resolves some of the challenges raised earlier. However, the approach in *Suleman* has its setbacks. For example, it is still restrictive in that it limits the scope of exceptional and unusual circumstances to the likelihood of success of an appeal and the risk that the sentence may have been served by the time the appeal is heard. *Suleman* is also not wholly in tandem with precedent. The Court was clear that courts are reluctant to extend the scope of exceptional and unusual circumstances beyond these two factors.[37] While it is true that most of the factors considered as exceptional or unusual by the courts relate to the likelihood of a successful appeal and the risk of the sentence being served before the appeal is determined, there are other factors that have been held to satisfy the test.[38] Hence, the conclusion in *Suleman* is regrettable since there are many instances where the interests of justice may require that release pending appeal should be granted. A further fault in *Suleman* is that it is irreconcilable with the fact noted earlier, that it is impossible to have an exhaustive list of exceptional and unusual circumstances. Actually, it flies in the face of the very meaning of the notion of 'unusual and exceptional circumstances' in everyday language to hold that the circumstances in fact are only two. Such a conclusion effectively means that the circumstances are no longer 'exceptional' or 'unusual' in any sense of the word. According to the *Oxford English dictionary*, 'exceptional' means 'very unusual', while 'unusual' entails 'different from what is usual or normal'. It follows from this that once the

36 *Suleman* 402.
37 As above.
38 See cases cited in nn 15-22 above.

circumstances are reduced to two, they lose the character of being exceptional or unusual.

Given this background, it was not unexpected that the High Court sought to set the record straight on the proper test for release pending appeal in *Kumuwa*. Whether the Court got it right this time around is considered below.

3 *Kumuwa v Republic*

The three accused were serving a 10-year default sentence for the theft of cattle. In their application for release pending appeal, the appellants argued that the appeal was likely to succeed and that there was a possibility that the appeal would be delayed in view of the backlog of cases to be heard by the Court. While the Court raised and dealt with a number of issues in its judgment, it is the finding on the application for release that is of importance for present purposes.

Justice Mwaungulu criticised the test of exceptional and unusual circumstances as inadequate and unconstitutional. He held that 'there are bound to be cases of usual and unexceptional nature where, pending an appeal, the court may grant bail or stay execution of a sentence'.[39] The problem with the jurisprudence on release pending appeal, according to the judge, is that it transposes what should ordinarily be considered factors to the status of a test.[40] The Court held that the real test for all release applications before or after conviction must be the interests of justice.[41] It stressed that the likelihood of success on appeal and the risk that the sentence may be served before an appeal is heard should only be factors to be taken into account in determining whether the interests of justice require that release should be granted.[42] The Court was at pains to demonstrate 'that the prospect of success of a case is just a factor that informs the court where interests of justice lie'.[43] It ruled that 'the much vaunted "exceptional and unusual circumstances" would be totally inadequate or unnecessary' in certain cases where the circumstances were 'unexceptional and usual', yet the interests of justice tilted in favour of granting release pending appeal.[44] It pointed out that the problem would be that any test formulated so as to encompass all possible factors would be 'very pregnant as to be no test at all'. Moreover, the Court added, the test of unusual or exceptional circumstances fetters the discretion of a court as to the

39 *Kumuwa* (n 2 above) 5-6.
40 *Kumuwa* 13.
41 *Kumuwa* 2.
42 *Kumuwa* 13.
43 As above.
44 *Kumuwa* (n 2 above) 5-6, referring to offenders sentenced under secs 337 to 340 of the CPEC based on factors such as the lack of a previous conviction, youth, old age, home surroundings, and the health or mental condition of the accused.

factors warranting release on release pending appeal. It observed that the discretion to grant release pending appeal would be unduly fettered if a factor such as the existence of exceptional or unusual circumstances is elevated to a test instead of complementing the discretion in the balancing of justice. The Court concluded that the dominant principle in release pending appeal applications must be the interests of justice as informed by various factors, including the prospect of success of the appeal. It explained that the interests of justice would vary depending on the stage of the criminal process. Thus, at the post-sentence stage, the presumption of innocence and interference with witnesses ordinarily play no role; only the sentence, prescribed and imposed, the offender, the victim and the public interest would be relevant.

Justice Mwaungulu noted that the courts had continued to apply the same 'unusual and exceptional circumstances' test used before the adoption of the democratic Constitution in 1994 without considering the implications on bail of this Constitution. He argued that the Constitution mandated 'one uniform and unified test for granting bail in all cases, before or after conviction, namely, the interest[s] of justice'. The Court's reasoning mainly turned on the wording of section 42, particularly section 42(2)(e). It is necessary to quote section 42 extensively as it is key to contextualising the decision of the Court:

> Arrest, detention and fair trial
>
> 1 Every person who is detained, including every sentenced prisoner, shall have the right –
>
> (a) to be informed of the reason for his or her detention promptly, and in a language which he or she understands;
> (b) to be held under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the state;
> (c) to consult confidentially with a legal practitioner of his or her choice, to be informed of this right promptly and, where the interests of justice so require, to be provided with the services of a legal practitioner by the state;
> (d) to be given the means and opportunity to communicate with, and to be visited by, his or her spouse, partner, next-of-kin, relative, religious counsellor and a medical practitioner of his or her choice;
> (e) to challenge the lawfulness of his or her detention in person or through a legal practitioner before a court of law; and
> (f) to be released if such detention is unlawful.
>
> 2 Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right –
>
> (a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;

(b) as soon as it is reasonably possible, but not later than 48 hours after the arrest, or if the period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be released;
(c) not to be compelled to make a confession or admission which could be used in evidence against him or her;
(d) save in exceptional circumstances, to be segregated from convicted persons and to be subject to separate treatment appropriate to his or her status as an unconvicted person;
(e) to be released from detention, with or without bail unless the interests of justice require otherwise;
(f) as an accused person, to a fair trial, which shall include the right –
    (i) to public trial before an independent and impartial court of law within a reasonable time after having been charged;
    (ii) to be informed with sufficient particularity of the charge;
    (iii) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
    (iv) to adduce and challenge evidence, and not to be a compellable witness against himself or herself;
    (v) to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights;
    (vi) not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;
    (vii) not to be prosecuted again for a criminal act or omission of which he or she has previously been convicted or acquitted, save upon the order of a superior court in the course of an appeal or review proceedings relating to that conviction or acquittal;
    (viii) to have recourse by way of appeal or review to a higher court than the court of first instance;
    ix) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her, at the expense of the state, into a language which he or she understands; and
    (x) to be sentenced within a reasonable time after conviction.

According to the Court, section 42(2)(e) provides 'a general right not restricted to bail before or after conviction'.[45] It stated that a careful reading of section 42(2) demonstrates that the interests of justice are the dominant test for all bail applications, before and after conviction.[46] The Court explained that the rights in section 42 were cumulative and that some rights relating to detention in section 42(1)

45 *Kumuwa* (n 2 above) 12.
46 *Kumuwa* 7.

applies to all detainees regardless of their status, that is, including suspects and sentenced offenders alike.[47] To be sure, 'a sentenced offender has the right to bail which *a fortiori* is bail pending appeal'.[48] Cementing this interpretation, Justice Mwaungulu then went on to clarify that the reference to an 'accused' in the opening statement of section 42(2) was not limited to suspects. Rather, it

> includes sentenced offenders, those convicted and sentenced of a crime. Section 42(2) in its introduction gives the rights to the accused … in relation to the right to a fair trial in section 42(2)(f), 'as an accused person' the 'accused' has rights like 'to have recourse by way of appeal or review to a higher court than the court of first instance' (section 42(2)(f)(viii)) and to be 'sentenced within a reasonable time after conviction' (section 42(2)(f)(viii)) which are consistent with the suggestion that as convicted or sentenced offenders they are accused persons who must enjoy the right to bail under section 42(2)(e) of the Constitution. Moreover, section 42(2)(e) by its wording does not limit the right to bail by qualifiers like 'before' or 'after' conviction; the right is unfettered and unqualified in any respect.[49]

The Court further stated that sentenced offenders must also enjoy the right to challenge the lawfulness of their detention and to be released if it is found to be unlawful as provided in sections 42(1)(e) and (f).[50] However, it emphasised that, although the interests of justice is the dominant principle that should govern applications for release pending appeal, there could be other principles.[51] What is critical, the Court continued, is that a court considers all relevant factors and circumstances 'arising latently or patently in the application'.[52] It warned that a court should not

> orchestrate a minor factor or undermine an important consideration. These factors or circumstance[s], therefore, must not limit the discretion; they must augment and complement the discretion in balancing justice.[53]

To further buttress its conclusions, the Court invoked section 11(2) of the Constitution which provides that in 'interpreting the provisions of this Constitution a court of law shall where applicable, have regard to current ... comparable foreign case law'. Justice Mwaungulu asserted that in as far as 'bail provisions' are concerned, 'South African decisions are like [Malawian decisions]. There the test for bail before conviction and pending appeal has been unified.' He then cited *Smith v S*:[54]

> All bail applications are governed by the same principle, but there are differences in emphasis in cases of bail pending an appeal from cases of bail prior to conviction … [T]he overriding consideration remains always

47 *Kumuwa* 9-10.
48 *Kumuwa* 10.
49 As above.
50 *Kumuwa* (n 2 above) 16-17. The Court mistakenly cites secs 42(1)(f) and 42(1)(g).
51 *Kumuwa* 14.
52 As above.
53 As above.
54 [2009] ZAECGH 52.

> the right of an accused person in terms of section 25(2)(d) of the Constitution to be released on bail unless the interests of justice require otherwise.

Turning to Zimbabwe, the Court discounted the High Court's decision in *Manyange v The State*,[55] which held that release pending appeal rested on whether there were reasonable prospects of success on appeal and that the release would not endanger the interests of justice.[56] In disagreement, Justice Mwaungulu described *Manyange* as being 'caught between modernity and tradition, combining a circumstance or factor with the test'.[57] He also faulted *Manyange* for citing the pre-Constitution South African case of *R v Mthembu*.[58]

Fortified in its interpretation of section 42(2)(e), *Kumuwa* concluded that the constitutional right to be released extended to sentenced offenders and mandated the interests of justice as the proper test for release pending appeal applications. On this understanding, the Court questioned why the Bail Guidelines Act was limited to release before conviction in terms of section 118 of the CPEC. It concluded that the factors listed in this Act should also inform the approach to post-conviction release except in cases where the death penalty had been imposed.

4 *Uche v Republic*

Inspired by this new approach in *Kumuwa*, the appellants in *Uche* argued that an accused no longer needed to prove exceptional circumstances to be released pending appeal. Rejecting this submission, the Court was of the view that the reasoning in *Kumuwa* was 'quite interesting'[59] but 'erroneous'.[60] Justice Kachale observed that there was inadequate justification for the conclusion that 'sentenced prisoners' were 'accused persons' within the meaning of section 42(2).[61] In his view, this was incompatible with the legal status of a convicted and sentenced person since, at that stage, any allegations against him had graduated into factual findings rendering him outside the ambit of persons envisaged in section 42(2).[62] The Court thus upheld 'the historical position that post-conviction and sentence, the burden on the convict seeking bail is necessarily quite onerous'.[63]

55 [2003] WHCC 1.
56 Cited in *Kumuwa* (n 2 above) 12-13.
57 *Kumuwa* 12.
58 1961 (3) SA 468 (D).
59 *Uche* (n 3 above) 2.
60 *Uche* 4.
61 *Uche* 3.
62 *Uche* 2-4.
63 *Uche* 4.

5 *Kumwembe v Republic*

The MSCA in *Kumwembe* had the opportunity to 'clarify the law' governing release pending appeal by considering the correctness of *Kumuwa*. The appellant in this case had applied for release pending appeal against his conviction and four months' sentence for contempt of court. Reasoning that the test for stays and release pending appeal was the same, the case centred on *Kumuwa* and its impact on the applicable test. As in the case of the applicant in *Uche*, Kumwembe argued that it was no longer necessary to show exceptional or unusual circumstances before granting a stay, and that all that was needed was for him to show that it was in the interests of justice that he be granted the stays prayed for.

Justice of Appeal Chikopa observed that the law on the test for granting release pending appeal had been clear until *Kumuwa* cast doubt on it. According to the Court, *Kumuwa* 'seemed to be saying that the standard for granting a stay or bail pending appeal was the same as that for bail pending trial'.[64] Like the High Court in *Uche*, the MSCA restricted itself to the question of whether section 42(2)(e) extended to convicted persons, and concluded that it was 'obvious'[65] that this was not the case. Capitalising on the latter part of the opening paragraph of section 42(2), which refers to a person 'arrested for, or accused of the alleged commission of an offence', the Court stressed that the provision was only applicable to suspects and excluded convicts.[66] It explained that a detained suspect was also entitled to rights under section 42(1) by virtue of being a detainee.[67] Treading carefully, the Court continued:[68]

> There are obvious overlaps in the identity of the persons envisaged in section 42(1) and (2) and the manner in which the Constitution thought we should deal with them. There is no denying however that they are clearly two distinct persons. In subsection (1) is a detainee who might also be a convict. In subsection (2) is a suspect who might also be a detainee but is certainly not a convict. There is also no denying that our Constitution in some important respects treats these two persons differently. For instance, whereas the suspect has all the rights of a detainee, the reverse is not true. Another instance is section 42(2)(e). It grants the detained suspect *the right to be released from detention, with or without bail unless the interests of justice require otherwise*. There is no identical provision for the detainees in [section 42(1)].

'[I]t is therefore to err', the Court concluded, 'to think that the Constitution conferred the right in section 42(2)(e) on sentenced prisoners [convicts] or to seek, via judicial opinion, to arrogate such right to them'. The Court, therefore, concurred with *Uche*. It endorsed

64 *Kumwembe* (n 4 above) 10.
65 *Kumwembe* 11.
66 As above.
67 As above.
68 *Kumwembe* (n 4 above) 9 (emphasis in original).

the traditional approach to release pending appeal as explicated in *Pandirker* and stressed that the factors listed therein were examples.[69] Importantly, the MSCA added that '[t]he list of examples is most likely longer'.[70] The Court then held that a convict bore the burden 'to show exceptional, special and unusual circumstances' before release is granted.[71] Accordingly, it found that in the instant case the question was whether the applicant had placed 'sufficiently special, unusual and exceptional circumstances' before the Court to warrant the stays sought.[72]

6 Analysis

6.1 Test or factor?

It is important to mention that *Kumwembe* is not correct by asserting that the test for release pending appeal had been clear until *Kumuwa.* As explained earlier, the jurisprudence did not speak with one voice on the meaning of exceptional circumstances. However, both *Uche* and *Kumwembe* are correct in finding that sentenced prisoners are not accused persons within the meaning of section 42(2). However, neither case addresses the interests of justice test argument, that is, the contention in *Kumuwa* that the courts have elevated factors relevant to release pending appeal to tests and that 'most circumstances or factors inform the interests of justice, they are not tests' separately.

The impetus to devise a new test for release pending appeal was that the present approach is too restrictive. This is understandable, given that courts have traditionally limited exceptional circumstances. In fact, the MSCA has previously held that, in effect, there are only two exceptional circumstances, namely, the prospects of success of the appeal and the risk that the sentence will have been served by the time the appeal is heard.[73] Consequently, courts have denied release in cases that raise other circumstances, such as missing court records, making it impossible to prosecute an appeal. Even ill health has been discounted as an exceptional circumstance. While some cases have been more generous and have granted release on factors outside the now seemingly closed list, the majority of cases have stuck to the traditional approach. *Kumuwa*, therefore, is right in criticising the approach to release pending appeal and recasting the inquiry as one of justice.

It stands to reason that the proper test, indeed, is the interests of justice as determined by the circumstances of the case. This is what

69 *Kumwembe* 12.
70 As above.
71 As above.
72 *Kumwembe* (n 4 above) 11.
73 *Suleman* (n 10 above).

the courts have stated in several cases though ultimately relegated to the traditional restrictive approach. For instance, in *Republic v Ndomondo*, the MSCA noted that the grant of an order of stay was ultimately 'a matter for judicial discretion based on the circumstances of the case and the justice of the matter'.[74] As observed in *Kumwembe*, the factors listed in *Pandirker* are but 'examples of exceptional and unusual … The list of examples is most likely longer.' One might go further to state that the list is *obviously* longer. Surely, if the listed factors are *examples*, the list is not exhaustive as there must be other factors that are not listed? Interestingly, a perusal of some cases indicates that courts have stressed that case law only provides examples; the fact that some cases recognise factors beyond those in *Pandirker* lends credence to this point.[75] The law then is that the test remains the interests of justice as informed by a wide range of factors. An attempt to close the list of circumstances that would justify the granting of release pending appeal lies at the heart of the problem that *Kumuwa* sought to rectify. As noted above, at some point it was even thought that the *Pandirker* factors must exist simultaneously, a proposition which was fortunately corrected but, unfortunately, continues to be endorsed in some cases.

Therefore, it has not always been obvious in the courts' approach to release a convict pending appeal that the list of factors that may justify release pending appeal remains subject only to the interests of justice and logic. As noted in *Kumuwa*, the courts have confused the test and the factors that must inform it. Instead of looking at exceptional circumstances as factors, the focus has been placed on the circumstances to such an extent that the highest court of the land has reduced these factors to two. The very nature of the interests of justice is such that the list of factors that can inform a court where the interests lie cannot be closed. Indeed, if only two factors can qualify as exceptional circumstances, they are no longer exceptional. This approach leads to a situation where other factors are ignored, resulting in injustice. For example, a missing court record would disadvantage an offender since the prospects of the appeal succeeding cannot be evaluated. Moreover, other factors, such as ill health, would and are excluded. Justice Mwaungulu, therefore, is right when he holds that in pursuance of the interests of justice, a court should be open to take account of a myriad of factors in determining an application for release pending appeal. Speaking of the factors laid out in the Bail Guidelines Act which is limited to release pending trial, *Kumuwa* aptly notes that the Act

> is dominated by one fundamental consideration: the interest(s) of justice. On this foundation is built factors that may be [taken] into account either generally or in the pursuance of the interest(s) of justice. The factors or circumstances taken into account are not a test or requirement for

74 Criminal Appeal 1 of 2010.
75 See cases listed in n 15 to n 22 above.

> granting bail. The factors are neutral and can, therefore, influence the result one way or the other. They are integral to the question whether, in the interests of justice, bail should be granted.[76]

Such an approach to release pending appeal would go a long way in ensuring that the interests of justice remain paramount, and that courts do not relegate the inquiry to one of whether the appeal is likely to succeed or the sentence may have been served before the appeal is determined. This is the common law position that needs no further constitutional backing.

6.2 Do sentenced prisoners have a right to be released from detention?

While *Kumuwa* is correct regarding the proper test and the confusion apparent in the jurisprudence, it remains problematic as it looks to section 42(2)(e) of the Constitution for justification. Here, as correctly found in *Uche* and *Kumwembe*, the decision was based on a questionable interpretation of section 42(2)(e) which, according to the court, provides to sentenced prisoners a right to be released from detention with or without bail unless the interests of justice dictate otherwise. The problem the Court had to grapple with here is that section 42(2), on the face of it, does not apply to convicted, let alone sentenced, persons since it relates to persons accused of the 'alleged commission of an offence'.

Sentenced prisoners only have a right to challenge the lawfulness of their detention and to be released if such detention is unlawful pursuant to sections 42(1)(e) and (f). Obviously, these rights are not the subject of an application for release pending appeal, if only for the reason that such an application is not a challenge to the lawfulness of detention within the meaning of section 42(1)(e). Holding otherwise would mean that the release of an applicant pending appeal is done pursuant to section 42(1)(f). This cannot be the case, since the decision to release is made before any finding on the substantive appeal and, thus, it cannot be said that such release is granted on the basis that the 'detention is unlawful' as dictated by section 42(1)(f). In any case, in view of the presumption in favour of a trial court's sentence until it is set aside, the detention remains lawful until the appeal rules otherwise. Moreover, it would be difficult to explain the granting of release where the appeal is only against conviction and not against sentence. This understanding of sections 42(1)(f) and 42(2)(e) is supported by scholars such as Chirwa. He states that the former provision 'will normally apply when there is no legal basis for an arrest or detention', while the latter covers scenarios 'where the state has good reasons for the arrest but fails to justify a request for further detention' prompting the court to 'consider whether the arrested person should be released with or without bail'.[77]

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76 *Kumuwa* (n 2 above) 7.

77 DM Chirwa *Human rights under the Malawian Constitution* (2011) 429.

The problem is that, unlike the rights under sub-sections 42(2)(a) to (e) which are applicable before conviction, section 42(2)(f), while obviously falling under section 42(2), provides an 'accused' with the right to a fair trial which includes rights that are only applicable to convicted persons. This includes the right to be sentenced within a reasonable time after conviction and the right not to be sentenced to a more severe punishment than that applicable at the time the offence was committed. It becomes clear from the wording of section 42(2)(f) that one remains an 'accused' person until the appellate process has been exhausted. This contradicts the general flow of section 42(2). Justice Mwaungulu basically reasoned that, since some rights under section 42(2)(f) apply to convicted persons, the 'accused' in section 42(2) includes convicted and sentenced persons. This is true. However, the Court runs into problems when it holds that section 42(2)(e), which it says is 'unfettered and unqualified in any respect' as it does not use words like 'before or after conviction', also applies to convicted and sentenced offenders. This is inconsistent with the words 'alleged commission of an offence' in section 42(2). A convicted person is no longer an 'accused' in that sense. Therefore, on this score *Uche* and *Kumwembe* correctly faulted *Kumuwa*.

The interpretation of section 42 advanced in *Kumuwa* would actually lead to absurd results if only for the reason that convicted and sentenced persons would have rights under section 42(2) which they logically cannot have. For instance, sentenced prisoners cannot have the right to be segregated from convicted persons and to be presumed innocent until proven guilty under sections 42(2)(d) and 42(2)(f)(iii) respectively. The only plausible explanation to overcome such an outcome is that the definition of an 'accused' does not remain static throughout section 42(2). The problem here lies in drafting: Section 42(2)(f) should not have been included as a sub-paragraph to section 42(2), but as a subsection to section 42 itself. This would mean that section 42 would have three categories of rights, and the meaning of 'accused' would then have to be given contextual interpretation.[78]

A more fundamental problem with *Kumuwa*'s reliance on section 42 as the foundation for the interests of justice test is a procedural one emanating from the *right* to be released pending trial. The wording of section 42(2)(e) is such that the burden is on the state to show that the interests of justice are not in favour of release. In other words, there is a presumption in favour of release primarily premised on the presumption of innocence. Certainly, this cannot be the case with convicted or sentenced prisoners. If there is a right to release pending appeal, then it is for the state to show why release should not be granted to an appellant. Obviously, the reason will always be that the accused is serving a valid sentence of imprisonment. The onus, therefore, must be on the applicant to show why he should be

78 As is the case with sec 35 of the 1996 South African Constitution.

released from custody in the face of a valid sentence of imprisonment.[79] This would be inconsistent with the wording of section 42(2)(e) and case law that has emerged from it. Therefore, the right to be released under this provision cannot be the basis for a right to be released pending appeal.

However, it is not adequate to simply discard, as *Uche* and *Kumwembe* do, *Kumuwa* on the basis that section 42(2) rights are only applicable to suspects or, to use the language of the Constitution, persons 'arrested for, or accused of, the alleged commission of an offence'. The overlap in the identity of the persons in section 42 is not limited to subsections (1) and (2), but also continues *within* the subsections. Some rights in section 42(2) do not accrue to suspects. This is particularly true of section 42(2)(f), which provides 'an accused person' with the right to a fair trial which, as confirmed in *Kafantayeni & Others v Attorney-General & Others*,[80] extends to the post-conviction stage. As noted in *Uche*, some rights in section 42(2), such as the right to appeal and review, apply to both suspects and convicts. Other rights in this section cannot logically be claimed by suspects but only by convicts. These include typical sentencing rights, such as the rights to be sentenced within a reasonable time and not to be sentenced to a more severe punishment than that applicable at the time the crime was committed. Holding that section 42(2) excludes convicted prisoners also does not sit well with certain rights in section 42(2)(g) conferred on children in the criminal justice system. Good examples of this clash are the rights of children not to be sentenced to whole life sentences and to only be imprisoned as a last resort and for the shortest time possible.[81] Equally, certain section 42(2) rights can only be claimed by suspects and not by convicts. This category covers rights such as the right to be presumed innocent, to challenge evidence and to be tried in a language which is understood by the suspect. It then becomes evident that section 42(2) requires a fluid definition of an 'accused person'.

It could be argued that these difficulties arise because of the fact that sections 42(2)(f) and (g) are listed as subsections to section 42 and not as separate sections. Furthermore, the argument could proceed that the rights in section 42(2)(a) to (e) can only be claimed by suspects. This cannot be true. The right not to be compelled to make an incriminating confession or admission applies to both suspects and convicts. It would be folly for a court to hold that a sentenced prisoner does not have this right simply because he is no longer a suspect or that there is no allegation against him.

What, then, is the constitutional basis for release pending appeal? It is beyond the scope of the article to fully explore this issue. However,

79 The question of onus is discussed further in sec 6.3 below.

80 [2007] MWHC 1 12.

81 If a literal interpretation of sec 42(2) is followed, these rights would apply only to children 'arrested for, or accused of, the alleged commission of an offence'.

suffice to say that such release can be rooted in the right to liberty[82] and a plethora of other rights that may come into play based on the facts of each case. For instance, the rights to life and health could be critical should it be that the continued detention of an applicant poses a real risk to his life in view of his ill-health. Release pending appeal can also be founded on the right to appeal 'which presents the possibility that a conviction may be overturned',[83] making it paramount that convicted persons should be released from detention pending appeal when so warranted.

6.3 Onus of proof

For some or other reason, *Kumuwa* did not consider the question of onus. However, there is also no suggestion in the judgment that the onus in release pending appeal applications would remain on the prosecution as is the case in applications for release pending trial. This lack of clarity could be responsible for arguments by the applicants in both *Uche* and *Kumwembe* that *Kumuwa* removed the need for an accused to show exceptional circumstances for release pending appeal. Clearly, it is this argument that informed the courts' subsequent analyses of *Kumuwa*. Justice Mwaungulu does correctly conclude, albeit not clearly, that the circumstances that must inform the interests of justice test need not necessarily be unusual and exceptional.[84] This is important given the fact that the depiction of a factor as usual or unusual, exceptional or unexceptional, cannot be made in a vacuum; it is a factual inquiry that rests on the facts of each case.

Overall, *Kumuwa* does not purport to change the traditional position which puts the onus on an offender to persuade a court to

82 See *R v Farinacci* (1993) 18 CRR (2d) 298, finding that, although the right not to be denied reasonable bail is rooted in the presumption of innocence which is substantially spent by the conviction, the appellate process comes with a sufficient residual liberty interest that warrants the protection of the right not to be arbitrarily detained and, to some degree, the presumption of innocence.

83 Chirwa (n 77 above) 437.

84 *Kumuwa* (n 2 above) 5-6, observing that in view of the considerations in secs 337 to 340 of the CPEC which could ground a decision to grant release pending appeal, 'the test of unusual and exceptional circumstances is not accommodative; unless, of course, courts regard matters raised in [these provisions] as unusual or exceptional. The rendition would itself be unusual and exceptional. The corollary, which is the better rendering, would regard the factors in [these provisions] as, as it should be, usual circumstances. The problem with this version is that it means that the test for granting bail pending appeal would have to be formulated [so] as to include these usual, unusual and exceptional circumstances. Such a test would be very pregnant as to be not a test at all. The test of unusual and exceptional circumstances could cause problems for the dual powers that are created in sec 355(1) of the [CPEC]. The power to stay execution of sentence is a substantial power that cannot be limited to unusual and exceptional circumstances. Equally, there are bound to be cases of [a] usual and unexceptional nature where, pending an appeal, the court may grant bail or stay execution of a sentence. In *Rep v Keke* (2010) Confirmation Case 404, this court considered regarding gender in sentencing offenders. The principle enunciated in that case is that sentencers must be sensitive to that, in treating male and female offenders in

release him pending appeal. Therefore, it would be simplistic to argue that *Kumuwa* suggests that release before and after conviction is the same in all respects, including onus. Preposterously, placing the onus on the state means that the state must show why an applicant should not be released pending appeal. It cannot be the case that in an application for release pending appeal, the default should be release as is the case with release pending trial. While, as Chirwa correctly notes, 'the state has an obligation to justify any form of detention',[85] this duty falls away when, as is the case with a sentenced prisoner, the person concerned is lawfully being detained as punishment. Once sentenced to imprisonment, the onus is reversed onto the accused. While the test for release remains the interests of justice, the default position is also reversed in that now release is to be denied unless the interests of justice require otherwise. This position is consonant with pre-trial release jurisprudence in Malawi:[86]

> Bail being as of right to an accused person it should not be upon the accused to press for it when he appears before a court; bail should readily be available to an accused as he appears before a court and it should be upon the state to first give reason to the satisfaction of the court that bail should not be available to the accused …

Transcribing this position to the situation of a sentenced prisoner is legally untenable. The assertion that offenders have a *right* to be released pending appeal, as flows from section 42, innately gives rise to onus issues as it necessitates the onus to be on the party, in this case the state, seeking to limit this 'right'. As Justice Katsala queries in *Macholowe v Republic*:[87]

> Now, if an accused person has the right to be released from detention then why should he be required to prove exceptional circumstances in order to be released on bail? … [W]hy should he be required to prove exceptional circumstances before he can enjoy his constitutional right? Indeed, why should his release be in the discretion of the court when it is his constitutional right to be so released?

6.4 Comparable foreign case law?

The use of comparable case law in *Kumuwa* is not convincing. To start with, the foreign law resorted to had to give insight regarding whether the right to be released from detention in section 42 of the

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the same way, in some cases, offends section 20(1) of the Constitution of Malawi. It should, therefore, be very competent and compellable, for example, for a sentencing court at first instance or on appeal, based on the nature and seriousness of the offence and sentence, to stay the sentence of a woman or release on bail a woman who, because, in the nature of things, the woman is with child in the womb, something that, but for modern science and technology, would not happen to a man. All these considerations weaken or compromise the "unusual and exceptional" test for stay of execution of sentence and granting of bail pending appeal.'

85 Chirwa (n 77 above) 422.

86 *Lunguzi v Republic* [1995] 1 MLR 135(HC) 142.

87 *Macholowe v Republic* Miscellaneous Criminal Application 171 of 2004 5.

Malawian Constitution is capable of being applied to sentenced prisoners, since this was the constitutional provision the Court was attempting to interpret. Disappointingly, the judgment does not adequately engage with South African case law on the point.

Smith, the case cited in *Kumuwa*, (apparently mistakenly) cites the interim Constitution of South Africa, of which section 25(2)(d) detailed that '[e]very person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right … to be released from detention with or without bail, unless the interests of justice require otherwise'. This provision has been replaced by section 35(1)(f) of the final Constitution, which provides that '[e]veryone who is arrested for allegedly committing an offence has the right … to be released from detention if the interests of justice permit, subject to reasonable conditions'.

Section 35(1)(f) removes any ambiguities on the scope of the right to be released from detention. This renders it less complex than the Malawian provision, which has accused and sentenced persons clumped together on this score of rights. Section 35(1)(f) leaves no room for an interpretation that it extends to convicted, let alone sentenced, persons. It ascribes the right to be released only to those 'arrested for *allegedly* committing an offence'. The Constitutional Court in *S v Dlamini* exclusively tied this provision to persons 'arrested for allegedly having committed offences, and may for that reason be detained in custody'.[88] The Court also made it clear that the import of the change in wording between sections 25(2)(d) and 35(1)(f) was profound. As Justice Kriegler succinctly explained, while the former 'contemplated release unless adverse factors tilted the scale against release',[89] the latter 'require[d] something positive to permit release' since 'a person's constitutional right to release from custody is now dependent on a finding that the interests of justice permit it'.[90] Put differently, section 35(1)(f) changed the default position in that, while 'previously … an arrestee was entitled to be released', the law now requires that 'unless there is sufficient material to establish that the interests of justice do permit the detainee's release, his or her detention continues'.[91] Consequently, in pre-trial release applications, the onus is on an accused to persuade a court to grant him release. This is the exact opposite of the position in Malawi where, as noted earlier, the default is release. Therefore, it cannot be said that the South African law on bail is the same as Malawian law. Moreover, for certain categories of serious offenders, South African law requires that

88 1999 (1) SACR 100 (CC) para 6.
89 *Dlamini* (n 88 above) para 41.
90 *Dlamini* para 38.
91 *Dlamini* para 45.

they may only be released pending trial on proof of 'exceptional circumstances'.[92] No lesser standard is expected from such an offender when seeking release pending appeal.[93] The right to be released from detention if the interests of justice so permit 'of course clearly deals with the position before finalisation of a trial'.[94]

Subsequently, *Smith* was incorrect in holding that the right in section 25(2)(d) extended to applications for release pending appeal. Be that as it may, *Smith* may be instructive on the fact that the presumption of innocence no longer plays a role post-conviction. Poignantly, this then makes it difficult to argue that a sentenced prisoner has a right to be released from detention, a right largely premised on the presumption of innocence. Indeed, it has often been said that pre-trial detention should not be used as punishment because at that stage the presumption of innocence stands. The position of a sentenced prisoner is the exact opposite of this: His detention *is* punishment.

7 Conclusion

The granting of release pending appeal is inherently different from release pending trial. While it is untenable to argue that the former stems from the right to be released from detention, it is also tenuous to restrict release pending appeal to situations where an offender has proved two factors, namely, the prospect of success on appeal and the likelihood of the sentence expiring before the appeal is concluded. Hence, *Kumuwa* was right in holding that the test for release pending trial and appeal was the interests of justice. However, it is incorrect to say that the constitutional premise for release remains the same before and after trial. Therefore, the High Court in *Uche* and the MSCA in *Kumwembe* were correct in finding that *Kumuwa* had been wrongly decided on this point. However, both decisions are disappointing to the extent that they fail to address the underlying rationale in *Kumuwa* and whether the proper test for release pending appeal was the interests of justice. The gist of *Kumuwa* is that courts have been overly restrictive in their approach to release pending appeal decisions because they focus on pre-determined exceptional circumstances instead of looking at what the interests of justice require in a particular case. What is required is for courts to be more generous in deciding which factors should inform the interests of justice in a particular case, bearing in mind the conviction, sentence and the right to appeal.

Once it is conceded that *Kumuwa* erred in extending the right to be released from detention to sentenced prisoners, it becomes clear that,

92 See sec 60(11) and Sch 6 of the Criminal Procedure Act 51 of 1977.

93 *Babuile & Others v S* [2015] ZAGPPHC 1110 para 9; *Manaka v S* [2016] ZAGPJHC 1 para 11; *S v Bruintjies* 2003 (2) SACR 575 (SCA) para 5; *Scott-Crossley v S* 2007 (2) SACR 470 (SCA) para 12.

94 *Crossberg v S* [2007] ZASCA 93 4.

as far as the law on release pending appeal is concerned, *Kumwembe* in essence is no different from *Kumuwa*. Importantly, although using different terminology, the two cases ultimately arrive at the same conclusion, which highlights three points: (i) that the proper test remains the interests of justice depending on the circumstances of each case; (ii) that case law merely provides examples of circumstances that would justify release pending appeal; and, therefore, (iii) that there is no closed list of circumstances that should justify release pending appeal.

Despite the problematic premise on which *Kumuwa* based the interests of justice requirement, it correctly finds that the proper test is the interests of justice. In light of the above, the proper test for release pending appeal must be the interests of justice. This should be informed by the circumstances of the case. The court's discretion should not be limited to a pre-defined category of circumstances, but should be dependent on the facts of each case. Appeals or reviews should not be rendered nugatory by a denial of release. If this approcah is endorsed, factors such as a lost record, ill-health and even pregnancy should count in favour of release pending appeal. Justice nyaKaunda Kamanga reminds us in *Nanseta v Mapwelemwe & Another* that an appellate court has an obligation to 'see to it that the appeal, if successful, will not be rendered nugatory'.[95] In the case of an appeal against a sentence of imprisonment, a successful appeal will be rendered nugatory if the courts do not carefully consider release pending appeal, since the appellant will certainly have suffered punishment despite his lodging an appeal. As held in *Nomale*, if by the time the appeal is heard the sentence or even a substantial part of it has been served, the whole process is rendered nugatory.[96]

The question remains as to what the interests of justice require regarding release pending appeal. Since, characteristically, the concept of 'interests of justice' is not static, there can be no one answer to what factors should justify release pending appeal as it will always be a factual enquiry turning on the facts of each case. However, if understood as a factor and not a test, then releasing offenders whose records have been lost will not be a problem as it cannot be in the interests of justice, however understood, that such an offender must be detained although he is unable to exercise his right to appeal. Importantly, courts can also take a cue from the factors listed in the Bail Guidelines Act *mutatis mutandis*.[97] One may

95 Miscellaneous Civil Cause 12 of 2013 3, citing *AR Osman and Company v Nyirenda* [1995] 1 MLR 13 (SCA) 14.

96 *Nomale* (n 27 above).

97 The exception of capital cases is interesting. The court justified it by stating that all death sentences are automatically stayed by operation of secs 325 and 326 of the CPEC. These provisions dictate that all death sentences must be considered for mercy by the President. This does not explain why a death row inmate cannot apply for release pending appeal of his sentence and conviction. After all, the President's intervention can only come after the MSCA has confirmed the sentence.

be tempted to argue that it is merely semantics to say that the test is the 'interests of justice' and not 'unusual or exceptional circumstances'. However, as Justice Mwaungulu reminded us in 1997, release pending appeal 'is about exceptional circumstances showing that [the interests of] justice would be served by releasing a convict'.

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The direct application of the Constitution by ordinary courts and the concept of Shari'a as a source of legislation: A review of the Sudanese Supreme Court's decision in *Sudan Government v ASK*

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Summary

This is a review of the 2011 decision of the Sudanese Supreme Court in Sudan Government v ASK. *Relying on article 5(1) of the Sudanese Constitution 2005, which states that Shari'a should be the source of legislation, the Court decided to disregard the provision in section 4 of the Child Act 2010, which defines the child as a person whose age does not exceed 18 years, as unconstitutional as it was in conflict with the Criminal Act 1991, derived from Shari'a, that defines an adult as a person whose puberty is established by apparent features and has reached 15 years of age. While the article argues that the decision reaffirms the power of the ordinary courts to refrain from applying unconstitutional legislation even with the existence of a specialised Constitutional Court, it argues that in this specific case there was neither a violation of Shari'a nor of the Constitution that justifies invoking this power.*

Key words: *Shari'a; childhood; definition of child; Sudan Interim National Constitution; source of legislation*

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1 Introduction

Sudan Government v ASK[1] is a criminal case which initially required the interpretation of two conflicting provisions in the Criminal Act 1991 and the Child Act 2010. The Sudanese Supreme Court found that the provision in the Child Act 2010, which defines a child as a person whose age does not exceed 18 years,[2] was in conflict with the Criminal Act 1991, derived from Shari'a, which defines an adult as a person whose puberty is established by apparent features and who has reached 15 years of age.[3] Therefore, the Court concluded that, based on article 5(1) of the Sudan Interim National Constitution 2005 (INC), which states that Shari'a should be the source of legislation,[4] the provision in the Child Act was unconstitutional. Accordingly, the Court decided to disregard that provision and to base its judgment on the Criminal Act.

This decision raises two important issues. The first is the direct application of the Constitution by ordinary courts even with the existence of a specialised Constitutional Court. The second issue is the concept of Shari'a as a source of legislation and how this is conceived and interpreted by Sudanese courts. The article examines the Court's reasoning and addresses these two questions with reference to the relevant constitutional, legislative and jurisprudential framework. These two issues have a significant impact on the protection of the Bill of Rights in Sudan.

2 Facts

The facts of this case, as summarised by the Supreme Court, are as follows: The accused, a 19 year-old man, was put on trial for the alleged rape of the victim causing her illegitimate pregnancy. During the pre-trial investigation, the girl admitted that sexual intercourse had taken place with her consent. However, the charge was changed from adultery[5] to rape because of her age. She was 17 years old, which means that based on section 4 of the Child Act, she was a child, and according to section 3 of the Criminal Act 1991, the consent of a minor is not valid. Therefore, the act committed would

1 (2011) SLJR 75.

2 The Child Act 2010 provides in sec 4, in Interpretations, that a child means 'every person, who is not above the age of eighteen years'.

3 Sec 3 defines an adult as 'a person whose puberty has been established by definite natural features and has completed fifteen years of age. Whoever attains eighteen years of age shall be deemed an adult even if the features of puberty do not appear.'

4 Or rather, *a* source of legislation, as later argued.

5 Sec 145(1) of the Criminal Act 1991 provides: 'There shall be deemed to commit adultery (a) every man, who has sexual intercourse with a woman, without there being a lawful bond between them; (b) every woman, who permits a man to have sexual intercourse with her, without there being a lawful bond between them.'

fall within the definition of statutory rape as stipulated in section 149(1) of the Criminal Code 1991[6] which, if committed against a child, is severely punishable under the Child Act 2010, namely, by the death penalty or life imprisonment.

Thus, the Court had to answer the question whether or not the alleged victim was a child. If she was considered an adult, both she and the accused would be charged with adultery, but if she was found to be a child, the accused would be accused of having raped her.[7]

3 Decision

The court of first instance referred to the ordinary statutory interpretation rules and, accordingly, decided that the provisions of the Child Act 2010 as subsequent legislation should prevail over the provisions of the preceding Criminal Code of 1991.[8] Therefore, the court ruled that the alleged victim was a child and, therefore, that her consent was invalid. Accordingly, the court convicted the accused of rape and sentenced him to 20 years' imprisonment. This judgment was upheld by the Court of Appeal.

When brought before the National Supreme Court for confirmation, this Court reached a different conclusion. It reversed the ruling of the lower courts, deciding that the provision in section 4 of the Child Act 2010, which sets the age of majority at 18 years, was in conflict with the Criminal Act 1991 that sets the age at 15 years plus physical features of puberty or 18 years in all cases. Thus, the provision of the Child Act is unconstitutional as the Criminal Act is derived from Shari'a, and article 5(1) of the INC provides that '[n]ationally-enacted legislation having effect only in respect of the northern states of the Sudan shall have as its sources of legislation Islamic Shari'a and the consensus of the people'. Accordingly, the Court decided to disregard the provision in the Child Act and to base its ruling on the Criminal Act. Hence, the Court concluded that the alleged victim was an adult as her puberty had been established by her pregnancy. Therefore, the Supreme Court quashed the conviction

6 Sec 149(1) stipulates that '[t]here shall be deemed to commit the offence of rape, whoever makes sexual intercourse, by way of adultery, or sodomy, with any person without his consent'. However, in February 2015 this provision was amended to provide that rape will also be deemed to have been committed whenever someone has had sexual intercourse with a person who cannot express her consent because of her age.

7 Adultery is punishable by 100 lashes for unmarried persons according to sec 146 of the Criminal Act 1991.

8 Sec 6(3) Interpretation of Laws and General Clauses Act 1974.

of rape and ordered the retrial of the accused on a charge of adultery.[9]

The Court referred to section 6(2) of the Interpretation of Laws and General Clauses Act 1974 which states that '[i]f any provision in any law is inconsistent with any provision of the Constitution, the provision of the Constitution shall prevail to the extent of such inconsistency'.[10]

The facts of the case *per se* do not entail any interpretation of the Constitution. However, the Supreme Court resorted to this constitutional provision to resolve the inconstency between the provision in the Criminal Act 1991 and the provision in the Child Act 2010 which both were in force.

4 Background

4.1 Direct application of the Constitution by ordinary courts

The direct application of the Constitution by ordinary courts refers to the power, or duty, of ordinary courts to refrain from applying unconstitutional legislation. In some countries where a European centralised system of constitutional judicial review is followed, and even with the existence of a specialised Constitutional Court as the sole organ that can determine constitutional issues, an ordinary court, when it finds that the Constitution expressly overrides a provision in an ordinary law, can disregard that law and decide the case on the basis of the Constitution. In this case, the judgment of the ordinary court is considered to be neither a determination of a constitutional issue nor an exercise of 'proper' judicial review over the constitutionality of laws. Rather, it is merely a direct application of the Constitution. The judgment will not be *erga omnes*, that is, its effect will be restricted to the parties to the dispute and will not extend to annul the unconstitutional provision. This approach is followed in a number of countries, including Portugal, Russia, Columbia and Egypt.[11]

In Sudan, the Constitutional Court has exclusive power to review the constitutionality of legislation and to strike down unconstitutional

9 The Court held that the prosecution had at the outset wrongfully excluded the girl from accusation and, therefore, there was no way to then include her in the trial as an accused (80).

10 *Sudan Government v ASK* (n 1 above) per Abusin Deputy CJ 80.

11 AF Serour *The constitutional protection of rights* (2000) 219 (in Arabic); A Cortes & T Violante 'Concrete control of constitutionality in Portugal: A means towards effective protection of fundamental rights' (2010-1) 29 *Penn State International Law Review* 759 761, where they stated that '[o]rdinary courts shall not apply rules that are inconsistent with the constitutional provisions or principles. This means that there is a duty on the judiciary not to enforce rules that are in opposition to the Constitution.' However, '[o]nly the Constitutional Court has competence for the abstract control of constitutionality, which means that it is within its exclusive jurisdiction to declare a provision is unconstitutional with general binding force'.

legislation. However, the lower courts have the power to apply and to interpret the Constitution in the ordinary course of disposing ordinary cases brought before them as long as the constitutional law in question is clear. This approach has its basis in article 128 of the INC, in the chapter governing the national judiciary,[12] which stipulates that '[j]ustices and judges shall uphold the Constitution and the rule of law'.[13] This is further supported by article 48 of the INC, which states that '[t]he Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts'. It is submitted that upholding, protecting and applying the Constitution by 'other competent courts' necessarily implies the disregard by these courts of unconstitutional legislation. This power of ordinary courts to directly enforce constitutional norms has been supported by the Constitutional Court in an *obiter dictum* in *Masarat Media Co Ltd and Accord Services Co Ltd v National Security and Intelligence Service.*[14]

This is compatible with section 6(2) of the Interpretation of Laws and General Clauses Act 1974 which provides for the dominance of the Constitution over inconsistent legislation. It is obvious that this provision addresses ordinary courts. The fact that this Act was passed in the era preceding the establishment of a specialised Constitutional Court should not be of significance as at that time constitutional judicial review had also been exercised centrally by a specialised chamber of the Supreme Court.

What adds considerable weight in support of this approach is that neither the INC nor the Constitutional Court Act 2005 provides for a concrete judicial review procedure through which an ordinary court can halt the proceedings before it and refer the issue to the Constitutional Court to decide on the constitutionality of the debated provision. This leaves the ordinary courts with no option but to proceed with handling the constitutional issue in this limited scope.

This power of direct application of the Constitution was exercised by the Supreme Court in *Abdulla El Tayeb Osman v Mohammed Osman El Tayeb*,[15] where the Court ignored a provision in the Civil Transactions Act 1984 which purports to oust the jurisdiction of the

12 The national judiciary is composed of the ordinary courts as opposed to the Constitutional Court for which another chapter of the INC is assigned.

13 Art 128(3). It corresponds to art 101(2) of the Sudanese Constitution of 1998, under which the Constitutional Court was first established in Sudan, which stipulates that a judge of ordinary courts 'shall be guided by the principle of the supremacy of the Constitution and the law and he shall protect this principle'.

14 (2006-2010) Sudan Constitutional Court Law Reports 550 570 per Somi Zaidan J.

15 Civil Cassation 433/2001, Supreme Court Khartoum (unreported). The Court decided that sec 559(6) of the Civil Transactions Act 1984, which precludes courts from hearing any suit brought against the government or against the registered owner of a land regarding any matter relating to the ownership of any investment land, violated the right of access to court which is protected by art 31 of the Sudanese Constitution of 1998. The Court, therefore, decided to disregard this provision and to proceed hearing and determining the dispute on the basis of the Constitution. The Court acknowledged that it did not have the power to annul such a provision, but affirmed its power to refrain from applying it.

courts to hear and determine certain types of disputes over government land. The Supreme Court deemed the provision unconstitutional and decided to exercise jurisdiction over the dispute as a direct application of the constitutional right to litigate. In addition to section 6(2) of the Interpretation of Laws Act, the Court referred to its earlier decision in *Nasr Abdelrahman v The Legislative Authority*,[16] where it decided that in case of a conflict between any provision of any law and the Constitution, courts should ignore the provision of the law and refrain from its application.[17]

In principle, this approach is well supported by the constitutional, legislative and jurisprudential framework. It is submitted that the approach may be considered an important safeguard for ensuring constitutionalism and respect of constitutional rights, especially in countries where the Constitutional Court is highly politicised and less independent compared to the judiciary. The experience illustrates that the Sudanese Constitutional Court is reluctant to exercise its power to strike down unconstitutional legislation on issues the government deems as touching upon its remit.[18] Therefore, this approach allows ordinary courts to avoid the application of unconstitutional provisions in a limited scope, that is, as between parties in specific cases. After the adoption of the INC in 2005, more than 60 laws were identified as infringing the Bill of Rights and, accordingly, as unconstitutional. Although many recommendations were made to amend these laws to bring them into conformity with the Constitution, in fact very little has realised.[19] Therefore, it is submitted that in the absence of the political will to amend these unconstitutional provisions, this power of the ordinary courts should be a basis for avoidance of the application of those provisions and, hence, an important safeguard for the protection of constitutional rights.

Of course, the application of this approach is limited by the principle that the unconstitutionality of the provision in question should be obvious, and there should not be a contrary ruling in the matter by the Constitutional Court. In other words, the constitutional law on the matter should be obvious and clear. According to section 24(1) of the Constitutional Court Act 2005, judgments and decisions of the Constitutional Court are binding on all state organs in Sudan, including ordinary courts.

16 (1974) SLJR 74.

17 This decision was passed in 1974 when the Supreme Court was the 'custodian of the Constitution' under the Constitution of 1973 and before the adoption of the Constitutional Court system in 1998. However, it remains relevant as the constitutional judicial review was centrally entrusted to a specialised chamber within the Supreme Court.

18 See eg *Kamal Saboun v Sudan Government* (2006-11) Sudan Constitutional Court Law Reports 123.

19 See A Teir & B Badri (eds) *Law reform in Sudan: Collection of workshop papers* (2008).

4.2 Shari'a as a source of legislation

It appears that the English version of article 5(1) of INC, which provides for Islamic Shari'a and the consensus of the people as sources of legislation, differs from the Arabic one; the translation is not accurate. In the Arabic version of the Constitution, the word 'sources' is used without a definite article which means that it is not intended to be the sole sources of legislation. However, in the English version, this was translated in a manner that suggests that Shari'a and consensus are the exclusive sources of legislation: 'shall have as its sources of legislation Islamic Shari'a and the consensus of the people'.[20]

In all cases, Shari'a is not the only source of legislation; the consensus of the people is another independent source according to article 5(1) of the Constitution. However, it is not clear how this consensus can be established; whether through referendum or just by way of an Act of parliament, customary law or otherwise. As long as the Constitution does not provide for any mechanism to establish the consensus of the people, one may wonder whether the legislature may replace that mechanism, that is, whether the will of the legislature can act as the criterion of the consensus. Further, it is also not clear whether the consensus of the people, however it may be established, is enforceable even if it is inconsistent with Shari'a norms.

As to the effect of such a provision, Lombardi states that '[i]t might seem logical to assume that a decision to adopt an SSL [Shari'a as a source of legislation] clause making Shari'a something less than "the chief source" indicates an intention not to be bound by any firm prohibition on legislation inconsistent with Shari'a'.[21] Similarly, the jurisprudence of the constitutional courts in countries adopting similar provisions shows that such a provision in the Constitution is not a basis for striking down inconsistent legislation.[22]

It is submitted that even if Shari'a is considered the only source of legislation, the outcome would not be certain. It may be inferred that the drafters of the INC did not intend to vest the Constitutional Court or the judiciary with the power to strike down legislation which is inconsistent with Shari'a norms. If they intended this result, they would have used wording similar to that of the equivalent provision in the preceding Constitution of 1998, where it was explicitly stated that

20 However, both versions are authoritative; art 223 INC.

21 CB Lombardi 'Constitutional provisions making Shari'a "a" or "the" chief source of legislation: Where did they come from – What do they mean – Do they matter' (2012) 28 *American University International Law Review* 733 768.

22 Eg, the Kuwaiti Constitutional Court held that art 2 made Shari'a 'a source' and not 'the only source' of law so that the legislator could adopt rules which may be considered inconsistent with traditional Shari'a. J Goldenziel 'Veiled political questions: Islamic dress, constitutionalism, and the ascendance of courts' (2013) 61 *American Journal of Comparative Law* 35-36. See also Lombardi (n 21 above).

'no legislation in contravention with these fundamentals shall be made'.[23] To the same extent, article 114 of the Draft Constitution of 1968 clearly stated that '[e]very legislation passed after the adoption of this Constitution in contravention with the provisions of *Kitab* and *Sunnah* should be void'. In the absence of such wording, one may reasonably assume that such a provision should not operate as a basis for striking down non-Shari'a-compliant legislation.

The term Shari'a *per se* is vague and susceptible to different interpretations.[24] Shari'a is commonly mistaken for *Fiqh*; many use these two terms interchangeably. To avoid plunging into this conceptual muddle, it is important at least to distinguish *Fiqh* as the detailed jurisprudence developed over centuries by Islamic scholars.[25] In this context, it has been reaffirmed in many cases by the Sudanese Supreme Court that what was meant by the term Shari'a is the conclusive provisions contained in the *Quran* and *Sunna* and not the detailed *Fiqh* opinions even if delivered by eminent Muslim jurists.[26]

Similarly, it is well settled among Islamic scholars in Egypt and in the jurisprudence of the Constitutional Court there that what is meant by Shari'a as the source of legislation is the fundamental general principles agreed upon by the different schools, excluding the detailed rules that may change from one environment to another.[27] Whether or not this is a useful criterion is still open to further debate.

In *obiter dicta* it seems that the Sudanese Constitutional Court is going in the same direction.[28] According to EA Eljail J, the prevailing opinion in the Constitutional Court is that it is not concerned with the extent to which a statute is consistent with Shari'a because article 5(1) addresses the legislature. Therefore, there is no way for the Constitutional Court to intervene to review the consistency with Shari'a unless there is a specific conclusively-established and indicative text of Shari'a (*Qat'ī-uth-Thubūt* and *Qat'ī-ud-Dalālah*).[29] This has been reaffirmed by two other judges, AE Elbasheir J, the Chairperson of the Court, and Somi Zaidan J, although differently worded, adding that article 5(1) can be invoked only if the right allegedly infringed

23 Art 65.

24 According to Cardozo, '[a] good deal of warfare has its origin in the confusion that arises when a single term of a broad and ill-defined content is made to do duty for two or more ideas'; BN Cardozo *The growth of the law* (1966) 30.

25 See eg MA Hussein *Islamic Fiqh: The chief source of legislation* (1999) (in Arabic) 16-18.

26 *Abdelwahab M Yousuf v Mohammed E El-Amin* (1992) SLJR 301. This has been reaffirmed by the Constitutional Court in *Adam Musallam v SG* (2012) Sudan Constitutional Court Law Reports 283 288, where it was stated that what was meant by Shari'a was the divine texts included in the *Quran* and *Sunna*, whereas the *Fiqh* is a mere human endeavour.

27 Hussein (n 25 above) 8.

28 *Faroug M Ibrahim v The Government of Sudan* (2006-2010) Sudan Constitutional Court Law Reports 365.

29 *Ibrahim* (n 28 above) 372.

relates to an agreed-upon Shari'a rule and not rules that are subject to endeavour by scholars.[30]

In spite of the contradiction in or, at least, the inaccuracy of these statements, which the limited scope of this article does not allow us to indulge in, it is at least settled that article 5(1) cannot be invoked to strike down legislation that adopts one of the different opinions within Islamic *Fiqh*. Therefore, the courts do not have the power to intervene with the choice of the legislature.

There is even doubt about the justiciability of article 5(1). According to Abdalla, although the provision that 'the provisions contained in this chapter are not by themselves enforceable in a court of law' applies to Chapter 2 of the INC, the principles expressed herein are basic to governance and 'the state is duty-bound to be guided by them, especially in making policies and laws'. The unjustifiability should rather attach to the entire general principles of the INC, including article 5(1).[31]

5 Analysis of the reasoning

It is submitted that although, in principle, this approach of direct application of the Constitution is jurisprudentially well supported, its application in this case was not. There was neither a violation of the Constitution nor of Shari'a that justifies the application of this approach. The Court's reasoning seems unsound for a number of reasons.

5.1 Lack of diligence in rendering the judgment

This judgment was delivered *per incurium*. The Supreme Court disregarded binding precedents of the Constitutional Court. It ignored the decision in *Najmeldin Gasmelseed v 'Awlia dam' Abdelrahim M Ali*,[32] in which the Constitutional Court upheld the constitutionality of a similar provision in the Child Act 2004 that similarly defined a child as not exceeding 18 years of age.[33] The Constitutional Court considered both issues in detail in its *ratio decidendi*: the issue of constitutionality of the provision that set the majority age at 18, as well as the issue of Shari'a as a source of legislation, and concluded by upholding the constitutionality of the provision. It even followed its earlier decision in *Abdelmouiz Hamdoun v SG*.[34]

30 *Ibrahim* 376 380.

31 Nabil Adib Abdalla, Senior Advocate, personal interview 23 October 2015.

32 (2006-2010) Sudan Constitutional Court Law Reports 399.

33 This conclusion was recently reaffirmed by the Constitutional Court in *Salih H Jad Karim & Others v SG and Awlia' Dam Ali Hammad & Others* CC/CC/51/2013 delivered 19 November 2014.

34 (1999-2003) Sudan Constitutional Court Law Reports 93.

Therefore, it would not be easy to accept this lack of diligence in delivering the judgment by a panel of the Supreme Court presided over by the then Deputy Chief Justice of the Sudan who, shortly thereafter, became the Chief Justice of the Sudan with the current Deputy Chief Justice as a member of the panel who delivered the first judgment.[35] Further, and as long as the Constitutional Court has expressed its opinion on the constitutionality of the provision in question, it may amount to usurpation of jurisdiction for the Supreme Court to deviate from this ruling.

5.2 Violation of Shari'a and the Constitution

The Court disregarded the fact that the opinion within the Islamic *Fiqh,* declaring 15 years of age plus apparent features of puberty as the criteria of adulthood, which was adopted by the legislature of the Criminal Act 1991, is not the only available opinion even within the orthodox Islamic *Fiqh*. Therefore, it cannot readily be assumed that this opinion represents Shari'a. There are different views within the four Sunni schools of Shari'a on establishing the age of majority or the age of criminal liability. The option of 18 as the age of adulthood is actually based on the *Hanafi* and *Maliki* schools, and there are many other opinions within the traditional Islamic jurisprudence.[36] Therefore, and according to what has been posited above, selecting of any of these different views cannot by any means be considered a violation of Shari'a. This is obvious, and has also been discussed clearly by the Constitutional Court in the case of *Najmeldin* referred to.[37]

The Court did not explain how the Criminal Act was considered Shari'a law. Even if the provisions of the Criminal Act were derived from Shari'a, or *Fiqh*, they do not form part of the Constitution for the Court to determine the constitutionality of other laws by reference to it. The constitutionality of a statute cannot be reviewed by reference to a similar statute. Also, there should be a flagrant contradiction to the Constitution; the unconstitutionality of the relevant provision should be obvious and not reasonably disputed as posited earlier.

5.3 A possible solution

It is understandable that the Supreme Court endeavoured to alleviate the situation of the accused who, apparently, was relatively of the same age as the alleged victim of rape and in circumstances leading

35 The Constitutional Court's decision in *Najmeldin* was delivered on 2 December 2008 while the decision of the Supreme Court in this case was delivered on 30 May 2011. Therefore, the fact that *Najmeldin* was only published as a reported case in 2011 is probably not an excuse. The Chief Justice, or the judiciary, is served with all decisions of the Constitutional Courts on constitutional suits based on judicial decisions. However, one cannot negate the effect of the defective law-reporting system in Sudan. Throughout the 18 years of the existence of the Constitutional Court, only three volumes of law reports have been issued.

36 A Auda *The modern cyclopedia of Islamic criminal Fiqh* (2001) 377.

37 *Najmeldin* (n 32 above).

to a reasonable inference that they were in a consensual relationship. It is submitted that this result could have been reached without addressing the issue of constitutionality of the provision of the Child Act 2010.

A possible solution would have been to rely on the ordinary rules of interpretation of statutes applicable to cases of conflict between two pieces of legislation, as provided for in the Interpretation of Laws and General Clauses Act 1974. Section 6(4) states that '[a]ny special law or any special provision in any law in respect of any matter shall be deemed an exception to any general law or general provision in any law governing such matter'. For the purpose of establishing the consent which would act as a defence in the crime of rape, the provision in the Criminal Act 1991 that provides for the age of adulthood could have been considered a special provision that prevails over the general provision in the Child Act which sets the majority age at 18. This is because when the legislator of the Criminal Act set the proviso of consent as an exception from criminalising what would be the *actus reus* of rape, he meant consent of an 'adult' as defined in the same Criminal Act. Even the accused would be entitled to reasonably think so. It is more appropriate to define the degree of adulthood which is required to render consent effective by reference to the same statute that provides for the crime and the available defences and not by reference to an external text.

This approach is supported by the rule of lenity which requires that an ambiguity in a criminal statute, in prohibition or in penalties, should be resolved in favour of the accused. This rule of construction requires courts when facing a set of inconsistent punishments to resolve the ambiguity in favour of the more lenient punishment.[38]

This interpretation could also be fostered by adhering to the purposive approach of statutory interpretation as provided for in section 6(1) of the Interpretation of Laws Act 1974. This sub-section provides that '[t]he provisions of every law shall be construed in such manner as to achieve the purpose for which it has been enacted and in all cases the construction which achieves such purpose shall be preferred to any other construction'. The Child Act intends to protect minors from sexual abuse by adults, a situation that is unlikely to exist between persons of a relatively similar age as in this case.[39] This approach could also have been supported by invoking the rule of avoiding absurdity, that the legislature did not intend an absurd or unjust result. It might be absurd, or unjust, for a partner in the same act who was more or less of a similar age as that of the other partner in circumstances which suggest it was a consensual and continuous relationship to end up with a 20 years jail sentence while the other partner is released and converted to a victim.

38 See Z Price 'The rule of lenity as a rule of structure' (2004) 72 *Fordham Law R*eview 885.

39 See the General Principles of the Child Act 2010 sec 5.

However, the article by no means addresses the adequacy of this corporeal punishment of flogging for adultery as provided for in section 146 of the Criminal Act 1991, nor does it indulge in the discussion of the issue of criminalising or decriminalising the act of consensual pre-marital sexual intercourse *per se*. These issues need to be adequately addressed under separate cover. Rather, the article explores the available solutions in such situations within the existing applicable laws.

In the same vein, these issues have not been addressed in light of the obligations of Sudan under the relevant international conventions to which Sudan is a party.[40] Article 27(3) of the Sudan Interim National Constitution provides that '[a]ll rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill'. Although this provision intends to render the relevant international human rights conventions self-executing and to incorporate these international rights into Sudanese municipal law, its practical implementation was controversial and unfortunate. In practice, the Constitutional Court manoeuvred a flimsy reasoning to avoid the application of this provision in the few cases in which this provision was invoked.[41] Therefore, although these issues are worth addressing, the discussion was confined to the relevant possible solutions to the Court within the applicable framework. The facts of the case do not raise issues of child rights. The issue was whether the consent of the 17 year-old girl was valid or not.

Article 1 of the Convention of the Rights of Child (CRC), which has been ratified by Sudan, states that '[r]or the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. Therefore, fixing the age of majority at 15 plus puberty features does not violate the Convention and, accordingly, does not entail the relevance of the international norms in this area. The only mandatory provision referring to the age of 18 is the provision of article 37 of the CRC which forbids imposing capital punishment on persons under 18. The INC is in line with this provision and it was not an issue in this case.

6 Conclusion

To conclude, the judgment was poorly reasoned. Although it has been asserted that it was a reaffirmation of the power and duty of ordinary courts to refrain from applying unconstitutional legislation, there was no ground for using this approach in this specific case. This

40 See eg *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003).

41 See *Izzeldin Elhaj Elmakki v Sudan Government* (2011) Sudan Constitutional Court Law Reports 360.

power should be used cautiously; the violation of the Constitution should not be reasonably disputed; and there should not be a Constitutional Court precedent to the contrary on the issue. It has been submitted that the same result of relieving the accused of the unreasonably harsh punishment for the alleged rape could have been reached by reference to the rules of interpretation of statutes without addressing the constitutionality of the Child Act provision and without basing the decision on this bewildering 'Shari'a as a source of legislation clause'. The sound application of this power of ordinary courts may be an effective tool for the protection of the constitutional rights in specific cases where legislation overtly contravenes the Bill of Rights.

The significance of the case is that it seems to be the only reported case on this approach of abstention from application of unconstitutional laws in this era starting from the adoption of the specialised Constitutional Court system in Sudan. As such, the Supreme Court paved the way for the ordinary courts to exercise this power and to enrich the jurisprudence on this issue. The article has also shed light on the controversial issue of Shari'a as the source of legislation and the implication of such status. However, this case revealed the necessity for reforming this area of law to eliminate any conflict between the Criminal Act and the Child Act by addressing the issue legislatively. It also articulated the necessity for taking measures to enhance the legal methodology in Sudan as serious defects are manifest in areas of judicial reasoning, statutory interpretation and judicial review.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Focus: Adolescent sexual and reproductive rights in the African region

Guest-edited by

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Editorial

The three articles in this section focus on the sexual and reproductive rights of adolescents in the African region. The articles are products of a colloquium convened at the Centre for Human Rights, University of Pretoria, on 29 and 30 August 2016. The convenors were Professors Charles Ngwena (Centre for Human Rights, University of Pretoria) and Ebenezer Durojaye (Dullah Omar Institute, University of the Western Cape). The convenors also served as co-guest editors for the thematic focus on sexual and reproductive rights in this issue.

The theme of the colloquium, *Unmet adolescent sexual and reproductive needs in the African region: What can human rights do?* served as a pivot for an academic discourse around two main goals: (i) identifying persistent gaps and challenges in the respect, protection, promotion and fulfilment of the sexual and reproductive rights of adolescents in the African region; and (ii) advancing arguments for addressing the gaps and challenges using human rights frameworks.

The article by Savage-Oyekunle and Nienaber focuses on adolescent access to emergency contraception. Whilst addressing the African region, its particular focus is Nigeria. The authors find that adolescents experience discrimination and inequality in access to contraception generally. Among the solutions they propose, the authors suggest that comments of treaty-monitoring bodies, including the African Committee of Experts on the Rights and Welfare of the Child, are important resources for formulating arguments to support the rights of adolescents to adequate access to emergency contraception at the domestic level. The article by Kangaude is a critique of the criminalisation of consensual sexual conduct between or with children and adolescents. Kangaude argues that the assumptions underpinning such criminalisation are informed more by patriarchal, heterosexist, and gender biases and less by respect for the rights of children and adolescents. He proposes ways in which the law can be reformed in order to recognise consensual sexual conduct between or with children and adolescents.

The last article is by Ofuani, who focuses on the involuntary sterilisation of adolescent girls with intellectual disabilities and focuses on Nigeria. The article uses the human rights standards laid down by the Convention on the Rights of Persons with Disabilities (CRPD) to appraise the law and practice in Nigeria. Ofuani concludes that Nigeria falls woefully short of the standards laid down by the CRPD, including article 12 of the CRPD which recognises the rights of girls with intellectual disabilities to legal capacity on an equal basis with others, and suggests remedial measures.

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Adolescents' access to emergency contraception in Africa: An empty promise?

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Summary

Governments have committed themselves at international human rights fora to prioritising programmes aimed at adolescents' development and wellbeing, particularly their educational and health needs. Such programmes include those focused on adolescents' sexual and reproductive health, and are aimed at enabling adolescents to manage in a positive manner their awakening sexuality. African countries, too, have focused their efforts on adolescents. Despite commitment by governments, an alarmingly high rate of unintended pregnancies among Africa's adolescents persists. These unintended pregnancies are associated with a low level of contraceptive use, especially among adolescent girls who face significant discrimination and inequality when accessing contraceptive information and services, including specific information on where and how to access emergency contraceptives. This situation flies in the face of the realisation that unconditional and unhindered access to emergency contraceptives is an important tool to protect adolescent girls from sexual ill-health and maternal mortality and morbidity. In light of obstacles in the way of adolescent girls' access to emergency contraception in the African region, the comments of the various treaty-monitoring bodies are highlighted in the article in order to strengthen arguments in support of African adolescents' access to emergency contraception. Additionally, mechanisms which may be adopted to overcome obstacles that hinder adolescents' access and use of emergency contraceptives are examined in

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order to determine whether they may be beneficial in ensuring African adolescents' access to emergency contraception. Although the study is comparative in nature, specific attention is paid to Nigerian adolescents' access to emergency contraception.

Key words: *sexual and reproductive health; adolescents; access to emergency contraception; maternal mortality*

1 Introduction

Governments the world over increasingly realise the necessity of paying attention to the rights and needs of adolescents. Consequently, they have committed themselves at international human rights *fora* to prioritising programmes aimed at adolescents' development and wellbeing, particularly their educational and health needs.[1] Such programmes include those focused on adolescents' sexual and reproductive health,[2] and are aimed at enabling adolescents to manage in a positive manner their awakening sexuality. African countries, too, have focused their efforts on adolescents and, consequently, various African regional human rights instruments[3] emphasise the right of adolescents to access sexual health care information and services, including those relating to emergency contraception.

1 At the International Conference on Population and Development held in Cairo, Egypt, in 1994, states committed themselves to ensuring a shift away from the narrow focus on population and fertility reduction, to a broader agenda that addressed a range of SRH issues that affect the lives of women. In relation to adolescents, states in paras 7.44 and 7.46 of the Programme of Action committed themselves to comprehensively addressing adolescents' SRH issues, including reducing unsafe abortions, substantially reducing unwanted pregnancies, and promoting their rights to reproductive health education, information and care. In this regard, see ICPD Programme of Action, 1994, https://www.unfpa.org/sites/default/files/event-pdf/PoA_en.pdf (accessed 9 June 2016).

2 The term SRH, though used as a combination, consists of distinct concepts. The initial definition of reproductive health in the ICPD Programme of Action and the Beijing Declaration lumped sexual health in the definition for reproductive health in para 7.2 (ICPD Programme of Action 1994 and para 94 Beijing Declaration and the Platform for Action 1995). This was done as a result of the overlapping nature of the two concepts which entail supporting normal biological functions associated with pregnancy and childbirth and reducing the adverse outcomes associated with the occurrence of sexual activities. The difference between the concepts is further highlighted by the fact that not all sexual activities result in childbirth or procreation. In a recent WHO definition of sexual health, it was noted that the sexual rights of all individuals must be respected, protected and satisfied. See WHO *Measuring sexual health: Conceptual and practical considerations and related indicators* (2010) 10, http://whqlibdoc.who.int/hq/2010/who_rhr_10.12_eng.pdf (accessed 20 April 2016); AM Miller 'Sexual but not reproductive: Exploring the junction and disjunction of sexual and reproductive rights' (2000) 4 *Health and Human Rights* 68-109.

3 Regional human rights instruments, such as the African Charter (art 16), the African Children's Charter (art 14) and the African Women's Protocol (art 14), guarantee the right of adolescents to health care. Particularly, the African Women's Protocol recognises the right of women and adolescent girls not only to

Adolescents in sub-Saharan Africa face numerous sexual and reproductive health hazards, including unintended pregnancies; unsafe abortions; and sexually-transmitted infections (STIs)[4] as a result of their involvement in early – and often unprotected – sexual activity.[5] In addition, approximately 40 per cent of all pregnancies worldwide are unintended, with higher unintended pregnancy rates in African countries.[6] In a review of the sexual and reproductive health and rights of adolescents in nine countries in sub-Saharan Africa,[7] it was noted that adolescents in the region are particularly vulnerable to sexual and reproductive health issues such as high adolescent birth rates.[8] According to the review, sub-Saharan Africa contributes over 50 per cent of the global adolescent birth rate, as well as over 23 per cent of the burden of diseases associated with pregnancy and child and maternal ill-health.[9] Consequently, these adolescents' education and livelihood options are negatively affected.[10] Unintended pregnancies among adolescents, therefore, represent a major health challenge in many African countries.

The high level of unintended pregnancies in Africa is associated with a low level of contraceptive use in the region, especially among adolescent girls who not only face significant discrimination and inequality when accessing contraceptive information and services, including particular information on where and how to access

choose appropriate methods of contraception to control their fertility, but also to ensure their self-protection against STIs and HIV and have access to family planning education; see generally arts 14 (1)(a)(c)(d) and (g) of the African Women's Protocol. See OA Savage-Oyekunle & A Nienaber 'Adolescent girls' access to contraceptive information and services: An analysis of legislation and policies, and their realisation, in Nigeria and South Africa' (2015) 15 *African Human Rights Law Journal* 433-448.

4 Globally, figures indicate that adolescents in sub-Saharan Africa remain most affected by the HIV epidemic, despite encouraging indications that the HIV prevalence is declining among young people in the region. See UNESCO *Young people today: Time to act now – Why adolescents and young people need comprehensive sexuality education and sexual and reproductive health services in Eastern and Southern Africa* (2013) 8, http://unesdoc.unesco.org/images/0022/002234/223447E.pdf (accessed 8 June 2016).

5 N Lukale *Adolescent reproductive health concerns in sub-Saharan Africa* (2015), https://girlsglobe.org/2015/12/15/adolescent-reproductive-health-concerns-in-sub-saharan-africa/ (accessed 14 June 2016); CW Kabiru et al 'The health and wellbeing of young people in sub-Saharan Africa: An under-researched area?' (2013) 13 *BMC International Health and Human Rights,* http://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/1472-698X-13-11 (accessed 15 June 2016).

6 UNFPA *Adolescent pregnancy: A review of the evidence* (2013) 14-15, https://www.unfpa.org/sites/default/files/pub-pdf/ADOLESCENT%20PREGNANCY_UNFPA.pdf (accessed 14 June 2016).

7 The countries under review were Angola, Benin, Ethiopia, Rwanda, Kenya, Nigeria, Sierra Leone, Tanzania and Zambia.

8 UNFPA (n 6 above).

9 As above.

10 See OA Savage-Oyekunle 'Female adolescents' reproductive health rights: Access to contraceptive information and services in Nigeria and South Africa' LLD thesis, University of Pretoria, 2014; and World YWCA *Sexual reproductive health and rights for adolescents in sub-Saharan Africa – Youth fact sheet* (2014) 3.

emergency contraceptives,[11] but who also frequently are victims of sexual assault and violence.[12]

The poor sexual health outcomes associated with adolescence in sub-Saharan Africa are discouraging as, in theory, adolescents are 'protected' and guaranteed access to contraceptive information and services, including emergency contraceptives.[13] While emergency contraception does not protect against STIs, unhindered access to it is an important tool in the prevention of unintended pregnancies among adolescents – especially pregnancies resulting from sexual violence – and consequently lends protection against sexual ill-health and maternal mortality.[14]

In relation to emergency contraception, specifically, Williams reports that the dearth of knowledge about relevant sexual and reproductive health care services by women and adolescent girls in sub-Saharan Africa indisputably hinders the demand for emergency contraception as women's awareness of this contraception continues to be below 10 per cent in Senegal and Zambia.[15] According to Williams, even in countries such as Kenya, where reports reveal high levels of awareness of the method, the actual use of emergency contraception remains low.[16]

Because of these alarming statistics, African governments have resolved to integrate emergency contraception into their family planning service delivery policies and guidelines,[17] and many governments offer the contraceptive method in public sector services.[18] Further, adolescents' access to emergency contraception is

11 C Mouli et al 'Contraception for adolescents in low and middle-income countries: Needs, barriers, and access' (2014) 11 *Reproductive Health* 3-4, http://www.reproductive-health-journal.com/content/11/1/1 (accessed 10 June 2016).

12 UNAIDS Empower young women and adolescent girls: Fast-tracking the end of the aids epidemic in Africa (2015) 12-13, http://www.unaids.org/sites/default/files/media_asset/JC2746_en.pdf (accessed 14 June 2016); WHO *World report on violence and health* (2012) 152-154, http://www.who.int/violence_injury_prevention/violence/world_report/en/full_en.pdf?ua=1 (accessed 14 June 2016).

13 See Savage-Oyekunle (n 10 above) 22-72. See also OA Savage-Oyekunle & A Nienaber 'Female adolescents' evolving capacities in relation to their right to access contraceptive information and services: A comparative study of South Africa and Nigeria' (2015) 48 *Comparative and International Law Journal of South Africa* 1.

14 Wikipedia *Emergency contraception,* https://en.wikipedia.org/wiki/Emergency_contraception# History (accessed 18 June 2016).

15 K Williams *Provider-related barriers to accessing emergency contraception in developing countries: A literature review* (2011) http://www.popcouncil.org/uploads/pdfs/2011RH_ECBarriersLitReview.pdf (accessed 14 June 2016).

16 Eg, in Kenya, even though 40% of the population is aware of EC, only 2% of women report ever having used it. See Williams (n 15 above).

17 In response to the state of SRH rights in the region, African governments as well as regional groups (including the African Union and SADC) developed a policy known as the Maputo Plan of Action that would be used for the achievement of SRH rights in the region. The Maputo Plan of Action, which was specifically broad and flexible to adapt to the unique circumstances of each country, generally contains steps that were to be adopted in order to realise universal access to SRH rights in Africa by 2015. With the passing of the 2015 deadline, a comprehensive

premised on the obligation of state parties to human rights instruments to guarantee to adolescent girls the right to enjoy the highest attainable standard of health through their access to sexual health care services and information and, indeed, their right to choose their preferred method of contraception.[19] Also based on the provisions of human rights instruments, African governments are compelled to ensure that emergency contraceptives not only are accessible, but that they are affordable and readily available to adolescents.

Despite these guarantees in human rights instruments,[20] emergency contraception remains largely inaccessible. In light of this, the article analyses obstacles in the way of adolescent girls' access to emergency contraception in sub-Saharan Africa, specifically focusing on the access to emergency contraception of adolescent girls in Nigeria. Selected comments by treaty-monitoring bodies, including those of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), are analysed in order to support arguments for African adolescents' access to emergency contraception in the promotion of their rights to sexual and reproductive health care. In addition, methods that may be adopted in overcoming obstacles to the use of emergency contraceptives are examined in order to determine whether they may be helpful in ensuring adolescents' access to emergency contraception on the African continent.

Below we begin with a description of emergency contraceptives and their use.

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review of the implementation, achievements, challenges and gaps of the Maputo Plan of Action was carried out. This review culminated in the adoption of the revised Maputo Plan of Action 2016-2030. Para 18(vi) of the revised Maputo Plan of Action commits states to investing in the SRH needs of adolescents and other vulnerable and marginalised populations. See Maputo Plan of Action 2016-2030 for the operationalisation of the continental policy framework for sexual and reproductive health and rights, http://www.au.int/en/sites/default/files/documents/24099-poa_5-_revised_clean.pdf (accessed 15 June 2016). See further African Union Commission's Decision on the Continental Policy Framework for the Promotion of Sexual and Reproductive Health and Rights in Africa (Doc EX.CL/225 (VIII) http://pages.au.int/sites/default/files/SRHR%20English_0.pdf (accessed 10 September 2017). This framework was put into operation by the AU's Maputo Plan of Action on Sexual and Reproductive Health and Rights (see above).

18 Z Shewamene et al 'Is emergency contraceptive accessibility a barrier in developing countries? A review' (2013) 4 *International Journal of Pharmaceutical Sciences and Research* 1324-1325; CRR Governments Worldwide Put Emergency Contraception into Women's Hands: A global review of laws and policies (2004) 5-6, http://www.reproductiverights.org/sites/default/files/documents/pub_bp_govtswwec.pdf (accessed 15 June 2016).

19 Art 14(1)(c) African Women's Protocol.

20 These guarantees are not discussed in detailed here. For a detailed discussion of human rights guarantees of adolescent girls' sexual and reproductive health rights, see E Durojaye 'Realising access to contraception for adolescents in Nigeria: A human rights analysis' LLD thesis, University of the Free State, 2010; and Savage-Oyekunle (n 10 above).

2 What is emergency contraception?

Emergency contraceptives are contraceptives that can be used to *prevent* pregnancy during the first few days after intercourse.[21] Often referred to as the 'morning-after pill', emergency contraceptives prevent ovulation or fertilisation and are intended for emergency use following unprotected intercourse, contraceptive failure or incorrect use,[22] rape or coerced sex.[23]

The emergency contraceptive pill may be taken up to 72 hours[24] after unprotected sex, but is more effective when used within the first 24 hours after sexual intercourse.[25] While emergency contraceptives should not replace the oral contraceptive pill which is taken daily, the emergency contraceptive pill may be taken by any girl or woman in order to avoid an unwanted pregnancy.[26]

In use since the mid-1960s, emergency contraception initially was developed to treat rape victims in order to prevent unintended pregnancies.[27] In the early 1970s, the Yuzpe regimen – a combination hormone formula – replaced the high-dose oestrogen emergency contraceptive methods of the 1960s and became the gold standard of treatment for post-coital contraception.[28] During this period the copper intra-uterine device (IUD) was also introduced and used by health care providers as the only non-hormonal method of emergency

21 Emergency contraceptives are intended for occasional use, when primary methods of contraception fail, in order to prevent the occurrence of pregnancy. See Association of Reproductive Health Professionals 'The difference between medical abortion and emergency contraceptive pills' http://www.arhp.org/publications-and-resources/clinical-fact-sheets/mifepristone-ec (accessed 2 April 2015).

22 Contraceptive failure or misuse involves situations where the woman or female adolescent forgets to take her daily pill or where a condom becomes damaged during sexual intercourse.

23 WHO *Emergency contraception*, http://www.who.int/mediacentre/factsheets/fs244/en/ (accessed 2 June 2016).

24 While data support that EC can be used up to 120 hours after unprotected sexual intercourse, it has been noted that its efficacy diminishes as hormonal administration becomes more remote from the unprotected intercourse event. See American Academy of Paediatrics Policy Statement: Contraception and adolescents (2007) 120 *Paediatrics* 1144.

25 Emergency contraceptive pills differ from medical abortion pills. While the EC pill is a back-up contraceptive method used to prevent a pregnancy after unprotected sex or contraceptive failure, the medical abortion pill is a non-surgical option for terminating an established pregnancy. See International Consortium for Emergency Contraception 'Emergency contraception and medical abortion: What's the difference?' (2013) http://www.cecinfo.org/custom-content/uploads/2014/01/ICEC_Medical-Abortion-Fact-Sheet_Feb-2013.pdf (accessed 23 June 2016).

26 WHO (n 23 above).

27 The treatment adopted then consisted of the use of a high dose of oestrogen after a rape. Though found to be effective, it was discovered that the treatment adopted had many harsh side-effects. See D Stacey 'The history of emergency contraception' https://www.verywell.com/the-history-of-emergency-contraception-906714 (accessed 18 June 2016).

28 The Yuzpe regimen was developed by A Albert Yuzpe in 1974. See Stacey (n 27 above); Wikipedia (n 14 above).

contraception to date.[29] Although it is an effective form of emergency contraception as it is able to prevent pregnancy for up to five days after unprotected intercourse, the copper-releasing IUD usually is not recommended for use in adolescents.[30]

Regarding the importance of emergency contraception, the Planned Parenthood Organisation explains that it provides women (and adolescent girls) with a second chance to prevent pregnancy in cases of unanticipated sexual activity, contraceptive failure or sexual assault.[31] Likewise, Babatunde remarks that emergency contraception is a safe, effective and relatively inexpensive means of preventing unplanned pregnancies after unplanned or unprotected sexual intercourse.[32] According to him, especially because of their earlier and often unplanned initiation into sexual activities, the use of emergency contraceptives in adolescence is particularly appropriate as adolescents often engage in sporadic and occasional sexual encounters which pose a serious challenge to their sexual health.[33]

In addition to providing a second chance to prevent unwanted pregnancies, emergency contraception has been proven safe and effective. It has no long-term effects on the health of the adolescent girl or woman, and does not affect future fertility or increase the risk of ectopic pregnancies.[34] The Planned Parenthood Organisation explains that two factors influence the effectiveness of the use of emergency contraception, namely, the length of time that elapses after unprotected intercourse; and at which stage during the menstrual cycle of the woman or adolescent it is used. When taken during the first few days after unprotected intercourse this form of contraception is most effective. Also, the closer a woman is to ovulation at the time of unprotected intercourse the less likely the method is to succeed.[35] However, emergency contraception is not as effective as the consistent use of other regular contraceptive methods,[36] neither does it protect against STIs and HIV.[37]

29 Stacey (n 27 above); Wikipedia (n 14 above).

30 American Academy of Paediatrics Policy Statement (n 24 above) 1144.

31 Planned Parenthood 'Emergency contraception: History and access' https://www.plannedparenthood.org/files/5713/9611/6188/Emergency_Contraception_History_and_Access.pdf (accessed 15 June 2016).

32 OA Babatunde et al 'Knowledge and use of emergency contraception among students of public secondary schools in Ilorin, Nigeria' (2016) 23 *Pan-African Medical Journal*, http://www.panafrican-med-journal.com/content/article/23/74/pdf/74.pdf (accessed 9 June 2016).

33 Babatunde et al (n 32 above).

34 International Consortium for Emergency Contraception 'The Unfinished agenda: Next steps to increase access to emergency contraception' (2014) 2, http://www.cecinfo.org/custom-content/uploads/2014/01/ICEC_Next-Steps-WEB_2014.pdf (accessed 23 June 2016).

35 Planned Parenthood (n 31 above).

36 Regular contraceptive methods include the pill, the IUD, implants, injections, patches or rings.

37 Planned Parenthood (n 31 above). See also American Academy of Paediatrics

We now move on to present a brief outline of guarantees in human rights instruments of the SRH rights of adolescents. Because of the focus of the article, we highlight the rights of female adolescents.

3 An overview of adolescents' sexual and reproductive health rights

> [A]s a matter of policy, the sexual and reproductive health of adolescents matter because they comprise almost one half of the world's population. As a matter of international human rights law, adolescents have reproductive and sexual health rights.[38]

The period of adolescence is critical: Adolescents transition from being dependents to being providers; and adolescents' health and sexual choices during the period to a large extent shape their futures.[39] In fact, improvements in the sexual and reproductive health status of a region over time depend on the degree to which governments invest in adolescent sexual health.[40] The situation is particularly tendentious in the case of adolescent girls as they are constantly faced with peer pressure to engage in early sexual relations,[41] and also often are victims of sexual violence.[42]

Internationally, apart from the Universal Declaration of Human Rights (Universal Declaration) and other human rights instruments generally recognising the right of everyone to the highest attainable standard of health,[43] children's rights to sexual and reproductive

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Emergency contraception (2012) http://pediatrics.aappublications.org/content/130/6/1174 (accessed 8 June 2016).

38 A Haider 'Adolescents under international law: Autonomy as the key to reproductive health' (2008) 14 *William and Mary Journal of Women and the Law* 605.

39 See Savage-Oyekunle (n 10 above) 21.

40 G Kangaude 'Enhancing the role of health professionals in the advancement of adolescent sexual health and rights in Africa' (2016) 132 *International Journal of Gynaecology and Obstetrics* (2016) 105.

41 A Ankomah et al 'Reasons for delaying or engaging in early sexual initiation among adolescents in Nigeria' (2011) 2 *Adolescent Health, Medicine and Therapeutics* 78-80, http://www.pathfinder.org/publications-tools/pdfs/Reasons-for-delaying-or-engaging-in-early-sexual-initiation-among-adolescents-in-Nigeria.pdf (accessed 8 May 2013); T Selikow et al 'I am not *umqwayito*: A qualitative study of peer pressure and sexual risk behaviour among young adolescents in Cape Town, South Africa' (2009) 37 *Scandinavian Journal of Public Health* 109-110; JB Bingenheimer et al *'The peer group context of sexual behaviours among Ghanaian youth'*, http://paa2013.princeton.edu/papers/131537(accessed 8 May 2013).

42 R Jewkes 'Non-consensual sex among South African youth: Prevalence of coerced sex and discourses of control and desire' in SJ Jejeebhoy et al (eds) *Sex without consent: Young people in developing countries* (2005) 88; FF Akanle 'Sexual coercion of adolescent girls in Yoruba Land of Nigeria' (2011) 3 *Current Research Journal of Social Sciences* 132-138; Family Health International 'Non-consensual sex' (2005) 23 *Network* 3-4, http://lastradainternational.org/lsidocs/583%20fhi_05_nonconsensual_sex_070402.pdf (accessed 8 May 2013); Ankomah et al (n 41 above) 81-82.

43 Art 25 Universal Declaration; art 12 CEDAW; and art 12 ICESCR. See also, generally, paras 14-21 General Comment 22 of the ESCR Committee.

health were given the status of legally-binding international law with the adoption by the United Nations (UN) Convention on the Rights of the Child (CRC) on 20 November 1989.[44] In 1994, at the International Conference on Population and Development (ICPD),[45] governments from all over – including Africa – acknowledged the need to recognise adolescents' sexual and reproductive health rights.[46] Following the lead of the ICPD, several additional international declarations have urged governments to commit to the realisation of adolescent sexual and reproductive health rights through their access to quality sexual and reproductive health care services.[47]

According to Durojaye the adoption of a rights-based approach to realise the rights of adolescents to emergency contraception is necessary as it creates an avenue for holding governments accountable for the fulfilment of adolescents' sexual rights under international and regional human rights law.[48]

In Africa the right of adolescents to sexual and reproductive health care – specifically their right of access to emergency contraception – may be inferred from the right to health as recognised in article 16 of the African Charter on Human and Peoples' Rights (African Charter),[49] and articles 14(1), 14(2)(b) and 14(2)(f) the African Charter on the Rights and Welfare of the Child (African Children's Charter).[50]

Additional rights that are necessary for the enjoyment of adolescents' rights to access emergency contraceptives include the rights to equality (non-discrimination); life; dignity; privacy; information; and education,[51] also guaranteed in these instruments.

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44 The Convention on the Rights of the Child was adopted by Resolution 44/25 of 20 November 1989.

45 The conference resulted in countries committing to the ICPD Programme of Action - A/CONF.171/13/Rev.1, http://www.unfpa.org/public/publications/pid/1973 (accessed 20 April 2016).

46 Art 24 of the CRC recognises the rights of children to the enjoyment of the highest attainable standard of health and orders state parties to assure their access to preventive health care, including that relating to family planning education and services. See arts 24(1) & 24(2)(f) of the CRC. Paras 7.41-7.48 of the ICPD Programme of Action were specifically dedicated to adolescent sexual and reproductive health.

47 Paras 97 & 98 Beijing Declaration and Platform for Action; African Youth Charter 2009; Bali Global Youth Forum Declaration 2012; and so on.

48 E Durojaye 'Realising access to sexual health information and services for adolescents through the Protocol to the African Charter on the Rights of Women' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 152.

49 The African Charter on Human and Peoples' Rights was adopted in 1981; OAU Doc CAB/LEG/67/3 Rev 5. Also see AU Commission (n 18 above).

50 The African Children's Charter was adopted in 1990; OAU Doc CAB/LEG/24.9/49. The rights of African children to access EC may be inferred from the provisions of arts 14(1), 14(2)(b) & 14(2)(f) of the African Children's Charter which implores state parties to develop preventive health care, family life education and services for children.

51 See generally arts 2, 4, 5, 9 and 17 of the African Charter; arts 3, 5, 9, 10, 11 & 21 of the African Children's Charter.

Particularly, article 11(2)(h) of the African Children's Charter makes provision for the 'direction of the education of children towards their understanding of primary health care'. This provision is such that it may be interpreted to accommodate giving adolescent girls information regarding emergency contraceptive services, as the provision of advice on family planning and contraception constitutes a part of primary health care services. Also, the right to privacy protected in the African Children's Charter[52] is of paramount importance in guaranteeing the protection of the sexual health of adolescent girls in the region. This is so because assurances that their privacy will be protected positively influence adolescent girls' readiness to access emergency contraception where available.[53]

In addition to the above, the African Children's Charter contains three major guarantees which influence adolescent girls' access to emergency contraception in Africa: the best interests of the child;[54] the right of the child to participate in decisions affecting them;[55] and the 'evolving capacities of the child' concept.[56] With the inclusion of these provisions, the Children's Charter demonstrates an acceptance that adolescent girls not only mature at different rates, but that they attain various levels of competence and insight as they grow. Also, it is these levels of competencies that must be considered when adolescent girls require confidential information on emergency contraception or about the services themselves.

Despite these admirable provisions, a major criticism of the African Children's Charter is that it fails adequately to protect the rights of female children in the region because of the gender-insensitive manner in which some of its provisions are couched, thereby trivialising 'adolescent girls' sufferings'.[57] The adoption in 2003 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),[58] which focuses on issues that hitherto have not been addressed, and which indirectly domesticates the Beijing Declaration and the ICPD

52 Art 10 African Children's Charter.

53 Adolescent girls will not use contraception, whether regular or emergency, if their rights to privacy and confidentiality are not adequately assured. See R Cook et al 'Respecting adolescents' confidentiality and reproductive and sexual choices' (2007) 98 *International Journal of Gynaecology and Obstetrics* 186; R Cook & BM Dickens 'Recognising adolescents' "evolving capacities" to exercise choice in reproductive healthcare' (2000) 70 *International Journal of Gynaecology and Obstetrics* 17.

54 Art 4 African Children's Charter.

55 Art 4(2) African Children's Charter.

56 Art 9(2) African Children's Charter.

57 See Durojaye (n 48 above) 155.

58 The African Women's Protocol was adopted in 2003, OAU Doc AHG/Res. 240 (XXXI).

Programme of Action in the African region,[59] was aimed at correcting criticisms of gender insensitivity levelled against the African Children's Charter. The African Women's Protocol did this through its proactive inclusion of adolescent girls as among the women whom it protects.[60] Viljoen notes that although the African Women's Protocol was drafted as an addition to the African Charter, unlike its international counterpart, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Women's Protocol expands on the protective scope of women's rights as it addresses concerns that are particular to African women.[61]

Article 14 of the African Women's Protocol protects the sexual and reproductive health of all women and affirms their right to reproductive choice and autonomy.[62] In relation to adolescent girls' rights to access emergency contraceptive information and services, it recognises the rights of adolescent girls to control their fertility;[63] to choose any method of contraception;[64] and to access family planning education.[65] It also recognises the obligation that African governments adopt all appropriate measures to provide adequate, affordable and accessible health services and information.[66] Thus, with the inclusion of these provisions, the African Women's Protocol actively promotes the recognition of adolescent girls' rights to access information and services on emergency contraceptives in order to prevent unplanned pregnancies.

4 Nexus between adolescents' sexual and health rights and their access to emergency contraception

As explained above,[67] the connection between good sexual health practices by adolescents and their access to sexual and reproductive health care information and services – especially contraceptive information and services, including emergency contraceptives – has

59 Eg, art 6 on marriage specifies the age of 18 as the minimum age of marriage, and requires that both parties to the union give consent and calls for the registration of marriages in order for them to be legally recognised. See F Banda 'Blazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72-73 76; M Wandia *Not yet a force for freedom: The Protocol on the Rights of Women in Africa*, http://www.pambazuka.org/en/publications/africanvoices_chap04.pdf (accessed 18 March 2016).

60 Art 1(k) African Women's Protocol.

61 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 21.

62 E Durojaye & LN Murungi 'The African Women's Protocol and sexual rights' (2014) 18 *International Journal of Human Rights* 886.

63 Art 14 (1)(a) African Women's Protocol.

64 Art 14 (1)(c) African Women's Protocol.

65 Art 14 (1)(f) African Women's Protocol.

66 Art 14(2)(a) African Women's Protocol.

67 See para 2 above.

received increased attention during over recent decades, with international and regional bodies pledging their commitment towards the recognition of adolescents' rights to access sexual and reproductive health care as a means of fulfilling other rights and meeting development needs.[68] Thus, attention to the sexual and reproductive health of adolescent girls is closely associated with the need to eradicate poverty and inequality which affect many girls, as a lack of access to sexual and reproductive health care education – including important information on where to access emergency contraceptives – cause female adolescents to bear the brunt of society's negligence by giving birth to unplanned and unwanted children.[69]

The importance and relevance of realising adolescents' sexual and reproductive rights in the context of reducing poverty are similarly recognised in the AU Commission's Continental Policy Framework for the Promotion of Sexual and Reproductive Health and Rights in Africa (Continental Policy Framework).[70] The Continental Policy Framework expressly recognises the connections between poverty and sexual and reproductive health, as well as their importance to sustainable development.[71]

In sub-Saharan Africa, as in the rest of the world, the protection of adolescents' sexual and reproductive health through their access to contraceptive services and information (including emergency contraception) not only generates concern among stakeholders, but also continues to be a constant subject of government policies and programmes due to the spread of HIV and unintended teenage pregnancies in many African countries.[72] These stakeholders either canvass for the restriction of adolescent girls' access to contraceptives and other sexual and reproductive health care information or services, or champion the increase of their access to the life-saving information and services.[73]

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68 UNICEF *The state of the world's children 2011: Adolescence an age of opportunity* (2011) 3, http://www.unicef.org/sowc2011/pdfs/SOWC-2011-Main-Report_EN_02092011.pdf (accessed 31 March 2016). Also see OA Savage-Oyekunle & A Nienaber 'Adolescent girls' access to contraceptive information and services in South Africa: What is going wrong?' (2015) *Journal on Contemporary Roman Dutch Law* 363-396.

69 UNICEF (n 68 above) 3; AU Commission (n 17 above) 15.

70 AU Commission (n 17 above) 15.

71 As above.

72 E Yarrow et al 'Can a restrictive law serve a protective purpose? The impact of age-restrictive laws on young people's access to sexual and reproductive health services' (2014) 22 *Reproductive Health Matters* 148; A Bankole et al 'Sexual behaviour, knowledge and information sources of very young adolescents in four sub-Saharan African countries' (2007) 11 *African Journal of Reproductive Health* 29-30.

73 LL Wynn et al 'Harm reduction or women's rights? Debating access to emergency contraceptive pills in Canada and the United States' (2007) 38 *Studies in Family Planning* 253-267; V Schiappacasse & S Diaz 'Access to emergency contraception' (2006) 94 *International Journal of Gynaecology and Obstetrics* 302; BG Schoepf

An important issue connected to adolescent girls' sexual health and rights to access emergency contraception relates to the recognition of their autonomy.[74] Representing an increasing segment in many societies,[75] adolescents encounter various transitions, including the development of the identity; the acquisition of skills; and a move towards social and economic independence.[76] In addition, increased physical and sexual maturity leads to the start of sexual activity.[77]

However, the initiation of sexual activity, especially in Africa, gives rise to problems associated with adolescents' rights to access emergency contraception, in particular, and contraceptive information and services, in general. This is so because various stakeholders, including parents, tend to fight for control over the right to determine adolescents' sexual health needs, thus putting them in danger of sexual ill-health and unplanned pregnancies.[78] Tied to this struggle for control is the realisation that it is in the best interests of adolescent girls to recognise their autonomy and for them to access emergency contraceptives in confidential and adolescent-friendly environments in order to guarantee good sexual health outcomes.[79]

'Uganda: Lessons for AIDS control in Africa' (2003) 30 *Review of African Political Economy* 554-556; NN Sarkar 'Barriers to emergency contraception (EC): Does promoting EC increase risk for contacting sexually-transmitted infections, HIV/AIDS?' (2008) 62 *International Journal of Clinical Practice* 1772.

74 Autonomy in this instance refers to 'personal autonomy', ie, the right of individuals to self-determination and taking informed decisions about personal matters without any form of coercion or fear.

75 J Fortin *Children's rights and the developing law* (2009) 81; A Bankole & S Malarcher 'Removing barriers to adolescents' access to contraceptive information and services' (2010) 41 *Studies in Family Planning* 117.

76 WHO *Adolescent development: A critical transition*, http://www.who.int/maternal_child_adolescent/topics/adolescence/dev/en/index.html (accessed 9 May 2013).

77 Studies abound showing that sexual activities usually are initiated during the period of adolescence. See S James et al 'Perceptions of pregnant teenagers with regard to the antenatal care clinic environment' (2012) 35 *Curationis* 2; M Mantakana *Dynamic contextual analysis of adolescent sexual and reproductive health in Peddie, Eastern Cape* (2002) 7, http://www.cadre.org.za/files/DCA_final_report.pdf (accessed 17 June 2016); R Stephenson et al 'Community factors shaping early age at first sex among adolescents in Burkina Faso, Ghana, Malawi, and Uganda' (2014) 32 *Journal of Health, Population and Nutrition* 161-162.

78 While some view adolescents' sexuality as wrong and to be discouraged, others (liberationists) are of the belief that adolescents as rights holders do not deserve to be discriminated against through their exclusion from the adult world. According to them, adolescents possess greater abilities for self-determination than society cares to admit, and there is no reason to prohibit them from enjoying the freedoms granted to adults, including the right to control their sexual lives. Contrary to this view is that of Campbell, eg, who believes that adolescents will be under constant stress if, like adults, they are to make rational decisions for themselves. See Fortin (n 75 above) 4-5; TD Campbell 'The rights of the minor: As person, as child, as juvenile, as future adult' (1992) 6 *International Journal of Law, Policy and the Family* 1-23.

79 See Savage-Oyekunle (n 10 above) 149-182.

In *Gillick v West Norfolk and Wisbech Area Health Authority & Another,*[80] the court held that a doctor would not be acting unlawfully if he gave contraceptive advice or treatment to an adolescent who is '*Gillick* competent'.[81]

Another means of achieving adolescent girls' access to emergency contraceptives involves the adoption of approaches that guarantee access to factual sexuality information coupled with access to affordable and accessible emergency contraceptive services in general.[82] In a review of emergency contraception literature from various countries – including developing countries – Family Health International notes that in all countries there is little awareness of the existence of emergency contraceptives.[83] Even in countries where this concept is known, knowledge regarding its accurate use is low. In Tanzania, for example, although government policies support the use of emergency contraception and advise that the pills should be made available at every level of the health system, the use of emergency contraception remains low due to a lack of knowledge about their availability.[84] In fact, in a Nigerian study adolescent girls identified

80 (1986) 1 AC 112, (1985) 3 All ER 40. The House of Lords was of the opinion that once an adolescent girl under the age of 16 understood the nature of sexual and reproductive health care services she requested and its implications, she should be granted access to the treatment in confidential settings without parental consent.

81 The *Gillick* competent child is one who can personally consent to medical services, including emergency contraceptives. The principle was laid down with the House of Lords agreeing that the competence of adolescents to consent to treatment has evolved to the extent that it is to be measured based on their level of maturity and not age. In the *R(Axon)* case, the courts adopting the decision in the *Gillick* case, reached the decision that female adolescents that are *Gillick* competent, were entitled to confidential health care services, in the same way as adults, in order to forestall situations where the adolescents will be further exposed to SRH ills. See also *Christian Lawyers Association v Minister of Health* (*Christian Lawyers* case 2) 2005 (1) SA 509 (T); *The Teddy Bear Clinic for Abused Children & Another v Minister of Justice and Constitutional Development & Another* (CCT 12/13) [2013] ZACC 35; and Savage-Oyekunle & Nienaber (n 13 above) 377-379.

82 WHO *Cutting-edge global research on family planning and improving adolescent sexual and reproductive health* (2012) 2, http://apps.who.int/iris/bitstream/10665/76235/1/WHO_RHR_HRP_12.30_eng.pdf (accessed 23 March 2016); UNFPA *Community pathways to improved adolescent sexual and reproductive health: A conceptual framework and suggested outcome indicators* (2007) 2, http://www.unfpa.org/webdav/site/global/shared/documents/publications/2007/asrh_pathways.pdf (accessed 23 March 2016); para 107(e) Beijing Declaration and Platform of Action (1995) http://www.unesco.org/education/information/nfsunesco/pdf/BEIJIN_E.PDF (accessed 23 March 2016).

83 Family Health International *Adolescents and emergency contraceptive pills in developing countries* (2005) 6, http://ec.princeton.edu/references/ecps-adolescents.pdf (accessed 23 June 2016).

84 GAB Kagashe et al 'Availability, awareness, attitude and knowledge of emergency contraceptives in Dar Es Salaam' (2014) 6 *Journal of Pharmaceutical Sciences and Research* 16-17. Also see the Tanzanian President's recent decree banning pregnant girls from attending school: R Ratcliffe 'After getting pregnant, you are done' *The Guardian* 30 June 2017, https://www.theguardian.com (accessed 24 September 2017).

their peers and friends as their major source of information on emergency contraception – not government health initiatives.[85]

In Uganda, although emergency contraception was re-introduced in 2007 after a period of government restriction,[86] more than two-thirds of Ugandan women and adolescent girls have never heard of it, and consequently its use remains very low.[87] This lack may be the result of the fact that Uganda has banned comprehensive sexuality education in its schools due to religious and societal opposition.[88] Uganda further has a very high unsafe abortion rate which contributes to the high maternal mortality rate in that country.[89] Emergency contraception may help reduce the rate of unwanted pregnancies, so reducing the high rate of unsafe abortions.

The same problem of access to accurate knowledge about emergency contraceptive use is observed in Nigeria and Ghana, where only 12 per cent and 11 per cent respectively of adolescents know the correct time frame for starting emergency contraception.[90] In South Africa, even though several contraceptive methods are available without charge at public hospitals – including emergency contraceptives – its utilisation among sexually-active adolescents remains relatively low.[91]

Restricted access to sexual and reproductive health care services, generally, and contraceptives (including emergency contraception), in particular, negatively impacts adolescents. This negative impact is

85 IU Ezebialu & AC Eke 'Knowledge and practice of emergency contraception among female undergraduates in South Eastern Nigeria' (2013) 3 *Annals of Medical and Health Sciences Research* 7, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3868120/?report=reader (accessed 23 June 2016).

86 The restriction on emergency contraception use in the country was as a result of the backlash from religious leaders, who requested the government to stop efforts at promoting emergency contraceptives because it was an abortifacient. See International Consortium for Emergency Contraception (2014) http://www.cecinfo.org/custom-content/uploads/2014/04/ICEC_Uganda-Factsheet_2014.pdf (accessed 23 June 2016).

87 As above; JK Byamugisha *Emergency contraception among young people in Uganda: User and provider perspectives* (2007) 21.

88 See S Singh 'Hospital admissions resulting from unsafe abortion: Estimates from 13 developing countries' (2006) 368 *The Lancet* 1887. Again, in 2016, the teaching of comprehensive sexuality education was banned in Uganda and efforts are currently being made to ensure its reversal. See Rutgers *Ugandan youth challenge ban on sexuality education* (2016) https://www.rutgers.international/news-opinion/news-archive/ugandan-youth-challenge-ban-sexuality-education (accessed 26 September 2017); A Fallon *NGOs turn to courts to unravel Uganda's ban on sexual education* (2017) https://www.devex.com/news/ngos-turn-to-courts-to-unravel-uganda-s-ban-on-sexual-education-89979 (accessed 26 September 2017).

89 Singh (n 88 above).

90 Family Health International (n 83 above) 6; Ezebialu & Eke (n 83 above) 3-4.

91 ME Hoque & S Ghuman 'Knowledge, practices, and attitudes of emergency contraception among female university students in KwaZulu-Natal, South Africa' (2012) 5 *PLOS One*, https://www.researchgate.net/publication/232227107_Knowledge_Practices_and_Attitudes_of_Emergency_Contraception_among_Female_University_Students_in_KwaZulu-Natal_South_Africa (accessed 24 June 2016).

seen in higher rates of unwanted pregnancies among adolescents.[92] In a community-based study on abortion prevalence rates in Nigeria, it was revealed that a third of the women who obtained abortion procedures were adolescents who, due to the stringent anti-abortion laws in the country,[93] end up patronising quacks under unsafe conditions.[94] Also, in Côte d'Ivoire where restrictive abortion laws are in place, it was revealed that 70 per cent of abortions are carried out on girls and women aged 13 to 24, with the agreement of their parents or partners and upon payment of huge sums of money to health-care providers who do so illegally.[95] In that country, those who cannot afford this expense are compelled to undergo backstreet abortion procedures which often have disastrous consequences.[96] It is necessary to highlight that even in countries in Africa where abortion is legal, such as in South Africa,[97] young women still face barriers which cause them to undergo unsafe procedures.[98]

Adolescents not only experience unplanned and unwanted pregnancies, but also early child bearing which is linked to increased maternal mortality and morbidity rates.[99] Especially in the African region early pregnancy is a major cause of death and illness among adolescent girls between the ages of 15 to 19 years, who experience disabilities associated with early sexual initiation, pregnancy and child

92 IPPF *Qualitative research on legal barriers to young people's access to sexual and reproductive health services* (2014) 6, http://www.ippf.org/sites/default/files/ippf_coram_final_inception-report_eng_web.pdf (accessed 9 June 2016).

93 The performance of abortion is illegal under Nigerian criminal law, unless the woman's life is threatened by the pregnancy. See secs 228 & 229 of the Criminal Code Cap c38LFN 2004 and secs 232 & 233 Penal Code Cap p3 LFN 2004.

94 Babatunde et al (n 32 above) 23.

95 A Ouattara *Health – Côte d'Ivoire: Abortion – Illegal, sought after, sometimes fatal* (2016) http://www.ipsnews.net/2006/08/health-cote-divoire-abortion-illegal-sought-after-sometimes-fatal/ (accessed 24 June 2016).

96 As above.

97 South Africa is one of the few African countries where the procurement of an abortion upon a woman or adolescent girl's request is legal, based on the provisions of the Choice on Termination of Pregnancy Act 92 of 1996. See, generally, secs 2 & 5(2)(3) of the CTOP Act; 'Unsafe abortion in South Africa: A preventable pandemic' (2012) http:://www.ngopulse.org/blogs/unsafe-abortion-south-africa-preventable-pandemic (accessed 9 June 2016); C MacPhail 'Contraception use and pregnancy among 15-24 year-old South African women: A nationally representative cross-sectional survey' (2007) 5 *BMC Medicine* http://www.biomedcentral.com/1741-7015/5/31 (accessed 23 June 2016).

98 ME Ratlabala et al 'Perceptions of adolescents in low resourced areas towards pregnancy and the choice on termination of pregnancy (CTOP)' (2007) 30 *Curationis* 29.

99 Current estimates of maternal mortality in sub-Saharan Africa for 2014 according to the WHO is 510 per 100 000 live births. Nigeria and the Democratic Republic of Congo have a MMR of 560 and 730 per 100 000 live births, respectively. See WHO *Maternal mortality 2014 report* https://docs.google.com/spreadsheets/d/16jlHaWXO1zFxfW2Va8kTrfZRhfAFwkdyrLxPJP05rBs/edit?pref=2&pli=1#gid=995852383 (accessed 24 June 2016); S Ramos 'Interventions for preventing unintended pregnancies among adolescents' (2011) *WHO Reproductive Health Library Commentary* http://apps.who.int/rhl/adolescent/cd005215_ramoss_com/en/index.html (accessed 10 June 2016); IS Gupta *Human rights of minority and women: Human rights and sexual minorities* (2005) 266-267.

birth due to their lack of physiological development, and emotional immaturity making them unable to adequately care for a child.[100] These drawbacks underscore the urgency of guaranteeing adolescents' access to accurate information on contraceptives – including emergency contraceptives – and quality adolescent-friendly sexual health care services.

Nevertheless, as shown above, adolescents possess only limited knowledge about contraceptives, generally, and emergency contraceptives in particular. It has also been shown that they lack access to sexual health care services or do not feel comfortable using these.[101] A gradual increase in the age at which young people get married has also ensured that greater numbers engage in premarital sexual intercourse and, therefore, leads to an increase in unwanted pregnancies.[102] According to the Demographic and Health Surveys (DHS) in Ghana,[103] Kenya[104] and Namibia,[105] the proportion of currently-pregnant women under the age 20 who reported that their pregnancies were mistimed or unplanned was 42 per cent,[106] 52,7 per cent[107] and 30,2 per cent[108] respectively.

Given the high levels of unwanted adolescent pregnancies in Africa, it is self-evident that emergency contraception is an under-utilised method of primary pregnancy prevention, especially given its potential to reduce the number of unplanned pregnancies and, therefore, unsafe abortions.[109] Ojule et al remark that emergency contraceptives have a considerable role to play in reducing the rates of unwanted pregnancies and unsafe abortions.[110] However, low literacy levels, limited access to emergency contraceptive services and traditional beliefs that impede the use of modern contraceptive methods pose considerable challenges to their promotion.[111]

Sexual violence against women and female adolescents is one of the most pernicious consequences of the continued presence of economic, social and cultural inequalities between men and

100 Ramos (n 99 above); Gupta (n 99 above) 266-267.

101 See also Savage-Oyekunle & Nienaber 'Female adolescents' evolving capacities' (n 13 above) 377-379.

102 Family Health International (n 83 above) 1.

103 Demographic Health Survey *Ghana* (2014) http://dhsprogram.com/pubs/pdf/FR307/FR307.pdf (accessed 23 June 2016).

104 Demographic Health Survey *Kenya* (2014) http://dhsprogram.com/pubs/pdf/FR308/FR308.pdf (accessed 23 June 2016).

105 Demographic Health Survey *Namibia* (2013) https://dhsprogram.com/pubs/pdf/FR298/FR298.pdf (accessed 23 June 2016).

106 Demographic Health Survey *Ghana* (n 103 above).

107 Demographic Health Survey *Kenya* (n 104 above).

108 Demographic Health Survey *Namibia* (n 105 above).

109 JD Ojule et al 'Awareness and practice of emergency contraception among students of university of Port Harcourt, South-South Nigeria' (2008) 8 *Nigerian Health Journal* 6.

110 As above.

111 Ojule et al (n 109 above) 6.

women.[112] According to available data from the World Health Organization (WHO), one-third of women world-wide will experience violence in their lifetime; an estimated 7,2 per cent of women will be sexually assaulted and many more will experience unwanted sex from an intimate partner. Compounding the trauma of sexual violence and rape are fears of and unwarranted exposure to the risk of pregnancy and exposure to STIs and HIV.[113]

In Africa and the rest of the world, adolescents are constantly subjected to various forms of sexual violence in their homes, schools and communities. In Kenya, the African Child Policy Forum in a 2010 survey discovered that schools were the second-most common location for the perpetuation of sexual violence against girls aged 13 to 17. In Sierra Leone, 30 per cent of reported rapes were school-related. Similarly, in Swaziland it was revealed that one-third of adult women experienced some form of sexual violence as an adolescent.[114] Plummer and Njuguna note that constant sexual abuse is a significant problem in many African countries, with girls experiencing sexual violence at a younger age than boys.[115] Female victims have a higher risk of experiencing unplanned pregnancies and HIV.[116]

While some African countries have developed policies for the management of sexual assault and to provide post-rape care,[117] others do not have specific guidelines that may be followed in treating victims of sexual violence.[118] Specifically in relation to Nigeria, there is

112 Centre for Reproductive Rights *The reproductive rights of adolescents: A tool for health and empowerment* (2008) 11, http://www.reproductiverights.org/sites/default/files/documents/adolescents%20bp_FINAL.pdf (accessed 25 June 2016).

113 International Consortium for Emergency Contraception *EC for rape survivors: A human rights and public health imperative* (2013) https://www.ciaonet.org/attachments/27634/uploads (accessed 23 June 2016).

114 The African Child Policy Forum *The African report on violence against children* (2014) xii http://srsg.violenceagainstchildren.org/sites/default/files/documents/docs/african_report_on_violence_against_children_2014.pdf (accessed 23 June 2016); AM Krolikowski & A Koyfman 'Emergency centre care for sexual assault victims' (2010) 2 *African Journal of Emergency Medicine* 25.

115 CA Plummer & W Njuguna 'Cultural protective and risk factors: Professional perspectives about child sexual abuse in Kenya' (2009) 33 *Child Abuse and Neglect* 524-532. This does not mean that boys cannot be victims of sexual assault. See Krolikowski & Koyfman (n 114 above) 25.

116 S Mavundla & C Ngwena 'Access to legal abortion for rape as a reproductive health right: A commentary on the abortion regimes of Swaziland and Ethiopia' in C Ngwena & E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 61.

117 Countries such as Botswana (2012), South Africa (2004), Ethiopia (2009), Tanzania (2012), Kenya (2013) and Uganda (2007) have official national guidelines for the management of rape and sexual assault.

118 Burkina Faso, Burundi, Ghana, Nigeria and Senegal do not have specific national guidelines on post-rape care, even though elements of care that can be given to the victims may be contained in other policies. See J Thompson et al *Access to emergency contraception and safe abortion services for survivors of rape: A review of policies, programmes and country experiences in sub-Saharan Africa* (2014) 9, http://www.popcouncil.org/uploads/pdfs/2014STEPUP_EC-SA_Report.pdf (accessed 25 June 2016).

no policy (whether local or national) that addresses the clinical management needs of rape survivors in that country.[119]

The administration of emergency contraceptives has consistently been identified as one of the minimum core requirements for the post-rape care of victims of sexual violence, as up to 5 per cent of sexual assault victims fall pregnant as a result of the assault.[120] Consequently, as a matter of respect for the human rights of female adolescents and a public health imperative, it is essential that emergency contraceptives are readily available in emergency health care facilities. However, while HIV prevention treatments tend to be readily available, emergency contraception often is inaccessible despite the reality that the risk of an unintended pregnancy occurring is as high as the risk of HIV infection.[121] A case in point is that of the Democratic Republic of the Congo (DRC) where, despite high rates of sexual violence, access to emergency contraception is absent from key national health policies, and is not used in post-rape care.[122] This is so despite the fact that the WHO's Global Guidance on Sexual Violence recommends the provision of emergency contraceptives as an integral part of prompt and comprehensive women-centred sexual and reproductive health care.[123]

5 Challenges to adolescents' access to emergency contraception: A case study of Nigeria

5.1 Introduction

The provision of detailed and accurate sexual and reproductive health care information and services is a significant factor in ensuring that

119 Thompson (n 118 above) 10.

120 Other minimum core requirements include the conduct of a medical examination, counselling and the administration of anti-retroviral medicines to prevent HIV and STIs. On-site immediate pregnancy testing should also be conducted and a positive test within five days of the assault indicates a pre-assault pregnancy. See Krolikowski & Koyfman (n 114 above) 26.

121 International Consortium for Emergency Contraception *EC for rape survivors* (n 113 above); ACLU *Ensuring access to emergency contraception after rape* https://www.aclu.org/ensuring-access-emergency-contraception-after-rape (accessed 25 June 2016). Recently, a case was instituted against the Peruvian government at the Inter-American Commission on Human Rights as a result of its ban on access to EC even for victims of sexual violence; see CRR 'New human rights case filed on behalf of Peruvian rape survivor denied emergency contraception at public hospital' (2016) http://www.reproductiverights.org/press-room/new-human-rights-case-filed-on-behalf-of-peruvian-rape-survivor-denied-emergency-contraception (accessed 26 June 2016).

122 International Consortium for Emergency Contraception *Counting what counts: Tracking access to emergency contraception in Democratic Republic of the Congo* (2015) http://www.cecinfo.org/custom-content/uploads/2015/07/ICEC_DRC_July-2015.pdf (accessed 25 June 2016).

123 WHO *Responding to intimate partner violence and sexual violence against women: Clinical and policy guidelines* (2013) 5, http://apps.who.int/iris/bitstream/10665/85240/1/9789241548595_eng.pdf (accessed 24 June 2016).

the sexual and reproductive rights of people are fulfilled.[124] Ensuring that female adolescents in Africa have access to complete information on contraceptives (including on emergency contraception) and other sexual and reproductive health issues from an early age facilitates the development of their autonomy which, in turn, allows them to make informed choices about their sexual health later in life.[125]

In particular, guaranteeing adolescents access to various emergency contraceptive options is germane to their enjoyment of the right to sexual and reproductive health care as guaranteed in various human rights instruments. The Committee on the Rights of the Child (CRC Committee) has often reiterated that the obligation to respect, protect and fulfil the rights of children includes a duty to ensure that adolescents not only have access to available sexual and reproductive health information which is essential for their health and development, but also that they have access to available contraceptive methods of appropriate quality according to their evolving capacities.[126] Regrettably, however, adolescent girls encounter numerous challenges in obtaining factual information about emergency contraception and where to access these pills,[127] and thus are adversely affected.[128]

5.2 Challenges

A number of challenges hinder adolescents' access to emergency contraceptives. First are laws and policies restricting adolescents' access to the medication. According to Gupta, although the majority of governments that are state parties to conventions guaranteeing the right to health and thus the right to sexual health care information and services, in compliance with their obligations, seek to fulfil the rights of women and female adolescents to sexual health care, in many of these countries the choice of whether to use emergency

124 CRR *Submission to the Committee on the Rights of Persons with Disabilities* (2013) 2, http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD17April2013.aspx (accessed 21 June 2016).

125 UNFPA *Comprehensive sexuality education: Advancing human rights, gender equality and improved sexual and reproductive health* (2010) 12, http://www.unfpa.org/webdav/site/global/groups/youth/public/Comprehensive%20Sexuality%20Education%20Advancing%20Human%20Rights%20Gender%20Equality%20and%20Improved%20SRH-1.pdf (accessed 8 October 2013).

126 Paras 35(b) & (c) & 37 CRC Committee General Comment 4 *Compilations of General Comments and Recommendations Adopted by Human Rights Treaty Bodies, Vol II,* http://www.bayefsky.com/general/hri_gen_1_rev9_vol_ii.pdf (accessed 21 June 2016); C Ngwena *Sexual health and human rights in the African region* (2011) 206-207 http://www.ichrp.org/files/papers/185/140_Ngwena_Africa_2011.pdf (accessed 9 October 2013).

127 Gupta (n 99 above) 266.

128 C Ngwena 'Introduction to the symposium issue: Reproductive and sexual health and the African Women's Protocol' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 4; CRR *Submission to the CRPD Committee* (n 124 above) 4; K Casey *Adolescent reproductive health in Nigeria* (2001) http://www.advocatesforyouth.org/storage/advfy/documents/fsnigeria.pdf (accessed 8 June 2016).

contraceptives or not is not in women's hands.[129] Hurdles are placed in their way by anti-choice parties who seek to block access to the emergency contraceptives by all means, thereby forcing governments to declare them to be abortifacients.[130]

The existence of clear policies on emergency contraception promotes their use and availability. If this type of contraception is not included in family planning programmes and are available on prescription only, health care providers are at a loss: It is only through the existence of clear provisions regarding their availability and use that health care providers are able to recommend emergency contraceptives to adolescents who need them. For example, emergency contraceptives are neither included on the DRC's Essential Medicines List, nor in that country's national health policies, despite the fact that the DRC has a very high rate of sexual violence.[131] In Nigeria, although registered, emergency contraceptives are not included on the country's Essential Drugs List.[132]

It should be noted that it is very important that emergency contraception be accessed on an over-the-counter-basis. This need is because the requirement for a prescription entails the adolescent making two trips: first to the hospital to get a prescription; and, second, to a pharmacist to buy the emergency contraceptives. This demand creates unnecessary obstacles and significantly encroaches on the use of emergency contraception during the 'safety window'.[133] In *R (Smeaton) v Secretary of State for Health*,[134] the courts in the United Kingdom held that the sale of emergency contraception was not prohibited by the Offences Against the Person Act[135] and, therefore, refused an application that its over-the-counter sale be restricted. In that case, the claimant challenged the prescription of the morning-after-pill on grounds that using the pill would cause miscarriages, and that its use would be an offence under the 1861 Act. In reaching the decision that the morning-after-pill was not an abortifacient, the judge explained that '[t]he 1861 Act was an "always speaking" Act,

129 Gupta (n 99 above) 254.

130 In Uganda, EC was re-introduced in 2007 after a period of government restriction due to protests by religious bodies who viewed it as an abortifacient. See International Consortium for Emergency Contraception *Counting what counts* (n 122 above); D Uberoi & M de Bruyn 'Human rights versus legal control over women's reproductive self-determination' (2013) 15 *Health and Human Rights* 163.

131 International Consortium for Emergency Contraception (n 122 above).

132 Population Council Nigeria *Day of dialogue: Expanding opportunities for increased access to emergency contraception (EC) in Nigeria* (2013) 5, 6 & 12 http://www.popcouncil.org/uploads/pdfs/2013RH_DayOfDialogueEC-Nigeria.pdf (accessed 25 October 2016).

133 As above.

134 *R (Smeaton) v Secretary of State for Health* [2002] EWHC 886 (Admin) http://swarb.co.uk/regina-smeaton-v-secretary-of-state-for-health-and-others-admn-18-apr-2002/ (accessed 7 September 2017).

135 Offences Against the Person Act 1861.

and was to be interpreted according to current understanding and not as in 1861'. The judge in fact noted that[136]

> [t]here would in my judgment be something very seriously wrong, indeed grievously wrong with our system … by which I mean not just our legal system but the entire system by which our polity is governed if a judge in 2002 were to be compelled by a statute 141 years old to hold that what … millions, of ordinary honest, decent, law-abiding citizens have been doing day in day out for so many years is and always has been criminal. I am glad to be spared so unattractive a duty.

In addition, the limited availability and the high cost of emergency contraception are barriers that prevent adolescents' use of the contraception. Adolescents will forgo the use of emergency contraception where it is not readily available at public health centres and can only be accessed from expensive private sources.[137]

Furthermore, another impediment which affects access to emergency contraceptives involves the use of 'conscience' clauses[138] that allow health care providers (and pharmacists) to refuse to provide emergency contraception pills and other contraceptive methods to adolescents and women because of their religious inclinations. This loophole significantly affects adolescents' ability to access emergency contraceptives within the 120-hour time frame when they are most effective.[139]

Another challenge faced by adolescents who access emergency contraception relates to their lack of knowledge about the various types of contraceptives, including emergency contraceptives. Hooja and Mital state that although adolescents may be aware of the existence of emergency contraceptives, they generally are not properly informed as to the correct time frame for starting treatment.[140] In fact, even though adolescents may have heard about emergency contraceptives, their use as a method of birth control after unprotected sexual relations is very low due to misconceptions that range from viewing them as an abortifacient to a belief that they will make them infertile.[141] Babatunde et al are of the opinion that the low prevalence rates of contraceptive use (including that of emergency contraception) may also be tied to poor societal attitudes towards adolescent sexuality in African communities.[142] Isa et al in a

136 *Smeaton* (n 134 above).

137 Family Health International (n 83 above) 9.

138 Conscience clauses are legal clauses that allow health care providers to refuse to provide some services on the premise that such medical services are against their religion and conscience.

139 International Consortium for Emergency Contraception Legal and Opposition Issues http://www.cecinfo.org/ec-issues/legal-opposition-issues/#a (accessed 26 June 2016).

140 N Hooja & P Mital 'Knowledge, attitude and practices relating to emergency contraception among college girls and their mothers' (2012) 16 *Internet Journal of Gynaecology and Obstetrics* http://print.ispub.com/api/0/ispub-article/13854 (accessed 9 June 2016).

141 Babatunde et al (n 32 above) 23.

study of the unmet need for emergency contraceptives among female adolescents in the Niger Delta also note that young women seeking to access sexual health care services (especially for contraception) face social and cultural obstacles which make it difficult for them to access effective contraception, thereby exposing them to the risk of unsafe abortions.[143] According to Amnesty International, the lack of access to information on sexual and reproductive health rights combined with women's low socio-economic status within the family and society at large, among others, are dominant factors undermining their right to exercise autonomy over their own sexual and reproductive health.[144]

Even where knowledge exists about the existence of emergency contraception, the capacity of adolescents to give consent to medical treatment is another problem affecting their uptake of emergency contraception and other sexual and reproductive health care services.[145] In addition, unfriendly and judgmental attitudes among health care providers negatively affect adolescents' access to emergency contraceptives. According to Family Health International, in Zambia and Zimbabwe, adolescents see health care providers in government hospitals as unwelcoming and judgmental.[146] These health care providers not only make adolescents feel embarrassed, but they strip them of their right to privacy as their services are not rendered in a confidential environment.[147]

142 Babatunde et al 23; PB Gichangi et al 'Knowledge, attitudes, and practices regarding emergency contraception among nurses and nursing students in two hospitals in Nairobi, Kenya' (1999) 59 *Contraception* 253-256.

143 Isa et al 'Unmet need of emergency contraceptives: The curious scenario of female undergraduates in the Niger Delta' (2015) 5 *British Journal of Medicine and Medical Research* 1393.

144 G Mirugi-Mukundi 'A human rights-based approach to realising access to sexual and reproductive health rights in sub-Saharan Africa' in E Durojaye (ed) *Litigating the right to health in Africa: Challenges and prospects* (2015) 52.

145 The age of consent to medical treatment varies from country to country. In Nigeria, the position adopted in relation to consent is paternalistic as adolescents and children generally cannot make any medical decisions, including those relating to the protection of their SRH until they are 18 years of age. It is even more disappointing that the National Health Act 2014 does not rectify the problem. In South Africa, the age of 12 is the threshold for adolescents giving consent for medical treatment and accessing contraceptives so far as it has been established that the child possesses sufficient maturity and mental capacity to understand the benefits and risks associated with the treatment proposed. See secs 129 and 134(1) of the Children's Act. For termination of pregnancy in South Africa, however, the threshold of 12 years does not apply as the CTOP Act 1996 allows a woman of 'any age' to give consent to the termination of her pregnancy. See secs 1(xi) and 5(1)(2) & (3) of the Choice on Termination of Pregnancy Act. Also in countries such as The Gambia, Ghana and Kenya, the age of majority is 18 years.

146 Family Health International (n 83 above) 7. See also Hooja and Mital (n 140 above) 16.

147 RS Geary et al 'Evaluating youth-friendly health services: Young people's perspectives from a simulated client study in urban South Africa' (2015) 8 *Global Health Action* http://www.globalhealthaction.net/index.php/gha/article/view/26080 (accessed 20 July 2016); E Durojaye 'Children and adolescents' access to

In addition, as a result of socio-cultural beliefs, health care providers, parents and even policy makers fear that adolescents' use of emergency contraception will lead to their engaging in unprotected sexual intercourse more readily, thereby limiting their use of regular contraceptive methods.[148] However, it is important to stress that this belief is unfounded as studies on emergency contraceptives reveal that their use does not necessarily expose adolescents to greater risks of STIs and HIV infection, as those who use emergency contraception are not less likely to use other methods of contraception. Instead, adolescents' access to emergency contraception may provide them with an opportunity to learn about the availability of regular contraceptive methods.[149]

Other challenges affecting the use of emergency contraceptives by adolescents in Africa include inconvenient operating hours at adolescent-friendly clinics; adolescents having to travel long distances to access emergency contraceptive services; and the fact that the majority of health care providers are not properly trained in the provision of emergency contraceptives.[150]

Another important hurdle to the uptake of emergency contraception is the fact that in many African countries these contraceptives are accessed in the private health care service only, causing them to be more expensive than other contraceptive methods. In Kenya, for example, private sector pharmacies account for as much as 94 per cent of emergency contraceptive sales.[151]

Below we examine Nigerian adolescents' access to emergency contraception as guaranteed in the Nigerian Constitution, legislation and policies. We briefly investigate the realisation of those guarantees in adolescents' access (or lack thereof) to emergency contraception in Nigeria.

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reproductive and sexual healthcare' in IO Iyioha & RN Nwabueze (eds) *Comparative health law and policy: Critical perspectives on Nigerian and global health law* (2015) 155; G Nalwadda et al 'Persistent high fertility in Uganda: Young people recount obstacles and enabling factors to use of contraceptives' (2010) 10 *BMC Public Health* 7 http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2940919/pdf/1471-2458-10-530.pdf (accessed 20 July 2016).

148 Family Health International (n 83 above) 7-8.

149 JE Luziga 'Implementation processes of emergency contraception in Tanzania: The case of three wards of Nyamagana district – Mwanza' Muhimbili University of Health and Allied Sciences (2013) 23; IPPF *Qualitative research on legal barriers to young people's access* (n 93 above); Family Health International (n 83 above) 7-8.

150 Family Health International (n 83 above) 7.

151 As above.

5.3 Nigerian adolescents' access to emergency contraceptives: A case study

As the country with the largest population on the African continent, Nigeria's population totals over 182 million people,[152] and adolescents represent over 22 per cent[153] of this total. As is the case with their counterparts in the rest of Africa and the world, Nigerian adolescents often are sexually active at a young age.[154] This activity comes with the risks usually associated with adolescent sexual behaviour, including unplanned and unwanted pregnancies.[155]

The large number of adolescents in Nigeria, coupled with the fact that many of them are sexually active, makes it critical that their sexual health is protected through their unhindered access to emergency contraception and other sexual health care services and information.[156]

152 United Nations Department of Economic and Social Affairs/Population Division *World Population Prospects: The 2015 Revision, Volume II* (2015) 567, https://esa.un.org/unpd/wpp/Publications/Files/WPP2015_Volume-II-Demographic-Profiles.pdf (accessed 15 October 2016).

153 R Cortez et al *Adolescent sexual and reproductive health in Nigeria* (2015) 1 http://documents.worldbank.org/curated/en/199031468290139105/pdf/950290BRI00PUB0geria0VC0ADD0SERIES0.pdf (accessed 18 October 2016).

154 BO Idonije et al 'A study on knowledge, attitude and practice of contraception among secondary school students in Ekpoma, Nigeria' (2011) 2 *Journal of Pharmacy and Clinical Sciences* 26; A Attahir et al 'Knowledge, perception and practice of emergency contraception among female adolescent hawkers in Rigasa sub-urban community of Kaduna State Nigeria' (2010) 4 *Journal of Family and Reproductive Health* 15-20; IO Morhason-Bello et al 'Sexual behaviour of in-school adolescents in Ibadan South-West Nigeria' (2008) 12 *African Journal of Reproductive Health* 94.

155 A Bankole et al *Unwanted pregnancy and induced abortion in Nigeria: Causes and consequences* (2006) 4 http://www.guttmacher.org/pubs/2006/08/08/Nigeria-UP-IA.pdf (accessed 14 September 2016); AA Galbraith et al 'Health care access and utilisation among pregnant adolescents' (1997) 21 *Journal of Adolescent Health* 253; L Ikamari & R Towett 'Sexual initiation and contraceptive use among female adolescents in Kenya' (2007) 14 *African Journal of Health Sciences* 1-2.

156 It is necessary to highlight that the large population of adolescents in the country gives rise to an opportunity to hasten economic development and minimise poverty. It often has been reiterated that an investment in the SRH of adolescents is an investment in a better future. See Population Reference Bureau *The time is now: Invest in sexual and reproductive health for young people* (2012) http://www.prb.org/pdf12/engage-youth-key-messages.pdf (accessed 20 October 2016); UNICEF (n 68 above) 4-5; Bankole & Malarcher (n 75 above) 117; J Chaaban & W Cunningham *Measuring the economic gain of investing in girls: The girl effect dividend* (2011) 3 http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2011/08/08/000158349_20110808092702/Rendered/PDF/WPS5753.pdf (accessed 20 October 2016); EY Jimenez et al World *Development Report 2007: Development and the Next Generation* (2006) 26-28, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/09/13/000112742_20060913111024/Rendered/PDF/359990WDR0complete.pdf (accessed 23 October 2016).

Despite the large number of adolescents in the country, access to quality and affordable sexual health care information and services remains out of reach for those adolescents who need it most.[157] This fact is the result of religious and socio-cultural factors,[158] and is despite the fact that the Nigerian Constitution[159] guarantees adolescents' rights, including their right to life,[160] dignity,[161] privacy,[162] information[163] and non-discrimination.[164] All of the aforementioned rights are pivotal in ensuring the protection of adolescent sexual and reproductive health, including their access to contraception, also emergency contraceptives.[165]

157 L Omo-Aghoja 'Sexual and reproductive health: Concepts and current status among Nigerians' (2013) 12 *African Journal Medical and Health Sciences* 107; E Monjok et al 'Contraceptive practices in Nigeria: Literature review and recommendation for future policy decisions' (2010) 1 *Open Access Journal of Contraception* 14; G Sedgh et al Meeting young women's sexual and reproductive health needs in Nigeria (2009) 11, http://www.guttmacher.org/pubs/2009/06/03/ASRH_Nigeria.pdf (accessed 14 October 2016) 16.

158 T Oloruntoba-Oju 'Young, female and African: Issues in sexual vulnerability' (2011) 7(1) *Sexuality in Africa: Magazine and Monographs* 3, http://www.arsrc.org/downloads/sia/jun11/jun11.pdf (accessed 15 October 2013); CO Izugbara 'The socio-cultural context of adolescents' notions of sex and sexuality in rural South-Eastern Nigeria' (2005) 8 *Sexualities* 607-609; CA Varga 'How gender roles influence sexual and reproductive health among South African adolescents' (2003) 34 *Studies in Family Planning* 160-172; S Yusuf & R Booth 'Religious, ethnic, and gender factors affecting sexuality' in RT Francoeur & RJ Noonan (eds) *The continuum complete international encyclopaedia of sexuality* (2004) 755-756.

159 The Nigerian Constitution was passed via Decree 24 of 1999. The Constitution is contained in Cap 24 LFN 2004, http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.html (accessed 5 October 2016).

160 Sec 33 Nigerian Constitution 1999. The protection of the right to life applies in all circumstances and can be used to hold the government accountable for the loss of life among female adolescents that occurs as a result of their lack of access to vital sexual health information and services including information and services related to emergency contraceptives.

161 Sec 34 Nigerian Constitution 1999. This constitutional provision may be used to ensure that adolescents are treated in a dignified manner, especially when accessing contraceptive (including emergency contraception) information and services in adolescent-friendly facilities.

162 Sec 37 Nigerian Constitution 1999. By guaranteeing this right to everyone, including adolescents, the Constitution provides ample grounds upon which the right of adolescents to access contraceptive services in confidential settings is recognised. In fact, guaranteeing adolescents access to emergency contraception contraceptives in private and confidential environments assists in the maintenance of good sexual health. See Cook et al (n 53 above) 183; Cook & Dickens (n 53 above) 17; S Jejeebhoy *Sexual and reproductive health of young people: Expanding the research and programme agenda* (2006) 5, http://hivaidsclearinghouse.unesco.org/search/resources/bie_pop_rev_jejeebhoy.pdf (accessed 15 October 2016).

163 Sec 39(1) Nigerian Constitution 1999. This right has advanced to the stage that it imposes concrete and immediate obligations on state parties not only to provide access to emergency contraception and other sexual health care services, but also to refrain from interfering with information that is crucial for the promotion and protection of the sexual health choices of adolescents.

164 Sec 42 Nigerian Constitution 1999.

165 It is necessary to point out that the Constitution does not contain any specific provision granting recognition of the protection of the right to health, nor does it guarantee the right to sexual and reproductive health. Health is mentioned only in

In addition, Nigeria is a party to several international and regional human rights instruments,[166] and has domesticated the African Charter[167] which guarantees the right to health in article 16. This factor makes it possible for courts to rely on the African Charter's provisions in order to ensure that adolescents access emergency contraceptives and other crucial sexual health care services.[168]

Further to the international human rights instruments and constitutional guarantees mentioned above, Nigeria's legislation[169] and policies[170] have a direct bearing on adolescent girls' access to emergency contraceptive information and services. The Child Rights Act[171] mandates that in matters concerning children, their best interests should be the primary consideration with guidance and

sec 17(3)(d) under the fundamental objectives and directive principles of state policy that have been declared non-justiciable. See GN Okeke & C Okeke 'The justiciability of the non-justiciable constitutional policy of governance in Nigeria' (2013) 7 *IOSR Journal of Humanities and Social Science* 9, http://www.iosrjournals.org/iosr-jhss/papers/Vol7-issue6/B0760914.pdf (accessed 8 October 2016).

166 Nigeria is a signatory to several human rights instruments, such as the ICESCR, ICCPR, CRC, CEDAW, the African Charter, the African Women's Protocol, the African Children's Charter, and so forth. While Nigeria has ratified these instruments, with the exception of the African Charter, they do not have the force of law as they have not been domesticated by the National Assembly which is the legislative arm of government. See sec 12 of the Nigerian Constitution 1999.

167 Adopted in 1981, OAU Doc CAB/LEG/67/3 Rev 5, 21 ILM 58 (1982) and entered into force in October, 1986 http://www1.umn.edu/humanrts/instree/z1afchar.htm (accessed 20 September 2012). Nigeria ratified the African Charter on 22 June 1983. Nigeria domesticated the contents of the African Charter through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9, LFN 2004. The power to domesticate international treaties is recognised in sec 315 of the Nigerian Constitution 1999. In *Abacha v Fawehinmi* (2000) 6 NWLR (Pt 660) 228, the Supreme Court explained that the provisions contained in the African Charter are 'provisions in a class of their own, protected by international law and cannot be overridden by other municipal laws'.

168 In Nigerian cases such as *Gbemre v Shell Petroleum Development Company & Others* (2005) Suit FHC/B/CS/53/05 (unreported), http://www.chr.up.ac.za/index.php/browse-by-subject/418-nigeria-gbemre-v-shell-petroleum-development-company-nigeria-limited-and-others-2005-ahrlr-151-nghc-2005.html (accessed 7 March 2013) and *Georgina Ahamefule v Imperial Medical Centre & Alex Molokwu* Suit ID/1627/2000, http://www.scribd.com/doc/126185950/Georgiana-Ahamefule-vs-Imperial-Medical-Centre-Dr-Alex-Molokwu-ID-1627-2000-Judgement (accessed 8 March 2013), the courts have consistently held that the violation of the right to health was not only a violation under art 16 of the African Charter, but a violation of the right to life under sec 33 of the Nigerian Constitution. The recent enactment of the National Health Act 2014 also makes the right to health care justiciable for the reason that the National Assembly has enacted a specific law for the protection and enforcement of a Ch 2 provision, namely, health.

169 These include the Child Rights Act (CRA) 2003 and the National Health Act 2014.

170 Policies include the National Health Policy 2004; the National Reproductive Health Policy 2001; the National Policy on Health and Development of Adolescents and Young People 2007; the National Youth Policy 2009; and the Family Life and HIV Education (FLHE) Curriculum.

171 Child Rights Act Cap C50 Laws of the Federation of Nigeria 2004. The Child Rights Act has translated into domestic law provisions for the protection of children's rights already contained in the CRC and its regional counterpart, the African Children's Charter.

direction provided to them according to their evolving capacities.[172] With regard to the right of adolescents to sexual health; the Child Rights Act recognises numerous rights, including the rights of children to enjoy the best attainable state of physical, mental and spiritual health; the rights to privacy; the rights to equality; the rights to dignity; and the rights to education, among others.[173] The inclusion of these rights in the Child Rights Act[174] is to be welcomed, as adolescents not only deserve the adoption of precautionary measures to ensure their survival and socio-economic development,[175] but they also require adequate access to affordable emergency contraceptives and other sexual health care information and services in a confidential environment with unbiased health care providers in order to allow them to make informed choices about their sexual health.

172 Secs 1, 7(2) & 277 Child Rights Act. A child is someone under the age of 18. The definition of the child in the CRA is in line with the definition contained the African Children's Charter, unlike the CRC which, in art 1, defines a child as an individual below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.

173 Secs 8(1), 10, 11, 13 & 15 Child Rights Act.

174 There is a need for adolescents to be treated with dignity when accessing sexual health care services, especially by health care providers who must be sensitive to their particular needs without exhibiting critical or judgmental attitudes. While the right of adolescents to information is not specifically included in the Child Rights Act, sec 3(1) provides that 'the provisions contained in Chapter IV of the Nigerian Constitution 1999 shall apply as if those provisions are expressly stated in the Act' and, as such, it is felt that adolescents have a right to access important information relating to emergency contraceptives and other sexual health care services as a result of the constitutional provision guaranteeing everyone (adolescents inclusive) the right to information. Major disadvantages of the Child Rights Act, however, include the provision in sec 8(3) which may dissuade adolescents from accessing the required sexual and contraceptive health services, thereby exposing them to numerous risks. Another is that the Child Rights Act does not apply uniformly all over the country due to Nigeria's federal structure which requires the various state legislatures to pass corresponding laws in relation to the protection of children's rights. At present, only 24 states of the Federation have passed corresponding children's rights laws. See UNICEF Nigeria – Fact Sheet on Child Rights Legislation in Nigeria, http://www.unicef.org/nigeria/Child_rights_legislation_in_Nigeria.pdf (accessed 23 September 2016).

175 International Centre for Research on Women (ICRW) *Girls' education, empowerment, and transitions to adulthood: The case for a shared agenda* (2012) 8-9, http://www.basiced.org/wp-content/uploads/Publication_Library/ICRW-Girls_Education_Empowerment_and_Transitions_to_Adulthood-2013.pdf (accessed 13 October 2016).

176 Nigerian National Health Act 2014, http://www.nphcda.gov.ng/Reports%20and%20Publications/Official%20Gazette%20of%20the%20National%20Health%20Act.pdf (accessed 15 September 2016). The Act was passed as law in the country after several controversies had stalled its adoption for almost ten years. See GI Okowa 'National Health Act: Translating the law into quality and accessible healthcare' (2014) http://www.vanguardngr.com/2015/08/national-health-act-translating-the-law-into-quality-and-accessible-healthcare/ (accessed 7 October 2016); S Ayo-Aderele 'Rid proposed Health Bill of contentious items – SOs' (2013) http://www.punchng.com/health/rid-proposed-health-bill-of-contentious-items-csos/ (accessed 21 October 2016); NIMASA 'Nigeria: National Health Bill 2013',

Recently, the Nigerian National Health Act[176] was enacted. This Act, aimed at guaranteeing access to basic health care services in the country, provides a framework to be used to periodically effectively monitor, plan, finance and appraise health care services.[177] Apart from specifically determining that health care providers under no circumstances are to refuse emergency treatment,[178] the Health Act includes provisions on making accessible to patients relevant information on their health,[179] and assures that patient privacy and confidentiality are constantly maintained (except in situations where to do so will prove impossible).[180] Although the Act does not specifically refer to adolescents, adolescents form a part of the larger patient group which it seeks to protect. Thus, the enactment of the Act is a step in the right direction, especially for adolescents who face obstacles when seeking to obtain emergency contraception and other sexual health care information and services at government hospitals, such as a lack of privacy.[181]

In addition to the above, Nigeria has adopted several policies[182] aimed at promoting adolescent wellbeing and development, and which have a direct influence on their access to sexual health care information and services, including emergency contraceptives in an adolescent-friendly environment. The National Health Policy[183] provides for a system where health care service delivery is the joint responsibility of the three tiers of government that are primarily responsible for health care services delivery in three (primary, secondary and tertiary) levels in the country.[184]

Local government councils are not merely responsible for the primary health care centres in the various communities with support

176 http://nimsanigeria.wordpress.com/2013/02/13/nigeria-national-health-bill-2013/ (accessed 21 October 2013).

177 See secs 1 and 3(2)(d) of the National Health Act.

178 Sec 20 National Health Act.

179 Sec 23(1) National Health Act.

180 Sec 26 National Health Act.

181 It is felt that the problems faced by adolescents will be relieved specifically by the provisions relating to confidentiality and prohibition of refusal by health officials to provide emergency health care services.

182 The policies include the National Health Policy 2004; the National Reproductive Health Policy 2001; the National Policy on Health and Development of Adolescents and Young People 2007; the National Youth Policy 2009; and the Family Life and HIV Education (FLHE) Curriculum, etc.

183 The 1988 national health policy which was named the National Health Policy and Strategy to Achieve Health for all Nigerians was the first comprehensive health policy in the country.

184 This was the system adopted for the delivery of health care services in Nigeria before independence in 1960. Based upon the guidelines proposed in the Fourth National Development Plan (1981-1985), each local government area would have a minimum of seven primary health centres, 30 health clinics and at least one comprehensive health centre to serve communities of more than 20 000 people. See A Scott-Emuakpor 'The evolution of health care systems in Nigeria: Which way forward in the twenty-first century' (2010) 51 *Nigerian Medical Journal* 53-65 http://www.nigeriamedj.com/article.asp?issn=0300-1652;year=2010;volume=51;issue=2;spage=53;epage=65;aulast=Scott-Emuakpor (accessed 23 October 2016).

from their respective state ministries of health, but they are also responsible for the provision of the first level of care, immunisations and family-planning services.[185] Although the three levels of government have the responsibility for a particular level of health care, they are not precluded from providing services in either of the other two levels of care.[186]

Noting that Nigeria's maternal mortality rate is among the highest in the world, the 2004 Health Policy[187] sets targets that are of relevance to adolescent girls, such as reducing the maternal mortality rate by three-quarters and halting the spread of HIV by 2015.[188] Strategies for the achievement of these goals include ensuring capacity building of health care providers and the availability of materials (including emergency contraceptives) necessary for the provision of efficient sexual health care services.

A new National Health Policy was drafted in 2016[189] in order to achieve universal health coverage and other health-related sustainable development goals. The 2016 policy notes that access to primary health care is the fulcrum of the Nigerian health care system and highlights that health care services rendered at these primary health care centres are generally poor and do not instil confidence in the public. This lack is mainly because of fragmented systems for the distribution of medicines, including contraceptives generally and emergency contraceptives in particular.[190]

185 The state government is responsible for the provision of secondary health care services at general hospitals with assistance from respective state ministries of health, while the federal government is responsible for the provision of tertiary health care at teaching hospitals with assistance from the Federal Ministry of Health.

186 MC Asuzu 'The necessity for a health systems reform in Nigeria' (2004) 16 *Journal of Community Medicine and Primary Health Care* 1; WHO - *The Nigerian health system* 21-23, http://www.who.int/pmnch/countries/nigeria-plan-chapter-3.pdf (accessed 15 March 2013). The division of responsibility for the delivery of health care services, which includes primary health care services among the three tiers of government, has been maintained in subsequent health policies. It is necessary to point out that while on the face of it, the fact that both the state and federal governments can assist in the provision of services at other levels of care looks good due to a belief that this will lead to the provision of better services, this is not the case as there is often a confusion of roles with a duplication of effort.

187 Nigerian National Health Policy 2004, http://cheld.org/wp-content/uploads/2012/04/Nigeria-Revised-National-Health-Policy-2004.pdf (accessed 20 October 2016).

188 Para 3.4 National Health Policy. Other intentions include reducing gender imbalance in SRH matters and promoting the undertaking of comprehensive research on reproductive health issues.

189 National Health Policy 2016 http://nigeriahealthwatch.com/wp-content/uploads/bsk-pdf-manager/1212_2016_National_Health_Policy_Draft._FMOH_1283.pdf (accessed 24 October 2016).

190 See National Health Policy (n 189 above) 8 & 12.

Additional policies of relevance to adolescents' access to emergency contraception in Nigeria are the National Reproductive Health Policy and Strategy[191] (which provides for actions by the government to ensure adolescents' access to sexual and reproductive health care services including emergency contraceptives);[192] the Family Life and HIV Education (FLHE) Curriculum,[193] introduced as a result of the realisation that adolescents are involved in unsafe sexual practices (despite widespread censure of adolescent sexual relations), and the necessity to restructure the existing family life education curriculum in order to allow for sexuality education at the different educational levels in the country.[194] The aim is to reduce misinformation, to strengthen positive attitudes and to increase adolescents' skills in making informed decisions in relation to their sexual health.

Despite these laudable policies, the main criticism is that the policies are poorly implemented;[195] they are unrealistically 'watered

191 National Reproductive Health Policy (2001) http://www.youth-policy.com/Policies/Nigeria%20National%20Reproductive%20Health%20Policy%20and%20Strategy.pdf (accessed 20 October 2016).

192 The actions include the removal of barriers generally affecting access to sexual and reproductive health care services especially at the primary health care level, ensuring the proper training of health care providers and promoting genuine access to family planning information and services. See para 1.3 of the Nigerian National Reproductive Health Policy.

193 Previous population and sexual education programmes that were adopted before 2002 when the Family Life and HIV Education was introduced include the Population Education Programme and the Population Family Life Education Programme. However, it is necessary to state that the two programmes were not successful. See AHI *Building consensus for family life and HIV/AIDs education in schools: Report of the national consultative forum with religious leaders on education sector response to adolescent sexual and reproductive health and rights* (2004) 4, http://www.actionhealthinc.org/publications/docs/building_consensus.pdf (accessed 24 September 2016).

194 Family Life and HIV Education was initially known as the National Sexuality Education Curriculum. The name and content of the curriculum had to be changed due to concerns from various stakeholders which led the National Council on Education to allow states to implement Family Life and HIV Education in a culturally-acceptable manner, based upon their socio-cultural peculiarities. See *National family life and HIV education curriculum for junior secondary schools* (2003) I, http://www.actionhealthinc.org/publications/docs/jnrcurriculum.pdf (accessed 17 September 2016); AHI *Family life and emerging health issues curriculum: Training guide for colleges of education in Nigeria* (2009) iv, http://www.actionhealthinc.org/publications/docs/FLEHICurriculum-TrainingGuideForCollegesOfEducation2009.pdf (accessed 17 September 2016); A Ajuwon & W Brieger 'Evaluation of a school-based reproductive health education programme in rural South Western Nigeria' (2007) 11 *African Journal of Reproductive Health* 48.

195 Federal Ministries of Health and Youth Development *Action plan for advancing young people's health and development in Nigeria: 2010-2012* (2010) 1 http://www.health.gov.ng/doc/actionplan.pdf (accessed 22 October 2016); see Lagos State AIDS Control Agency *Family life HIV Education implementation: An assessment of the status of implementation of the Family Life HIV Education curriculum in Lagos*

down'; and they merely serve as 'guidelines' for the implementation and provision of health care services and, as such, are not justiciable.[196]

5.4 Nigerian adolescents' access to emergency contraceptives

Several reasons have been advanced for the rise in adolescent sexual activity in Nigeria. Some attribute this escalation to the collapse of traditional customary principles,[197] whereas others are of the view that adolescents engage in sexual activities in order to gain economic benefit.[198] Kroone asserts that a major explanation for the increase in adolescent sexual relations is the fact that young people marry later in life as they spend many years studying. Nigerian adolescents' adoption of Western ideas and thoughts is also to blame.[199]

In some cases adolescent sexual activities are a result of peer pressure, but in the majority of instances, sexual activity among adolescents occurs due to the desire to satisfy their curiosity and, therefore, are a matter of choice.[200] More often than not, adolescent girls in Nigeria are victims of sexual violence[201] in most cases perpetrated by persons in positions of trust.[202] Adolescent sexual

195 *State* (2012) 6, http://www.google.com.ng/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=5&cad=rja&ved=0CFUQFjAE&url=http%3A%2F%2Fwww.lsaca.org%2Fwp-content%2Fuploads%2F2012%2F06%2FFLHE-Implementation-Report.doc&ei=lHcsUvrSCafL0AXopoCoAQ&usg=AFQjCNFxhTX0g3JIHxKjfvstLrIjHjv-nQ&sig2=hwlHGp5PYXXVNnnmVUWaSw&bvm=bv.51773540,d.d2k (accessed 18 October 2016).

196 Sedgh et al (n 157 above) 16; AO Esiet *Adolescent sexual and reproductive health in Nigeria* (2009) http://www.wilsoncenter.org/sites/default/files/Esiet%20Presentation.pdf (accessed 17 September 2016).

197 According to these people, the recognition of the individual's autonomy allows for a situation whereby community members can no longer be made accountable for their private sexual decisions. See D Meekers 'Sexual initiation and pre-marital child bearing in sub-Saharan Africa' (1993) 5 *Demographic and Health Survey Working Paper* 1, http://www.measuredhs.com/pubs/pdf/WP5/WP5.pdf (accessed 24 October 2016).

198 Meekers (n 197 above) 1 & 2.

199 MH Kroone *Sexual practice of adolescents in Benin* (2010) 4, http://www.aktiebenin.nl/userfiles/file/Papers/Sexual%20practice%20of%20adolescents%20in%20Benin%20Engels.pdf (accessed 14 September 2016). See also S Singh & JE Darroch *Adding it up: Costs and benefits of contraceptive services estimates for 2012* (2012) 4 & 5, http://www.guttmacher.org/pubs/AIU-2012-estimates.pdf (accessed 20 October 2016).

200 AE Biddlecom et al *Protecting the next generation in sub-Saharan Africa: Learning from adolescents to prevent HIV and unintended pregnancy* (2007) 13, http://www.guttmacher.org/pubs/2007/12/12/PNG_monograph.pdf (accessed 27 September 2016).

201 Jewkes (n 42 above) 88; Akanle (n 42 above) 132-138; Family Health International (n 42 above) 3-4; F Akinlusi et al 'Sexual assault in Lagos, Nigeria: A five year retrospective review' (2014) 14 *BMC Women's Health* http://download.springer.com/static/pdf/290/art%253A10.1186%252F1472-6874-14115.pdf?originUrl=http%3A%2F%2Fbmcwomenshealth.biomed central.com%2Farticle%2F10.1186%2F1472-6874-14-115&token2=exp=1478294801~acl=%2Fstatic%2Fpdf%2F290%2Fart%25253A10.1186%25252F1472-6874-14-115.pdf*~hmac=4f50fa9d3b2a8af53bbbda8ee77cdf2691d277710b4049b19e5074805d22fd4d (accessed 27 October 2016).

relationships often are impromptu[203] and, consequently, carry the risk of unwanted teenage pregnancies.[204] This is why knowledge and information about emergency contraceptives and other important sexual health care services are so desperately needed.[205]

In a study on the use of non-conventional methods such as emergency contraception in Nigeria, Ajayi et al discovered that even in situations where adolescent girls were aware of emergency contraception, their rate of utilisation remains low due to misinformation and misconceptions about emergency contraception.[206] The belief that emergency contraception is an abortifacient reveals a major misconception about this contraception among adolescents: a further cause of it not being used.[207] In fact, due to misinformation, adolescents prefer to use unconventional 'contraceptive' methods as a substitute to using recognised emergency contraceptive pills and resulting in great harm.

It is necessary to emphasise that ensuring Nigerian that adolescents have information about where to access emergency contraceptives is particularly crucial as the termination of unplanned and unwanted pregnancies is illegal in the country, except in situations where the woman's or adolescent girl's life is in danger.[208] At present, illegal and

202 O Badejoko et al 'Sexual assault in Ile-Ife, Nigeria' (2014) 55 *Nigerian Medical Journal* 254-259; O Ezechi et al 'Trends and patterns of sexual assaults in Lagos South-Western Nigeria' (2016) 24 *Pan African Medical Journal* http://www.panafrican-med-journal.com/content/article/24/261/full/#.WBzuZ_krLIU (accessed 28 October 2016).

203 J Tripp & R Viner 'ABC of adolescence: Sexual health, contraception, and teenage pregnancy' (2005) 330 *British Medical Journal* 590.

204 Teenage pregnancy constitutes a huge problem in Nigeria. The adolescent fertility rate of the country is exceptionally high, especially when compared to the adolescent fertility rates quoted for most countries of the world outside sub-Saharan Africa. See A Udo et al 'Teenage pregnancy and adverse birth outcomes in Calabar, Nigeria' (2013) 17 *Internet Journal of Gynaecology and Obstetrics* http://ispub.com/IJGO/17/2/2995 (accessed 25 October 2016).

205 In the majority of cases, female adolescents either fall pregnant, thereby losing their chances of improving their lives economically. See WHO *The sexual and reproductive health of younger adolescents: Research issues in developing* countries (2011) 24-25, http://whqlibdoc.who.int/publications/2011/9789241501552_eng.pdf (accessed 28 October 2016); Udo et al (n 204 above); WHO *Adolescent pregnancy* http://www.who.int/maternal_child_adolescent/topics/maternal/adolescent_pregnancy/en/ (accessed 2 November 2016); Galbraith (n 156 above) 253; Ikamari & Towett (n 155 above) 1-2.

206 A Ajayi et al 'Use of non-emergency contraceptive pills and concoctions as emergency contraception among Nigerian university students: Results of a qualitative study' (2016) 16 *BMC Public Health* http://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-016-3707-4 (accessed 28 October 2016).

207 Isa et al (n 143 above) 1393.

208 Nigeria currently has in place highly-restrictive abortion laws that permit access to legal and safe abortion only to save the life of a pregnant woman, thereby leading to a situation where adolescent girls resort to engaging in risky abortion methods, either by adopting various 'traditional methods' or engaging the services of unqualified charlatans. Secs 228-230 Criminal Code Cap c38 LFN 2004 & secs 232-234 Penal Code cap p3 LFN 2004. See also Bankole et al (n 155 above) 4.

back street abortions[209] are major contributors to the high mortality and morbidity rates in the country.[210]

The available data on the sexual and reproductive health outcomes of Nigerian women and adolescents is not encouraging:[211] The country contributes 10 per cent of the world's maternal deaths.[212] According to the Demographic and Health Survey of Nigeria, the country not only has a maternal mortality ratio of 576 maternal deaths per 100 000 live births, but the lifetime risk of maternal death indicates that one in 30 women in the country will suffer death related to pregnancy or childbearing.[213] Adolescent girls contribute to Nigeria's high maternal mortality rate as the high rate of unintended pregnancies among the group is a public health crisis (as it is worldwide),[214] and adolescent pregnancy is the main reason for death and ill-health among girls between the ages of 15 and 19.[215] The consequences mentioned above necessitate that Nigerian adolescents gain wider access to information regarding emergency contraceptives and their use, as well as to information about places or centres where emergency contraceptives and other sexual health care services are available free of charge (or at affordable prices) in the manner envisaged under the African Women's Protocol[216] and the ICESCR.[217] Generally, Nigerian adolescents experience the same

209 SA Aderibigbe et al 'Teenage pregnancy and prevalence of abortion among in-school adolescents in North Central Nigeria' (2011) 7 *Asian Social Science* 122-127; Attahir et al (n 154 above) 15-20; VO Otoide et al 'Why Nigerian adolescents seek abortion rather than contraception: Evidence from focus group discussions' (2001) 27 *International Family Planning Perspectives* 77-81.

210 K Graczyk *Adolescent maternal mortality: An overlooked crisis* (2007) http://www.advocatesforyouth.org/storage/advfy/documents/fsmaternal.pdf (accessed 25 September 2016).

211 National Population Commission and ICF International *Nigeria demographic and health survey* (2013) 66 70 94 273, http://dhsprogram.com/pubs/pdf/FR293/FR293.pdf (accessed 27 September 2016); Omo-Aghoja (n 157 above) 106-107.

212 Pathfinder International 'Reproductive health issues in Nigeria: The Islamic perspectives (2004) 9 http://www.nurhitoolkit.org/sites/default/files/tracked_files/Reproductive%20Health%20In%20Nigeria%20-%20Islamic%20Perspective.pdf (accessed 3 October 2016).

213 National Population Commission & ICF International (n 211 above) 273.

214 Ramos (n 99 above); WHO (n 205 above).

215 Currently, the country's adolescent birth rate is estimated at 112 per 1 000 women aged 15-19 years. See *Nigeria – Adolescent fertility rate* http://www.indexmundi.com/facts/nigeria/adolescent-fertility-rate (accessed 10 October 2016.

216 See arts 14(1) (a), (b), (c) and (g) of the African Women's Protocol. The Women's Protocol was adopted by the AU on 11 July 2003 by Resolution AHG/RES.240 (XXXI). It entered into force on 25 November 2005. See also para 8 General Comment 2 of the African Commission on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa http://www.achpr.org/instruments/general-comment-two-rights-women/ (accessed 2 November 2016).

217 Art 12 ICESCR. See also para 12 of General Comment 14 of the ESCR Committee; both discussed in para 6 below.

challenges when accessing emergency contraception as their counterparts in the rest of Africa.[218]

Similar to the situation those in Nigeria, adolescents in Ethiopia experience poor sexual and reproductive health outcomes as a result of their limited knowledge about sexual health and their limited access to relevant information. This is particularly due to a belief that it is not appropriate to publicly engage in discussions about sexual relations.[219] However, in order to address these problems, the Ethiopian government recently published several new policies, including the National Adolescent and Youth Reproductive Health Strategy,[220] which specifically address the sexual and reproductive health needs of Ethiopia's young population, as well as the National Comprehensive Reproductive Health Services for Adolescents and Youth Provider Training Curriculum.[221] These measures were undertaken in order for Ethiopia to align itself with the WHO Guidelines which emphasise the right of young people to privacy, confidentiality and respect when accessing sexual and reproductive health care services, and assuring the provision of comprehensive and integrated sexual and reproductive health services by a non-judgmental, trained health-care provider.[222]

Understanding that the mere formulation of policies is not sufficient to combat the formidable barriers impeding its adolescents' ability to access sexual and reproductive health services, the Ethiopian government, in partnership with non-governmental organisations (NGOs), also adopted an integrated health care services approach whereby the provision of different health care services is integrated into various youth-friendly sexual and reproductive health care services, including contraception and post-abortion care services in order to maximise adolescents' access to quality health care.[223]

The adoption of the Integrated Family Health Programme in Ethiopia encourages adolescents to visit health facilities where emergency contraception services are offered alongside other, more general health services, thereby reducing the stigma and embarrassment young people experience when accessing sexual health services. The Integrated Family Health Programme notes in its

218 See para 5.2 above.

219 Pathfinder International *Youth friendly services: Piloting to scaling-up in Ethiopia* (2016) http://www.pathfinder.org/wp-content/uploads/2017/05/Youth-Friendly-Services-Piloting-to-Scaling-up-in-Ethiopia.pdf (accessed 10 September 2017).

220 National Adolescent and Youth Reproductive Health Strategy (2007-2015) http://countryoffice.unfpa.org/filemanager/files/ethiopia/ayrh_strategy.pdf (accessed 10 September 2017).

221 National Comprehensive Reproductive Health Services for Adolescents and Youth provider training curriculum 2008. See Pathfinder International *Youth friendly services* (n 219 above) 3.

222 Pathfinder International (n 221 above) 2-3.

223 As above; T Kaneda & R Naik *Integrating health services for young people: Tackling the growing non-communicable disease epidemic* (2017) 3-4 http://www.prb.org/pdf17/NCD%20Young%20People%20Report.pdf (accessed 10 September 2017).

end-of-programme report that Ethiopia's adoption of adolescent and youth-focused interventions has greatly assisted in increasing access to sexual and reproductive health-related information and services for more than 14 million young persons.[224]

In addition to the measures mentioned above, and acting upon the realisation that religious leaders hold great sway in traditional Ethiopian society, including their giving advice on sexual and reproductive health issues such as family planning, religious leaders were enlisted to incorporate sexual and reproductive health advice in their routine religious messages.[225]

5.5 Strategic interest litigation as a tool to demand accountability

It is increasingly being recognised that the courts are an important avenue for attaining higher standards in the enforcement of the sexual and reproductive health rights of girls and women. In fact, national courts often are approached by human rights advocates to assist in bridging the gap between international human rights standards and the reality lived by women.[226]

Recognising the importance of adopting a strategic litigation approach, Roa and Klugman[227] note that strategic litigation[228] is invaluable in raising awareness – domestically or internationally – about various rights, including sexual and reproductive health, as well as the obligation on states to respect, protect, fulfil and promote these rights. This approach is a means of ensuring state accountability as attention is drawn to the plight of the most vulnerable in society who, for several reasons, may not have access to that which is guaranteed in international human rights instruments.

As pointed out above, adolescent girls in Nigeria continue to be vulnerable to sexual and reproductive ill-health, including maternal mortality and morbidity. Their access to emergency contraception and other life-saving sexual and reproductive health services is impeded, despite the country's human rights obligations according to

224 Pathfinder International *Integrated Family Health Programme End of Program Report 2008–2016* (2016) 7 & 18 http://www.pathfinder.org/wp-content/uploads/2017/05/IFHP-End-of-Program-Report-2017.pdf (accessed 11 September 2017).

225 N Muntean et al 'Addressing the sexual and reproductive health needs of young people in Ethiopia: An analysis of the current situation' (2015) 19 *African Journal of Reproductive Health* 93.

226 Z Qureshi *Using public interest litigation to address maternal mortality and morbidity in Pakistan*, https://uclhumanrightsreview.wordpress.com/volume-i/using-public-interest-litigation-to-address-maternal-mortality-and-morbidity-in-pakistan/ (accessed 7 September 2017).

227 M Roa & B Klugman 'Considering strategic litigation as an advocacy tool: A case study of the defence of reproductive rights in Colombia' (2014) 22 *Reproductive Health Matters* 31.

228 Strategic litigation is the litigation of a public interest case that has a broad impact on society – even beyond the specific interests of the parties involved. It has been described as an innovative advocacy tool which serves as a mechanism for demanding accountability from government.

regional and international instruments, as well as constitutional guarantees of the rights to life, dignity, privacy and access to information. In the case of Nigeria and in the rest of the developing world, therefore, the use of strategic litigation may go a long way towards making governments live up to their responsibilities.

However, it is necessary to point out that the strategic use of litigation is not a new approach as it has in the past been used to hold governments accountable for human rights violations. Such instances include the South African *TAC* case,[229] where the government's decision to provide restricted access to Neviropine, an anti-retroviral drug, to pregnant women living with HIV was successfully challenged. Also, in the case of *Environmental and Consumer Protection Foundation v Delhi Administration & Others,*[230] this approach was used to force the Indian government to ensure that schools provide proper facilities, including drinking water and capable teaching staff. In Nigeria, public interest litigation was used in *Gbemre v Shell Petroleum Development Company & Others*[231] to hold the Nigerian government accountable for human rights violations.

The approach of using strategic litigation, therefore, may prove invaluable in demanding accountability from governments on issues relating to the sexual and reproductive health rights of female adolescents, including their lack of access to emergency contraception. In Colombia, for instance, a court overturned a challenge by anti-choice groups to prevent the registration and distribution of emergency contraception on the basis that it was an abortifacient. The Centre for Reproductive Rights and its Colombian partner, Profamilia, submitted an *amicus* brief in support of the Colombian government's decision to approve the sale and distribution of emergency contraception. The Centre's brief opposed the citizens' petition filed by anti-choice groups in an effort to ban the sale of emergency contraception on the premise that these contraceptives induced abortion and, therefore, were illegal according to Colombian law. Arguing against the petition, the Centre noted that granting the citizens' petition would not only be contrary to the tenets of international human rights law, but would also violate the rights of Colombian girls and women to autonomy in reproductive decision making and their right to access safe and effective contraceptive methods. Deciding against the plaintiffs, the court found that emergency contraception in the form of the morning-after-pill was a contraceptive method and not an abortifacient as argued by the plaintiff, and that access to emergency contraception

229 *Minister of Health v Treatment Action Campaign (TAC)* 2002 (5) SA 721 (CC).
230 [2012] INSC 584.
231 *Gbemre v Shell Petroleum Development Company* (n 168 above).

guaranteed the right to life recognised in the Colombian Constitution.[232]

Also, in a recent decision in Chile the Constitutional Tribunal lifted the total abortion ban that had been in place for 28 years, to decriminalise abortion in cases of rape, foetal impairment or when a woman's life is in danger. The Centre for Reproductive Rights in partnership with other civil organisations had not only submitted an *amicus* brief demonstrating that the review was in line with international standards, but also testified before the Tribunal in support of the Abortion Bill meant to replace the existing draconian law which resulted in about 200 000 unsafe abortions per year.[233]

Below we turn to an examination of General Comments of selected treaty-monitoring bodies in order to arrive at insights regarding the protection of adolescents' rights to access emergency contraception.

6 Insights gained from selected comments of treaty-monitoring bodies

6.1 Introduction

Treaty-monitoring bodies monitor the fulfilment by state parties of the obligations created by human rights instruments. Treaty-monitoring bodies use General Comments or general recommendations as tools to aid in the interpretation and development of the provisions of international human rights instruments in order to guide states that are parties to those instruments in the implementation of their obligations.

6.2 African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (African Commission) adopted General Comment 2 on articles 14(1)(a), (b), (c) and (f) and articles 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) at its 55th ordinary session.[234] General Comment 2 provides interpretive guidance on the overall and specific obligations of state parties towards promoting the effective

232 See Council of State of the Republic of Colombia (2002) judgment of 5 June 2008, Exp 11001-03- 24-000-2002-00251-01, Bulletin 25, June 16/08: para 2.2.2, cited in E Kismodi et al 'Advancing sexual health through human rights: The role of the law' (2015) 10 *Global Public Health* 259. See also CRR *In re Access to Emergency Contraception in Colombia (amicus brief) (Colombian Council of State)* (2008) https://www.reproductiverights.org/case/in-re-access-to-emergency-contraception-in-colombia-amicus-brief-colombian-council-of-state (accessed 5 September 2017).

233 CRR *Chile makes history* (2017) https://www.reproductiverights.org/feature/chile-makes-history (accessed 12 September 2017).

234 Held from 28 April-12 May 2014 in Luanda, Angola.

domestication and implementation of article 14 of the African Women's Protocol.

The relevance of General Comment 2 in the quest to ensure adolescents' access to emergency contraceptives cannot be overemphasised. Under the heading 'Access to sexual and reproductive health services', paragraph 29 of General Comment 2 cautions that ensuring the availability, accessibility and acceptability of quality sexual and reproductive health care services for women is crucial and that, consequently, states have the obligation to ensure 'comprehensive, integrated, rights-based, women-centred and youth-friendly services that are free of coercion, discrimination and violence'. The African Commission clearly is aware that adolescents face significant obstacles related to a lack of youth-friendly health care centres, and that this is preventing them from realising their rights to access emergency contraception.

Also, in paragraph 30 of General Comment 2 the African Commission stresses the importance of choice in contraceptive methods, highlighting the Commission's concern 'about the limitations on and insufficient access to women's sexual and reproductive health services including access to preventive choices and methods'. This of course includes access by women and adolescent girls to emergency contraceptives.

Paragraph 31 of General Comment 2 is of particular relevance in light of the obstacles placed in the way of adolescents accessing these services by misguided health care workers, as discussed above.[235] The African Commission cautions that states should 'ensure that health workers are not allowed, on the basis of religion or conscience, to deny access to sexual and reproductive health services to women as highlighted in this document'. We have highlighted above that one of the obstacles in the way of adolescents' access to emergency contraceptives involves the use of 'conscience' clauses which allows health care providers (and pharmacists) to refuse to provide emergency contraception pills and other contraceptive methods to adolescents and women, because of their religious inclinations, significantly affecting their ability to access emergency contraceptives within the time frame when they are most effective. Paragraph 31 of General Comment 2, therefore, places a positive obligation upon states to ensure that health care providers are prevented from limiting access to emergency contraception in this way.

Finally, paragraph 46 of General Comment 2 entreats states to take 'all appropriate measures, through policies, programmes and awareness-raising in order to eliminate all barriers to women and girls enjoyment of sexual and reproductive health'. Paragraph 46 further notes that states should work towards eliminating 'disparities, harmful traditional and cultural practices, patriarchal attitudes, discriminatory

235 See para 5.1 above.

laws and policies in accordance with articles 2 and 5 of the Protocol'. The importance of paragraph 46 in reiterating the obligation put on states that are parties to the African Women's Protocol to ensure access to emergency contraception is self-evident, namely, that policies, procedures, practices and socio-cultural attitudes impeding access to emergency contraception should be eliminated.

6.3 African Committee of Experts on the Rights and Welfare of the Child

The right to the highest attainable standard of health requires African governments to ensure that its four essentials elements – availability, accessibility, acceptability and quality[236] – are achieved in the region without discrimination based on age.[237] In order to ensure that the provisions of the African Children's Charter are effectively implemented in the region, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) was established.[238] The Children's Committee has the mandate to monitor the implementation and protection of the rights of the child in Africa and, in order to do this, receives and considers state reports, individual communications pertaining to infringement of the rights of the child as contained in the African Children's Charter, and undertakes country investigations on issues relating to the violation of the rights of children in member states.[239]

In line with its authority to receive communications from individuals and groups about violations of children's rights, the African Children's Committee received a communication against the government of Kenya on behalf of children of Nubian descent in Kenya. This followed unsuccessful attempts by the Nubian community to affirm their rights to Kenyan nationality in the Kenyan national courts.[240] Based on the recognition in article 6 of the African Children's Charter of the rights

236 Para 12 General Comment 14 of the ESCR Committee. This involves facilities, drugs and health providers being available and accessible in sufficient quantities without discrimination. Also, quality SRH care services must be rendered by medical personnel that are skilled in their field and, most importantly, the services should be rendered in a manner that is not only culturally appropriate but must seek to protect the confidentiality of its clients, adolescents, at all times except where it will be improper to do so.

237 See paras 18-19 of General Comment 14 of the ESCR Committee.

238 The African Children's Committee was created in July 2001 during the 37th session of the Assembly of Heads of State and Government of the African Union in Lusaka, Zambia. It is a body of 11 independent experts who have been given the primary responsibility of overseeing the protection of the rights of children in the region. See arts 32 & 33 of the African Children's Charter.

239 See generally arts 42-45 of the African Children's Charter on the mandate and procedure of the Children's Committee.

240 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v The Government of Kenya* Communication Com/002/2009, http://www.ihrda.org/wp-content/uploads/2011/09/002-09-Nubian-children-v-Kenya-Eng.pdf (accessed 27 June 2016).

of children to nationality,[241] it was argued that the Kenyan government's stance in denying this right caused various violations of children's rights, such as a violation of their right to education, health care services and non-discrimination.[242] After considering various presentations made to it, the African Children's Committee held Kenya to be in violation of the various articles as alleged.[243]

As it did in the *Nubian Children* case, the Children's Committee is able specifically to make declarations that relate to adolescents' access to emergency contraception and other sexual health care services. In a recent Declaration on Ending Child Marriage in Africa, the Children's Committee expressed the view that child marriages adversely affected the health and well-being of the girl child, and called upon stake-holders to address the structural causes of child marriages and promote access to sexual health information, education and services.[244]

In line with its mandate to ensure the rights of African children recognised in the African Children's Charter, the African Children's Committee potentially is able to ensure the development of a robust jurisprudence that can assist in the advancement of children's rights.[245] Also, in line with its mandate to interpret the provisions of the African Children's Charter, through General Comments the Children's Committee can issue authoritative interpretations of the provisions contained in the African Children's Charter to clarify their meaning and scope.[246]

At present the Children's Committee has issued only two General Comments: one dealing with the rights of children of incarcerated mothers,[247] and another dealing with children's rights to birth registration, name and nationality.[248] The African Children's Committee is yet to issue a General Comment on adolescents' access

241 See para 7 *Nubian Children* case (n 240 above).

242 As above.

243 See generally paras 37-68 *Nubian Children* case (n 240 above).

244 African Children's Committee The Addis Ababa Declaration on ending child marriage in Africa was made at the 23rd session of the African Committee of Experts on the Rights and Welfare of the Child held in Addis Ababa, Ethiopia, in April 2014, http://srsg.violenceagainstchildren.org/sites/default/files/documents/docs/ACERWC-Declaration-on-Ending-Child-Marriage-in-Africa.pdf (accessed 27 June 2016); African Committee of Experts *Concept note on the Day of the African Child 2015* (2015) 4, http://www.girlsnotbrides.org/wp-content/uploads/2015/06/Concept-Note-DAC-2015.pdf (accessed 27 June 2016).

245 E Durojaye 'The potential of the Expert Committee of the African Children's Charter in advancing adolescent sexual health and rights in Africa' (2013) 46 *Comparative and International Law Journal of Southern Africa* 401.

246 African Children's Charter General Comments http://www.acerwc.org/general-comments/ (accessed 25 June 2016).

247 General Comment 1 of the African Children's Committee issued in 2013, http://www.acerwc.org/download/general_comment_on_article_30_of_the_acrwc_english/?wpdmdl=8597 (accessed 27 June 2016).

248 General Comment 2 of the African Children's Committee http://www.acerwc.org/download/general_comment_article_6_name_and_nationality/?wpdmdl=8606 (accessed 27 June 2016).

to sexual and reproductive rights and health. It is recommended that this should be done as soon as possible in the same way as has been done by its UN-based counterpart – the CRC Committee – which consistently gives purposeful interpretation to the provisions of the CRC that lends substance to provisions of the Convention.

As noted above,[249] a major obstacle to adolescents' access to emergency contraception is the lack of available information on the contraceptives and their use. Also, the blocking of access to sexual health care services by religious and societal gate-keepers who rely on the limitation in article 7 of the African Children's Charter[250] to restrict adolescents' access to sexual health care information and services violates their right to health care. The limitation in article 7 makes the right subject to 'such restrictions as are prescribed by laws', thus restricting adolescents' rights to access available information, to express their opinions freely, and to disseminate their opinions subject to whatever restrictive laws are in place in the particular state. This limitation, therefore, enables states to hide behind restrictive national laws that inculcate religious and cultural taboos on children's access to sexual and reproductive health information and services, including information and services regarding emergency contraception, and so enables states to limit adolescents' rights.

To resolve these obstacles, we recommend that the African Children's Committee should provide a decisive interpretation of the African Children's Charter, stating clearly that despite the 'restriction' contained in article 7, the rights of children to enjoy the best attainable state of physical, mental and spiritual health[251] includes their rights to access available and affordable quality sexual health-care information and services. Article 7, instead, should be read as an attempt to empower adolescents to make their own decisions in the face of parental or societal opposition. Moreover, in all cases the best interests and evolving capacities[252] of the adolescent should be considered.

Since another impediment affecting adolescent girls' access to emergency contraception and other sexual health care services is the absence of privacy and confidentiality in accessing emergency contraception,[253] the African Children's Committee needs specifically to impress upon African governments the necessity of not only of enacting laws on adolescents' access to confidential sexual and

249 Hooja & Mital (n 140 above); Babatunde et al (n 32 above) 23.

250 Art 7 of the African Children's Charter provides that '[e]very child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws'.

251 Art 14(1) African Children's Charter.

252 The best interests of the child are recognised in art 4 of the African Children's Charter.

253 Family Health International (n 83 above) 7. See also Hooja & Mital (n 140 above) 16.

reproductive health care services,[254] but also of monitoring the implementation of these laws so that genuine access to emergency contraceptives and other regular contraceptives may be achieved.[255]

In line with its mandate to examine state reports, the African Children's Committee should look into the reports submitted to it and, in its Concluding Recommendations, should hold African governments accountable for the various violations of the sexual health rights of adolescents., This it should do while also making comments that may assist in advancing adolescents' sexual and reproductive health needs, especially their access to emergency and other contraception, as inaccessible contraception is responsible for the region's continuing high rates of unplanned adolescent pregnancies and mortality resulting from unsafe abortions.

6.4 Committee on the Convention on the Rights of the Child

Noting that state parties have neglected the protection of the rights of adolescents in their access to sexual health information and services, thereby exposing them to sexual ill-health, the CRC Committee issued General Comments 3[256] and 4.[257] It did this in order to provide guidance to state parties to advance the realisation of the health rights of adolescents. In General Comment 4, the CRC Committee urged African states to remove barriers that hinder adolescents' access to sexual and reproductive health information.[258] The CRC Committee stated that denying adolescents in the African region access to emergency contraceptives on the grounds of their age infringes their rights to non-discrimination as guaranteed in article 3 of the African Children's Charter. Specifically, the CRC Committee categorically explained, in particular, that denying adolescent girls access to sexual health care services was an infringement of their various rights as it puts at risk and limits their developmental potential.[259]

In a General Comment on the Best Interests of Children,[260] the CRC Committee identified this principle as one of four general

254 Para 24 of General Comment 3 of the CRC Committee; para 29 of General Comment 4 of the CRC Committee.

255 Concluding Observation of the CRC Committee to Nicaragua 1999 CRC/C/15/Add. 108, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/a60af0697af8394280256 79700483778?Opendocument. (accessed 25 October 2015).

256 General Comment 3 on HIV/AIDS and the rights of the child issued at its 32nd session in 2003.

257 General Comment 4 on adolescent health and development in the context of the Convention on the Rights of the Child issued at its 33rd session (2003).

258 Paras 24 & 26 of General Comment 4 of the CRC Committee.

259 Para 6 of General Comment 4 of the CRC Committee.

260 General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration issued at its 62nd session (2014).

principles[261] that are important for interpreting and implementing children's rights.[262] In pointing out that the judgment of adults on what is believed to be in a child's best interests should not impede the duty to respect children's rights, it explains that all the rights protected in the CRC are in the child's best interests and that none should be interpreted negatively.[263] Aligning ourselves with Durojaye's view,[264] we recommend that a purposeful analysis of the provision on parental responsibilities contained in the African Children's Charter[265] should explicitly include an obligation on parents to ensure that their wards receive important sexuality information and education as this is in their best interests. The acceptance of this obligation should go a long way towards improving adolescents' access to emergency contraceptives, particularly, and other sexual health care services, generally.

Furthermore, in relation to children's rights to the enjoyment of the highest attainable standard of health, in General Comment 15[266] the CRC Committee noted that the right to health is made up of freedoms and entitlements.[267] While entitlements grant children the right to access sexual and reproductive health care services that will enable them to enjoy the highest attainable standard of health, freedoms (that progressively increase in line with their maturity and

261 Other principles include the obligation on states to respect and ensure the rights of the child to non-discrimination in art 2; the right of the child to life, survival and development in art 6; and the right of the child to be heard and to express his or her views freely in 'all matters affecting the child' in art 12. See generally para 12 of General Comment 5 of the CRC Committee's (2003) and para 2 of General Comment 12 of the CRC Committee (2009) http://www.refworld.org/docid/4ae562c52.html (accessed 4 June 2014).

262 Para 1 of General Comment 14 of the CRC Committee.

263 The 'best interests' principle recognises children as vulnerable members of society who deserve the highest levels of protection. The principle has been interpreted to mean the careful deliberation by state parties and other stakeholders (including judges) in their actions and orders as to what best serves the interests of children in all situations. Ensuring that adolescents have access to comprehensive SRH information has been adjudged as being in their best interests. According to the Committee, its reason for developing the General Comment is based on the need to strengthen an understanding and application of the right of children to have their best interests assessed and taken as a primary consideration in order to engineer a 'real change' in attitude that will lead to the full respect of children as rights holders. See generally paras 4, 11 and 12 of General comment 14 of the CRC Committee. See also G Lansdown & M Wernham 'Are protection and autonomy opposing concepts?' in IPPF (ed) *Understanding young people's right to decide* (2012) http://www.ippf.org/sites/default/files/ippf_right_to_decide_03.pdf (accessed 12 June 2016).

264 Durojaye (n 245 above) 398.

265 Art 20 African Children's Charter.

266 Children's rights to health are internationally protected in art 24 of the CRC General Comment 15 on right of the child to the enjoyment of the highest attainable standard of health issued by the CRC Committee in 2013 (CRC/C/GC/15).

267 Para 24 of General Comment 15 of the CRC Committee.

evolving capacity) include their autonomy to make responsible sexual and reproductive health choices.[268]

It is also necessary to point out that the realisation of adolescents' sexual health rights in the African region to a large extent rests on their being able to access confidential consultations with health providers who should ascertain whether they are *Gillick*-competent. Consequently, in considering the evolving capacities of children as recognised in the African Children's Charter,[269] the CRC Committee has advised governments to ensure that health care professionals specifically employed to render sexual health services to adolescents respect their rights to privacy.[270]

6.5 UN Committee on Economic, Social and Cultural Rights

We conclude this section of the article by briefly turning our attention to General Comments 14 and 22 of the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) on the right to health.[271] In General Comment 14, the ESCR Committee notes that the right to health is an inclusive right that extends to 'the underlying determinants of health', such as 'access to health-related education and information, including on sexual and reproductive health'.[272] By stressing the importance of education and information on sexual and reproductive health as an underlying determinant of health, the ESCR Committee displays its awareness that health cannot be achieved without adequate educational and information programmes being in place. As was pointed out above,[273] in the case of emergency contraception education and information about the method of contraception are severely lacking. General Comment 14, therefore, may be considered a call to action for states to include emergency contraception in health education and information programmes. The ESCR Committee further notes that health care services, including reproductive health care, must be available, accessible, acceptable and of good quality to all, particularly to vulnerable and marginalised groups such as young persons,[274] highlighting the extremely

268 As above.

269 Art 9(2) African Children's Charter and art 5 of the CRC.

270 Para 17 of General Comment 3 of the CRC Committee.

271 ESCR Committee General Comment 14: The Right to the Highest Attainable Standard of Health, 22nd session, 25 April-12 May 2000, Supp 2, UN Doc E/C.12/2000/4, 9, 11 (2000), http://www.ohchr.org/Documents/Issues/Women/WRGS/Health/GC14.pdf (accessed 22 October 2016); General Comment 22: The right to sexual and reproductive health (2016) UN Doc E/C.12/GC/22 https://www.escr-net.org/resources/general-comment-no-22-2016-right-sexual-and-reproductive-health (accessed 12 September 2017). The ESCR Committee was created in 1985 as a subsidiary of the Economic and Social Council of the UN and is vested with the mandate of performing monitoring functions over the ICESCR, and state parties are to submit periodic reports on the measures adopted and progress achieved in implementing the right contained in the Covenant.

272 Para 11 General Comment 14.

273 Para 5.2 above.

274 Para 12 General Comment 14.

vulnerable status of adolescents when accessing reproductive health care services, including emergency contraception.

In General Comment 14, the ESCR Committee introduces minimum core essentials to be guaranteed by state parties to the Covenant.[275] Pertaining to the right to health, essentials to be guaranteed by state parties include availability, accessibility, acceptability and quality.[276] In the context of adolescents' access to emergency contraception, 'availability' entails not only that health care facilities stock emergency contraception pills but also that the health care personnel at these facilities are fully trained in their use and are willing to prescribe this contraceptive. Also, emergency contraception must be available in sufficient quantities in both public and private health care facilities and within reasonable geographical reach.

'Accessibility' entails that health facilities are physically and economically accessible without discrimination to all adolescent girls needing emergency contraception and without distinction between those living in rural and urban areas. It also includes informational accessibility which means that adolescents who need to access the services must receive or have access to all requisite information pertaining to the treatment or service, including emergency contraception.

'Acceptability' entails that health care services and the facilities provided must be acceptable in terms of medical ethics, be culturally appropriate and must respect the rights to confidentiality of the adolescents they serve. This demand is particularly important if we note that one of the most significant barriers to adolescents accessing emergency contraception is a lack of confidentiality: General Comment 14, therefore, stresses the need to respect adolescents' rights to confidentiality when accessing emergency contraception.

'Quality' entails that all the facilities and services rendered must be of good quality and the medical personnel must be skilled in their various fields. It is submitted that this essentially includes when and how to prescribe emergency contraceptives to adolescents.

The observance of the core minimum content in relation to female adolescents' access to emergency contraceptive information and

275 As above. The South African Constitutional Court has consistently refused to engage with the concept of a minimum core content in its jurisprudence, and instead has opted for an approach of 'reasonableness'. For a critique of the approach of the Court, see D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 484-501; D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1-26; D Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 3 *Stellenbosch Law Review* 614-638; and S Liebenberg *Socio-economic rights: Adjudicating under a transformative constitution* (2010) 131-227.

276 As above.

services requires that state parties establish sufficient adolescent-friendly clinics in both rural and urban areas;[277] employ health providers with positive attitudes;[278] introduce comprehensive sexual and family life education in schools;[279] enact laws that proscribe stereotypes and discrimination; and ensure that the confidentiality and privacy of adolescent patients are maintained when accessing contraceptive services except where it will not be in the child's best interests, among others.

In line with the ESCR Committee's interpretation in its General Comment 14,[280] the rights of female adolescents to access contraception are violated[281] where state parties adopt policies and laws that bar them from accessing necessary information on the availability of contraceptive services and other reproductive health services. Also, state parties violate the right to health where their agents deliberately withhold information from adolescent girls that the use of family planning assists in the prevention of teenage pregnancies and infection by STIs, or where their accessibility to contraceptives is impeded due to the privatisation of health care services without providing alternatives where required information and services may be obtained.[282]

Paragraph 14 of General Comment 14 stresses that the right in article 12 of the Covenant may be 'understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning', underscoring the obligation on states to provide measures to improve access to sexual and reproductive health services, including emergency contraception.

The ESCR Committee further stresses that parties to the ICESCR should provide 'a safe and supportive environment for adolescents', in order to ensure that they have the 'opportunity to participate in

277 In its Concluding Observations to Russia in 2011, the ESCR Committee recommended ensuring that the Russian government should ensure that family planning information and services are available to everyone, including people residing in the rural areas, and that the teaching of sex education to adolescents should be included in the school curricular so as to prevent early pregnancy and STIs. See para 30 of the ESCR Committee's Concluding Observations on Russia 2011 E/C.12/RUS/CO/5.

278 'Positive attitude' here means health providers who do not have issues with prescribing contraception or other reproductive health services to adolescent girls.

279 In its Concluding Observations to the Republic of Moldova in 2011, the ESCR Committee expressed concern at the withdrawal of the teaching of life skills courses in public schools, and recommended that the teaching of sexual and reproductive rights should be reintroduced in the curricula of schools. See para 27 of the ESCR Committee's Concluding Observation on Moldova E/C.12/MDA/CO/2.

280 Paras 47-52 of General Comment 14 of the ESCR Committee.

281 A violation occurs where a state party is unwilling to invest the maximum available resources to ensure the realisation of the right to health in fulfilment of its obligations under article 12. In cases where a violation results from of an inability to comply, it is mandatory that the state party justify that it has expediently invested all available resources to satisfy its obligations.

282 Para 35 of General Comment 14.

decisions affecting their health, to build life skills, to acquire appropriate information, to receive counselling and to negotiate the health behaviour choices they make'. The significance of this directive for the provisioning of emergency contraception is self-evident.

The ESCR Committee also stresses that the rights to health of adolescents are 'dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services'.[283] We would argue that 'appropriate sexual and reproductive health services' include access to emergency contraception in a youth-friendly setting that respects the adolescent's privacy and confidentiality.

In General Comment 22, the ESCR Committee explains that the right to sexual and reproductive health is an integral part of the general right to health and primarily is linked to and is inter-dependent with the enjoyment of other rights, including the rights to life, education and information, equality and privacy.[284] Noting that the sexual and reproductive health of individuals is deeply affected by social determinants that generally reflect existing societal inequalities and limit the choices women and adolescent girls can make with respect to their sexual and reproductive health, the ESCR Committee reiterates the need for state parties to address the social determinants as manifested in their laws and social practices which prevent women from effectively enjoying their sexual and reproductive health in practice.[285]

According to the ESCR Committee, as a result of women's reproductive capacities, the guarantee of the right to sexual and reproductive health is not only essential to the realisation of the full range of their (other) rights, but also indispensable to their rights to make meaningful decisions about their health. To achieve equality, there is a need to understand that achieving gender equality requires that the health needs of women and girls, different from those of men, be taken into account with appropriate services provided to them throughout their lifetime.[286]

Thus, bearing the above in mind, there is a need for African governments not only to dismantle all forms of direct and indirect discrimination that persist in seemingly neutral laws, policies and practices which hinder women and adolescent girls from making autonomous decisions and accessing sexual and reproductive health information and services, but also to remove the inherent disadvantages women experience when exercising their rights to sexual and reproductive health.[287] These goals can be achieved by specifically adopting, reviewing and consistently implementing

283 Para 23 of General Comment 14.
284 Paras 1, 5 ,9 & 10 of General Comment 22.
285 Para 8 of General Comment 22.
286 Para 25 of General Comment 22.
287 Paras 26 & 27 of General Comment 22.

measures that will assure access to comprehensive sexual and reproductive health services, education and information in order to prevent unintended pregnancies and unsafe abortions. These measures include lowering the rates of maternal mortality and morbidity through access by women and girls to emergency obstetric care, skilled birth attendance in both rural and urban areas, as well as guaranteeing to all women and girls access to affordable, safe and effective contraceptives and quality post-abortion care where required.[288]

6.6 CEDAW Committee

The Committee monitoring the implementation by state parties of CEDAW, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW Committee), has issued several General Comments and recommendations addressing women's and girls' health issues, including General Recommendation 24 which specifically deals with women and health.[289]

General Recommendation 24 declares that the issues of 'HIV/AIDS and other sexually-transmitted diseases are central to the rights of women and adolescent girls to sexual health'.[290] Importantly, the General Recommendation notes that women and girls suffer from a lack of adequate information and of services; that they do not have sufficient power to refuse sex or insist on safe sexual practices; and that they often are subjected to marital rape and polygamy, exposing them to HIV infection.[291] From the evidence presented in the paragraphs above,[292] it is evident that this lack of adequate information includes information on emergency contraception, and that such knowledge may help protect against the consequences of unsafe sexual practices.

General Recommendation 24 further compels states to ensure the right to sexual health information for all women and girls, especially sex workers and trafficked women and girls, in programmes designed to respect their rights to privacy and confidentiality.[293] This underscores our argument that such information must include

288 Paras 28 & 49 of General Comment 22.

289 Committee on the Elimination of Discrimination against Women General Recommendation 24 Women and Health, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/77bae3190a903f8d80256785005599f (accessed 1 September 2017). Note that the CEDAW Committee has not yet dealt with the issue of discrimination against women or girls in accessing emergency contraception. The only communication so far dealing with women's and girls' access to health care services is *AS v Hungary* (Communication 4/2004), in which the author alleged a contravention by the state party of arts 10(h), 12 and 16(1)(e) of CEDAW, in that she was forced to undergo forced sterilisation when accessing a state hospital for an emergency cesarean section to remove her dead foetus.

290 Para 18.

291 As above.

292 See paras 5 & 6 above.

293 Para 18.

information on emergency contraception. The privacy and confidentiality of adolescents accessing emergency contraception services must be guaranteed, in line with this Recommendation.[294]

7 Recommendations on the way forward

As previously argued, adolescent girls' inability to access information about available means to protect themselves from unplanned and unwanted pregnancies leads to disastrous consequences for them and for society.[295] Therefore, in order to increase the health benefits associated with the widespread use of emergency contraception, it is necessary that adolescent girls are adequately informed and educated about the existence and use of this type of contraception. More importantly, it is paramount that adolescents are made aware of the time frames within which emergency contraceptives are effective.

In order to improve adolescents' access to emergency contraception, emergency contraceptives must be made as easily accessible as possible. Efforts should be made to ensure their availability in state health care institutions, private pharmacies and, especially, in adolescent-friendly health establishments.

In keeping with General Comment 2 of the African Commission, steps should be taken to remove societal and religious barriers that impede access to emergency contraception. This may be done by organising awareness-raising campaigns in the various information media to effect attitudinal changes to contraceptive use by adolescents, generally, and to emergency contraception, in particular. To achieve this, community and religious leaders need to be convinced of the need to encourage adolescents to use emergency contraceptives, especially in situations of sexual violence and assault. This may be done through presenting them with factual evidence on the negative effects occasioned by unplanned and unwanted pregnancies and the procurement of unsafe abortions, or by following the approach taken in Ethiopia where religious leaders are co-opted into incorporating important sexual and reproductive health information in their routine religious messages.[296]

To overcome concerns about the infringement of adolescents' privacy and confidentiality, it is necessary that sufficient adolescent-friendly health centres which operate during adolescent-friendly hours are established. These centres should be manned by approachable health care providers and should not be too far from where adolescents live. These centres should also be able to provide

294 See para 7 below. For additional insights into the jurisprudence of the CEDAW Committee as it is relevant to African women's and girls' reproductive rights, see S Iyayi Ibadin 'A critical evaluation of CEDAW Committee jurisprudence and its relevance to African women' LLM dissertation, University of Pretoria, 2011.

295 Hoque & Ghuman (n 91 above) 2.

296 Muntean et al (n 225 above) 93.

educational and other interactive programmes in addition to sexual health care services. The adoption of these measures will assist in rapidly reducing the embarrassment adolescents experience when asking a health care provider to prescribe emergency contraceptives.

It is in the best interests of adolescents that they are actively involved in decision-making processes on issues relating to the protection of their sexual health. Therefore, it is necessary that African governments ensure that adolescents are co-opted and encouraged to participate in programmes on emergency contraception intended for their benefit. Adolescents should be empowered so that they may avoid the health risks attendant upon a failure to access emergency contraception. The use of health-promoting strategies as a framework should be adopted to achieve this. Such strategies include building personal skills; creating a supportive environment; strengthening community action; reorienting health and social services; and instituting healthy public policies.[297]

8 Conclusion

We have argued that as governments have committed themselves at international human rights *fora* to prioritising adolescents' development and wellbeing, particularly their educational and health needs, governments should adopt programmes which promote adolescents' education about and access to emergency contraception. These programmes should be aimed at enabling adolescents to deal in a positive manner with their awakening sexuality. African adolescents should be able freely to access sexual health care information and services, including those relating to emergency contraception.

We highlight the challenges currently faced by adolescents in sub-Saharan Africa when attempting to access emergency contraception, as well as the numerous sexual and reproductive health hazards resulting from their inability to access these services. These hazards are unintended pregnancies, unsafe abortions, and sexually-transmitted infections, to name but a few.

Additionally we indicate the potentially valuable role to be played on the African continent by the African Committee of Experts on the Rights and Welfare of the Child. We argue that a proactive interpretation of the rights in the African Children's Charter by the African Children's Committee may go a long way towards respecting, protecting and fulfilling adolescents' rights of access to emergency contraception. Such an interpretation was presented by the UN

297 S Kumar and GS Preetha 'Health promotion: An effective tool for global health' (2012) 37 *Indian Journal of Community Medicine* 5-12; Health Service Executive *The health promotion strategic framework* http://www.healthpromotion.ie/hp-files/docs/HPSF_HSE.pdf (accessed 28 June 2016).

counterpart of the Children's Committee. Lastly, we make a number of recommendations on how to ensure easy access for adolescents to emergency contraception.

We conclude by stressing the plea of Dr Nafis Sadik on World Health Day:[298]

> We must do everything we can to prevent unwanted, unintended and high-risk pregnancies, including making family planning information and services universally available. The technologies and techniques needed are all well-known. Countries need only the will to act.

It goes without saying that without the political will to implement the recommendations we and others have made regarding the need to ensure adolescents' access to emergency contraceptives, unwanted, unintended and high-risk pregnancies will remain part of adolescents' lives.

298 Statement by Dr Nafis Sadik on World Health Day, 7 April 1999, http://www.familycareintl.org/UserFiles/File/pdfs/FCI_SRH_Briefing%20Cards.pdf (accessed 7 June 2016).

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Adolescent sex and 'defilement' in Malawi law and society

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Summary

During colonisation Malawi received a Western penal code, which included the 'defilement' provision, restricting males from sexually accessing girls below a specified age. Countries that maintain colonial age of consent provisions, including Malawi, have uncritically assumed that these laws serve the purpose of protecting girls and children from harm. This article examines the fundamental assumptions underlying the development of sections 138 and 160B of the Malawian Penal Code, and their historical and sociocultural origins. The article submits that these provisions serve the interests of adults and not those of children. They are inherently heterosexist, promote gender-stereotypical meanings of sexuality and potentially stigmatise the normative development of sexuality in children. Sections 138 and 160B need to be reviewed and aligned with Malawi's commitments to promote gender equality and sexual health and the rights of children.

Key words: *childhood sexuality; child rights; Gender Equality Act, age of consent, Malawi Penal Code*

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1 Introduction

On 1 April 1930, Malawi enacted its current Penal Code[1] which was based on the Colonial Office model code drafted by Albert Ehrhardt, which he based on the Nigerian Code of 1916, itself based on the Queensland Code of 1899.[2] Section 138 of the Penal Code (section 138), the 'defilement provision', restricts boys and men from sexually accessing girls below a specified age. The defilement provision is part of what broadly are referred to as 'age of consent'[3] provisions or laws. Section 138 regulates the age of consent to sexual intercourse. Originally, the age of consent was 13 years, but in 2000 the Malawi Law Commission recommended that it be raised to 16 years.[4] In 2010, parliament passed a Bill to implement the recommendations of the Malawi Law Commission.[5] The suggested amendments to the Penal Code were enacted and entered into force in 2011. Section 160B of the Penal Code (section 160B), which criminalises sexual activity with a child below 16 years of age, was at this time introduced. From the perspective of World Vision, a view probably representative of most stakeholders in Malawi, the intention behind the amendments was to enhance the protection of the girl child from sexual abuse.[6] The aim of this article is to explore the rationale and assumptions behind the development of sections 138 and 160B in view of Malawi's commitment to promote gender equality and the sexual health and rights of children.

Sections 138 and 160B must be understood in their historical, sociocultural and political contexts, beginning with their colonial origins, and including the legal developments that have since taken place. Most significantly, in 1994 Malawi adopted a democratic Constitution which includes a Bill of Rights.[7] Section 23 of the Constitution of Malawi (Constitution) recognises the rights of children. Another significant event was the enactment and entry into force of the Gender Equality Act in 2013.[8] This Act aims at addressing gender inequality between men and women. It also recognises the

1 Ch 7:01 Laws of Malawi, Penal Code 1930.

2 HF Morris 'A history of the adoption of codes of criminal law and procedure in British colonial Africa, 1876-1935' (1974) 18 *Journal of African Law* 18 22.

3 M Waites 'Age of consent and sexual citizenship in the United Kingdom: A history' in J Seymour & P Bagguley (eds) *Relating intimacies: Power and resistance* (1999) 92. According to Waites, the term 'age of consent' is not a legal term, but rather convenient language 'which can be used with caution to describe *minimum ages* below which certain sexual acts are *prohibited*' (emphasis in the original).

4 Malawi Law Commission *Report of the Law Commission on criminal justice reform on the review of the Penal Code* (CAP 7:01) (2000).

5 Bill 17 of 2009: Penal Code (Amendment).

6 World Vision 'Children's rights in Malawi: Stakeholder report on Malawi – Submission by World Vision for Universal Periodic Review, 9th Cycle, November-December 2010', http://lib.ohchr.org/HRBodies/UPR/Documents/session9/MW/WVI_WorldVisionInternational.pdf (accessed 14 July 2016).

7 Constitution of the Republic of Malawi, 1994.

8 Gender Equality Act 3 of 2013 (Malawi).

sexual and reproductive health and rights of everyone, including children.[9]

The article draws upon knowledge generated in the interdisciplinary field of childhood studies about the meanings of childhood and sexuality, and its intersections with human rights norms, to interrogate sections 138 and 160B and their implications for child and adolescent sexuality development, sexual health and rights. It employs a pro-feminist critique of gender to analyse the assumptions and rationale of the two provisions.

Section 23(6) of the Constitution defines a child as a person below the age of 18 years.[10] United Nations (UN) bodies have consistently defined adolescence as the ages between 10 and 19 years.[11] For purposes of this article, the term 'adolescence' is confined to persons between the ages of 10 and 18, so that the scope of discussion is limited to children as defined in the Constitution.

2 Theorising childhood

2.1 Childhood

There is consensus that Ariès was the first theorist to conceptualise childhood as a notion of which the meanings vary in time and context.[12] The idea that childhood is not simply a natural category but, rather, historically and culturally constructed, has influenced the study and development of knowledge about children, especially in the interdisciplinary field of childhood studies. The notion of childhood as socially constructed suggests that there are multiple conceptions of childhood across different cultures, and even within cultures. The meanings of childhood have shifted with time.

The dominant meanings of childhood have been shaped by developmental approaches associated with the period in Europe described as modernity.[13] Western conceptions of childhood were shaped by the social changes that took place during that period, including industrialisation, capitalism, and the rise of social class distinctions. Various scientific disciplines also proliferated during this period, including medicine and psychology. Drawing upon modernity's conceptions of childhood, Piaget's work in developmental

9 Sec 19 Gender Equality Act.

10 On 14 February 2017, parliament passed Bill 36 of 2016: Constitution (Amendment) raising the age of minority from 16 to 18. The Bill was signed into law in April 2017.

11 World Health Organisation *The health of youth,* Document A42/Technical Discussions/2.

12 P Ariès *Centuries of childhood: A social history of family life* (1962).

13 CE Forth 'History, modernity' in M Flood et al (eds) *International encyclopedia of men and masculinities* (2007) 291. Forth describes modernity as 'a complex and interrelated cluster of social, political, cultural and economic developments that has characterised Western societies since the decline of the feudal era'.

psychology provided an explanatory framework of childhood that has influenced the understanding of childhood in contemporary times.[14] In Piagetian development psychology, 'children are perceived to proceed through a biologically predetermined set of linear cognitive developments, which correlate with chronological age, to reach the ultimate goal of adulthood'.[15] Childhood, therefore, is constructed as a phase of 'becoming', a metaphorical state of immaturity and inferiority, and a stage of progression from irrationality to rationality, and from asexual to sexual.[16]

Hendrick traced the shifting concepts of childhood in Britain from 1800 to the 1990s. According to Hendrick, the dominant discourse of childhood drew discursively on constructions of childhood that dominated certain historical periods, including the child as innocent and pure; the child as tainted by original sin and in need of redemption; the child as in need of protection from labour; and the child who was unlike child: the delinquent child.[17] Childhood discourses progressively constructed children in opposition to and as dependent on adults. Schools were established to socialise and train children to become functional adults and to avoid delinquency or deviance.[18] The state became more interventionist in the lives of children by creating various laws on children, including age of consent laws.[19]

The notion of Western childhood conjures up powerful images, such as immaturity, helplessness, passivity, asexuality, innocence, irresponsibility and incompetence, and justifies their control by adults under the guises of saving and protecting children, and acting in their best interests.[20] However, constructing children as innocent and asexual masks the operation of power: the power to control, subjugate not only children but those who are deemed to be like children, or indeed to separate as 'other' those children who are 'unlike' children, such as children who have sex.[21] Children who do not behave as adults expect them to are stigmatised and constructed as deviant.

14 A Prout & A James 'A new paradigm for the sociology of childhood? Provenance, promise and problems' in A James & A Prout (eds) *Constructing and reconstructing childhood?: Contemporary issues in the sociological study of childhood* (1997)10-11.

15 KH Robinson 'In the name of "childhood innocence": A discursive exploration of the moral panic associated with childhood and sexuality' (2008) 14 *Cultural Studies Review* 115.

16 D Archard *Children: Rights and childhood* (2015) 48.

17 H Hendrick 'Constructions and reconstructions of British childhood: An interpretive survey, 1800 to the present' in James & Prout (n 14 above) 36-42.

18 Hendrick (n 17 above) 45.

19 Hendrick 50-51.

20 B Thorne '"Childhood": Changing and dissonant meanings' (2009) 1 *International Journal of Learning and Media* 21-22.

21 B Thorne 'Re-visioning women and social change: Where are the children?' (1987) 1 *Gender and Society* 86.

2.2 Adolescence

Adolescence is a phase of childhood the meaning of which, similar to that of childhood, is socially constructed. The theories and ideas of Granville Stanley Hall, dubbed as the 'father of adolescence', have had a lasting influence on the conceptualisation of adolescence.[22] Hall characterised adolescence as the age of 'storm and stress', and explained that adolescents are unstable, emotional and poor decision makers because of raging hormones. Hall's treatise on 'adolescence'[23] and the movement of the study of children 'invented' the institution of adolescence as that ideal age of development which, if properly administered, would contribute to the evolution of a healthy and superior human race.[24] The idea of adolescence was premised on gender, racial and class lines. Hall and his followers saw adolescence as

> a crucial point at which an individual (and society) jumped to a developed, superior, Western selfhood, or remained arrested in a savage state. Adolescence became the dividing line between rational, autonomous, and moral white bourgeois men, those civilised men who would continue the evolution of the race, and emotional, conforming, sentimental, or mythical others, namely primitives, women, and children.[25]

Hall and his followers promoted the study of school children to devise that kind of training or curriculum that would produce adolescents who were morally fit, physically strong and healthy to contribute to economic productivity. Hall advocated 'an economic logic of human health in which the nerve force of humans is limited, and one must not dissipate it in masturbation or other wasteful sexual activities'.[26]

By characterising adolescence as 'storm and stress', adolescents are perceived primarily as bodies controlled by raging hormones. Such conceptualisation, linked with the idea that adolescents ought to be trained to produce a healthy and superior race, became the foundation for institutionalising schools as the ideal training ground and management of future citizens. In schools, pupils would be trained in a manner that would discourage such behaviour that would lead to degeneracy and inferior development, such as masturbation and 'wasteful sexual activities'. Schools, therefore, became masculinised and sexually-sanitised environments.[27] It also extended the time that young people spend in schools, so that even when they attained sexual maturity, they were supposed to maintain discipline and behave like asexual beings.

22 N Lesko *Act your age!? A cultural construction of adolescence* (2012) 42.
23 GS Hall *Adolescence: Its psychology and its relations to anthropology, sex crime, religion and education* (1904).
24 Lesko (n 22 above) 46-47.
25 Lesko 46.
26 Lesko 55.
27 Lesko 68-69.

Therefore, just like childhood, adolescence is more than a natural category, the meaning of which is defined by biology and physiology. Rather, it is a socially-constructed and political category that has been applied to persons based on age and the onset of secondary sexual characteristics, and inflects sociocultural ideologies shaped by historical factors. For instance, therefore, the stigma faced by pregnant learners in schools, as described by Shefer et al, is in part attributed to the vision of schools as institutions for management of the sexuality of adolescents, so that pregnant girls are constructed as 'failures' or deviant because of their sexual precocity.[28] This also explains the anxiety schools face in teaching sexuality education, which is mostly focused on disease and danger, because sexuality education is used as a tool to control adolescents in order to prevent sexual degeneracy of society, as envisaged by Hall, rather than for empowering them.[29]

3 Interaction of law and culture in shaping the discourses of child sexuality

The social practices regulating sexual conduct of children existed in Malawi before the introduction of Western notions of an age of consent. The introduction of a Western system of regulation, therefore, created a pluralistic environment in which multiple regulatory systems coexist. In traditional Malawi,[30] the most important and significant marker of attainment of adulthood is puberty and, in some cultural groups in Malawi, it is marked by initiation rites.[31] At puberty, the child is recognised as capable of adult sexual conduct, and the initiation rites mark entry into adulthood. Generally, girls are taught to avoid sex with boys in case they become pregnant before marriage, which would bring shame and dishonour to the family.[32] There is a stricter regulation of sexual conduct for the girl, through the social shaming of girls who have sex

28 T Shefer *et al* 'Teenage pregnancy and parenting at school in contemporary South African contexts: Deconstructing school narratives and understanding policy implementation' (2013) 31 *Perspectives in Education* 3-5.

29 C Macleod 'Danger and disease in sex education: The saturation of "adolescence" with colonialist assumptions' (2009) 11 *Journal of Health Management* 382.

30 The term 'traditional Malawi' is used here to mean contexts in which the social practices are predominantly of native rather than of Western origin.

31 AC Munthali & EM Zulu 'The timing and role of initiation rites in preparing young people for adolescence and responsible sexual and reproductive behaviour in Malawi' (2007) 11 *African Journal of Reproductive Health* 154.

32 Munthali & Zulu (n 31 above) 160. Amongst the Chewa, eg, special 'shaming' initiation rites that were performed for girls who had become pregnant before marriage, see JC Njeula 'A study on influence of traditional initiation practices to reduce spread of HIV and AIDS in Chileka, a rural area in Blantyre in Malawi' (2014) 1 *International Journal of Research and Review* 21.

or have pre-marital pregnancies, but boys are relatively free to indulge in pre-marital sexual activities.[33]

There continues to be dynamic interaction between Western and traditional culture (and religion) ever since their coexistence, and they have influenced each other in shaping gender and sexuality discourses, including the way in which childhood and adolescent sexuality is understood in modern Malawi. The following example illustrates how public policy and culture interact to shape knowledge and discourse on adolescent sexuality. A report on a survey evaluating the implementation of the Youth Friendly Health Services (FHS) Programme captured the following sentiments from parents:[34]

> In most parent FGDs, participants were against their children using contraceptive methods. Use of contraceptive methods was perceived as culturally inappropriate, particularly for youth aged below 15 years. The parents could also not understand why unmarried girls should use contraceptive methods. Some parents even stated that they would beat or stop paying the school fees of the young people under their care found to be using contraceptive methods.

It is interesting to note that parents attached significance to the age of 15 as the cut-off point for adolescents' access to contraceptives. But where did the 15 come from? In traditional Malawi, the significant event was menarche and not a particular age. One explanation is that at that time section 22 of the Constitution discouraged marriage of children below the age of 15.[35] This might have shaped how parents conceptualise the sexuality of girls in such a manner that has imbued the age 15 with a significance that did not exist in traditional culture's conception of child sexuality.

The influence of Western laws on cultural practices has also been captured by Parikh in an ethnographic study of the development of age of consent law in Uganda, especially when the age of consent was raised to 18. Parikh found that the law was appropriated by fathers to control boys who are able to sexually access their daughters. Poor boyfriends would be threatened with prosecution, especially when the sexual intercourse ended up in the girl becoming pregnant.[36] The age of defilement law, therefore, reinforced the cultural patriarchal control

33 AC Munthali et al *Adolescent sexual and reproductive health in Malawi: A synthesis of research evidence* (2004) 13.

34 Evidence for Action *Evaluation of youth-friendly health services in Malawi* (2014) 169.

35 Parliament has since passed a Bill to amend sec 22 to raise the age of marriage to 18.

36 SA Parikh '"They arrested me for loving a schoolgirl": Ethnography, HIV, and a feminist assessment of the age of consent law as a gender-based structural intervention in Uganda' (2012) 74 *Social Science and Medicine* 1779. Raising the age of sexual consent for adolescent females from fourteen to eighteen years old and increasing the maximum sentence to death by hanging. The amendment can be considered a macro-level intervention designed to address the social and health inequalities affecting young women and girls, particularly their

of the sexuality of girls by their fathers, thereby contributing to the disempowerment of girls.

Sections 138 and 160B, therefore, reflect both cultural conceptions about children's sexuality, and shape societal attitudes about children's sexuality, and in ways that can reinforce social practices that disempower children. More than just regulating sexual conduct, these provisions constitute 'a framework for expectations and norms for parents and professionals working with young people, which informs how they seek to shape and influence young people's behaviour'.[37] Therefore, it is important to understand the rationale and assumptions behind sections 138 and 160B and their implications for the lives of children because, apart from regulating sexual conduct, these provisions shape certain culturally-specific meanings of childhood and adolescence. This means also investigating the colonial background of age of consent laws, the sociocultural contexts in which they originated, and the cultural context in which they were imposed.

4 Development of sections 138 and 160B of the Penal Code and their sociocultural and political contexts

4.1 Section 138 before the 2011 amendments: Sexual intercourse with a girl below 13 years of age

Section 138 came down though Ehrhardt's draft model Code, but its roots can be traced beyond the eighteenth century in the history of the development of English criminal law. According to Waites, the first minimum age of sexual intercourse in English law appeared in the Statute of Westminster of 1275, which prohibited sexual intercourse with 'any maiden within age'.[38] Scholars have interpreted this age to be 12 years. Following further legal developments, sexual offences became consolidated under the Offences Against the Person Act 1861. It included provisions prohibiting 'carnal knowledge' of a girl under 10 years, which was a felony attracting a maximum punishment of penal servitude for life, while carnal knowledge of a girl under 12 years was a misdemeanour, with a maximum sentence of

disproportionately high rate of HIV as compared to their male counterparts. While the intention of the law and aggressive campaign was to prosecute 'sugar daddies' and 'pedophile', the average age of men charged with defilement was twenty-one years old and many were believe to be 'boyfriends' in consensual sexual liaisons with the alleged victims. This article uses court records, case studies, and longitudinal ethnographic data gathered in east-central Uganda to examine the impact of the age of consent law at national and local levels, and specifically what the disjunctures between national intentions and local uses reveal about conflicting views about sexual privilege and rights. I argue that existing class, gender, and age hierarchies have shaped how the Defilement Law has been applied locally, such that despite the stated aim of 'protecting' young women, the law reinstates patriarchal privilege (especially against men of lower social class

37 M Waites *The age of consent: Young people, sexuality and citizenship* (2005) 217.

38 Waites (n 37 above) 62.

three years' penal servitude.[39] The Offences Against the Person Act 1875 raised the age for sexual intercourse from 12 to 13 years. Further legislative reforms led to the raising of the age of consent to 16 years with the enactment of the 1885 Criminal Law Amendment Act.

Waites describes the cultural context in which age of consent laws were developed in Europe. The first to note is that children were in legal terms regarded as the property of parents rather than individuals entitled to rights.[40] The development of laws regulating sexuality reflected culturally and historically-specific attitudes about gender, with the result that age of consent laws were fundamentally 'patriarchal in their conception, embodying male power and control over women and children, embedded in patriarchal heterosexuality understood as a system of social and legal property relationships and sexual relationships'.[41] Age of consent laws were designed to prohibit young girls from being sexually accessed to preserve their innocence, rather than to create a right to consent to sex. The formulation of the law reflected patriarchal and gendered conceptions of female and male sexuality 'whereby "the beast" of male lust required legal containment to preserve the virtue of a passive, innocent female sexuality'.[42] The law treated boys and girls differently based on the view that boys have an active whereas girls have a passive sexuality.[43]

Another aspect of the patriarchal basis of the law was that the girl was considered the property of her father and that the preservation of virginity was required to preserve the father's honour.[44] The offence of defilement, therefore, was really for the protection of the father's property in the virgin girl, rather than her right to sexual autonomy. Criminal law, therefore, conceptualised 'defilement' in hetero-normative terms and aimed at protecting girls from penile-vaginal sexual intercourse.

A further aspect of the age of consent laws is that they were race and class-based, and this is especially reflected in the developments that led to the raising of the age of consent from 13 to 16 years, through the efforts of the social purity reformers, whose rationale for raising the age of consent emerged out of the moral panic that young middle and upper-class 'white' virgins were being allured into prostitution.[45] A Select Committee of the House of Lords was asked to investigate the allegation of prostitution of British girls. The Committee's view of the reasons for the prostitution attest to the

39 As above.
40 As above.
41 As above.
42 Waites (n 3 above) 97.
43 Waites (n 37 above) 69.
44 Waites (n 37 above) 64.
45 Waites (n 3 above) 96.

gender-stereotypical, racial and class-based thinking behind the reform, and was captured as follows:[46]

> A vicious demand for young girls; overcrowding in dwellings; immorality arising therefrom; want of parental control, and in many cases parental example; profligacy; and immoral treatment; residence, in some cases, in brothels; the example and encouragement of other girls slightly older; and the sight of the dress and money which their immoral habits have enabled them to obtain; the state of the streets in which little girls are allowed to run about, and become accustomed to the sight of open profligacy; and sometimes the contamination of vicious girls in schools.

Western laws introduced during colonialism, therefore, reflected the sociocultural and political contexts from which they originated. However, when they were imposed on Malawi during colonialism, they carried an additional significance. Colonial laws were not designed to respect the rights of the natives, but to advance the colonialists' imperialist project to manage the natives in a way that would be most productive for the capitalist economy. The colonial government was careful not to implement laws, for instance, governing social relationships, that would disturb too much the natives' way of life to avoid disruption of the labour the natives provided for the sustenance of the imperial capitalist economy.[47] Therefore, over and above the purported intentions of the colonial law stated in the legislation books, colonial laws were designed to manipulate the natives for the colonialists' imperialistic agenda.

The original version of section 138, therefore, must be understood in the context outlined above. The original version of section 138 reads as follows:[48]

> (1) Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of a felony and shall be liable to imprisonment for life, with or without corporal punishment.
> …
> Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court, jury or assessors before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of thirteen years.

One aspect to note is the heterosexist and gender-stereotypical meanings of sexuality inflected in the provision, which construct only girls as needing protection from sexual conduct. The choice of exporting to the colonies the age of consent of 13 years when in England it had been raised to 16 years reflects the class-based context of the 1885 reforms in England. Further, the colonial government

46 F Mead & AH Bodkin *Criminal Law Amendment Act, 1885, with introduction, notes and index* (1885) 12.

47 TA Barnes 'The fight for control of African women's mobility in colonial Zimbabwe, 1900-1939' (1992) 17 *Signs: Journal of Women in Culture and Society* 589.

48 Sec 138 Penal Code (n 1 above), before the 2011 amendment.

might have feared that raising the age of consent to 16 would be too disruptive of the social relationships of the natives in a context where menarche was the significant event that marked entry into adulthood.

Another aspect to note is that the law was formulated in a manner that constructed the girl as a passive subject, so that even the defence itself was from the perspective of the defendant boy or man who was accorded subjectivity, and not from the perspective of an agentic girl. Further, the use of the term 'unlawful' in the definition of the crime suggested that there were circumstances in which it would be lawful to have sexual intercourse with a girl of below 13 years. This shows that the provision was not really about protecting girls from being sexually accessed but, rather, for controlling the girl's sexuality.

Since the age of consent was so low and, in addition, according to section 14 of the Penal Code, a male of under the age of 12 years was deemed incapable of engaging in sexual intercourse, the gap for criminalising consensual sexual conduct between children was very narrow. This, however, changed when section 138 was amended in 2011.

4.2 2011 amendments

Several amendments to the Penal Code were made in 2011, but only two are considered for purposes of the article. These are the amendment of section 138 and the introduction of section 160B. However, these sections should not be read in isolation from other related provisions.

4.2.1 Section 138: Sexual intercourse with a girl below 16 years of age

The amended section 138 reads as follows:

> (1) Any person who carnally knows any girl under the age of sixteen years shall be guilty of felony and shall be liable to imprisonment for life.
>
> (2) Any person who attempts to have carnal knowledge of any girl under the age of sixteen years shall be guilty of felony and shall be liable to imprisonment for fourteen years.
>
> Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court, jury or assessors before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen years.

The reasoning of the Law Commission in recommending that the age of consent to sexual intercourse be raised from 13 to 16 years was

> [p]remised upon the provisions of section 22(8) of the Constitution which prescribes a minimum age of entering into marriage. Presently, that age is prescribed at fifteen years, but the Commission noted that the Law

> Commission on the Technical Review of the Constitution has recommended that the age be raised to sixteen years.[49]

It is rather interesting that the rationale was to tie the age of consent to sexual intercourse to the age of consent to marriage. Now that a constitutional amendment has since changed the age of consent to marriage to 18 years, it remains to be seen whether this development would prompt a review upwards of the age of consent to sexual intercourse from 16 to 18 years.[50] It is the argument of the article, which will become clear below, that such a move would most likely not serve the best interests of children. On the other hand, when the Commission's recommendation to raise the age of consent to sexual intercourse was considered in parliament, the debates of members of parliament mostly focused on the moral panics about 'rampant' cases of child abuse and the need to protect children from male abusers.[51]

The new section 138 maintains the salient features of the colonial version. In fact, the amendment suspiciously resembles the 1885 Criminal Law Amendment Act in England, the main difference being that the offence in the Malawi version is a felony rather than a misdemeanour. However, it does not need much more explication to demonstrate that section 138 inflects patriarchal, heterosexist and gender-stereotypic notions of gender and sexuality.

One explanation for the uncritical appropriation of colonial baggage in the development of section 138 is that it resonates with certain cultural ideals that are also patriarchal, heterosexist and gender-stereotypical. For instance, girls are supposed to maintain virginity before marriage, while boys are let free to explore their sexuality. Restricting boys from sexually accessing girls resonates with the idea that the law should prevent marauding boys from 'defiling' the virginity of someone's daughter.

The amended section 138 also presents a novel challenge that was not apparent with the earlier version of the provision because the age of consent had been very low. The range of sexual relationships criminalised includes non-exploitative sexual intercourse between adolescents below the age of 16 years. According to the Malawi Demographic and Health Survey, 19 per cent of young men and 14 per cent of young women aged 15 to 24 first have sex before the age of 15 years.[52] Therefore, because a significant number of adolescents

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49 Malawi Law Commission *Report of the Law Commission on criminal justice reform on the review of the Penal Code* (CAP 7:01) (2000) 39.

50 Bill 36 of 2016: Constitution (Amendment).

51 Eg, the Malawi National Assembly *Daily Debates (Hansard) 18 November 2010* (2010) 72 captured the following contribution to the debate by a member of parliament: 'Mr Speaker, Sir, it is clear from the language used in both paragraphs of section 138 that at the time this particular section was put in the Penal Code, it was inconceivable that grown men would defile one-year-old, two-year-old, five-year-old. Sadly, in recent times in the last few years, we have seen a proliferation of this heinous crime …'

52 National Statistical Office (NSO) and ICF *Malawi Demographic and Health Survey 2016-15* (2017) 210.

engage in sexual intercourse by the age of 16, a blanket criminalisation of sexual intercourse with girls of below 16 also catches adolescent boys who have sex with their peers. Apart from the criminalisation aspect, it also has implications for sexual health and the rights of the adolescent, because the law can influence attitudes that stigmatise adolescents who are sexually active.

4.2.2 Sexual activity with a child below 16 years of age

The 2011 amendments introduced a new offence through section 160B, of which the first part is reproduced here, as it suffices for the discussion:

> 1 Any person who engages or indulges in sexual activity with a child shall be guilty of an offence and shall be liable to imprisonment for twenty-one years.
> …

Sexual activity is defined in section 160A to mean

> sexual contact other than sexual intercourse (whether between persons of the same or opposite sex) in the form of genital, oral-genital, anal-genital contact or otherwise, masturbation, touching of genitals, buttocks or breasts, sadistic or masochistic abuse and other deviant sexual behaviour.

Section 160B was introduced to cover the *lacuna* left by section 138 which only deals with sexual intercourse. Section 160B (as read with section 160A) covers offences of a sexual nature other than sexual intercourse.[53]

Similar arguments raised in the discussion of the amended section 138 also apply here. Section 160B introduces a blanket criminalisation of sexual activities with a child below 16 years of age, including normative and non-exploitative sexual activity between children who are peers. It also conflates normative with non-normative sexual behaviour by including in the definition of sexual activity terms such as 'sadistic or masochistic abuse and other deviant behaviour'.

5 Re-visioning children and adolescents as gendered and sexual subjects

To reiterate, colonial age of consent laws were not aimed at protecting the rights of girls, but at the advancement of patriarchal and imperialist interests. It is significant that the voices of the subjects of concern, girls, were absent in the process of formulating these laws.[54] Girls and children are constructed as non-autonomous and passive subjects of the law, requiring the benevolent and salvific acts of law makers (dominated by men) to save them from would-be

53 Malawi Law Commission (n 49 above) 45.

54 H Bannerji *Inventing subjects: Studies in hegemony, patriarchy and colonialism* (2001) 77.

defilers (also dominated by men) through legislation. In the colonialist's scheme of things, girls and women were but objects for control and manipulation, and laws regulating sexual relationships were designed not to promote the rights of girls and women, but to pacify adult males.[55] It is unfortunate, therefore, that the 2011 amendments merely appropriated and consolidated the colonial baggage.

It will be the ultimate argument of the article that sections 138 and 160B, and others like them, cannot be sustained under Malawi's commitment to advance gender equality and the rights of the child. However, the process of reform should be less about making additional laws than about how to fashion better age of consent laws that are not laden with patriarchal, heterosexist and gender-stereotypical notions of sexuality. One way to think about this is to re-visualise children as partners rather than passive subjects.

In her 1987 article, Thorne raises a challenge primarily directed at feminist theorising about how, despite developing complex critiques of gender, feminism has uncritically assumed meanings of childhood that were in fact problematically imbued with the very meanings the critiques attempted to challenge.[56] Prout and James also pointed out that in the history of social science research, children (and women) had been 'muted' groups, not that there was an absence of interest in children but, rather, that it was not their voice that articulated these interests.[57] Indeed, political theories have often lumped women and children together as relegated to the margins, while men occupied centre stage as autonomous actors.[58] James and Prout, therefore, urge that children be seen as

> actively involved in the construction of their own social lives, the lives of those around them, and the societies in which they live. They can no longer be regarded as the passive subjects of structural determinations.[59]

Recreating age of consent laws that are truly in the best interests of children requires making them partners, which means regarding them as autonomous and agentic subjects.

5.1 Making children partners in promoting gender equality and advancing sexual health

Constructing males (and boys) as having power over girls and children reproduces unequal power relations. Angelides argues that power relationships should be understood not as a relationship in which some have power and others lack power, but where 'each

55 Bannerji (n 54 above) 83.
56 Thorne (n 21 above) 86.
57 Prout & James (n 14 above) 7.
58 B Thorne 'From silence to voice: Bringing children more fully into knowledge' (2002) 9 *Childhood* 251.
59 A Prout & A James 'Introduction' in Prout & James (n 14 above) 4.

subject is differentially marked and positioned in power and discourse structures',[60] so that '[d]ominance and submission are not fixed positions determined by the presence and absence of power'.[61] Making this argument in the context of child sexual abuse, Angelides suggests that conceptualising children as lacking knowledge about sexuality and as powerless in relation to adults not only misconstrues the power relationship, but disempowers children by erasing their autonomy and agency.[62] Sections 138 and 160B, therefore, are inherently flawed as they disempower girls and children by erasing their sexual autonomy and agency.

Further, constructing children and girls as sexually passive defeats the aim of making them partners in gender equality. The International Conference on Population and Development (ICPD) Programme of Action affirmed that

> [r]esponsible sexual behaviour, sensitivity and equity in gender relations, particularly when instilled during the formative years, enhance and promote respectful and harmonious partnerships between men and women.[63]

This would be possible if children are recognised as gendered and sexual subjects, and are supported throughout their development so that by the onset of adolescent sexual activity they are able to relate to others in a manner that recognises each person's dignity.

5.1.1 Children as sexual and gendered

Although adults sometimes implicitly recognise children as potentially sexual, they tend to perceive children as nonsexual despite the fact that children do actively engage in gendered relations of power, and invest in sexual relationships, including sexual pleasure.[64] Children are not passive in matters of gender and sexuality. Bhana's research about young children of below the age of 10 years reveals a common misconception of adults that gender and sexuality do not matter to young children until they are older. According to the views of teachers of primary school children that Bhana interviewed, 'gender, doesn't matter to young children … children are children';[65] they are 'just

60 S Angelides 'Feminism, child sexual abuse, and the erasure of child sexuality' (2004) 10 *GlQ: A Journal of Lesbian and Gay Studies* 151.

61 Angelides (n 60 above) 152.

62 Angelides 158.

63 Report of the International Conference on Population and Development (ICPD) UN Doc A/CONF.171/13 (1994) para 7.34.

64 D Bhana 'Love, sex and gender: Missing in African child and youth studies' (2017) 42 *Africa Development* 251-252; P Talavera 'The myth of the asexual child in Namibia' in S Lafont & D Hubbard (eds) *Unravelling taboos: Gender and sexuality in Namibia* (2007) 61-62 66). In his research, Talavera found that children amongst the Ovahimba and Ovaherero cultural groups of Namibia play games that may involve sexual acts, and most probably sexual pleasure. However, adults do not consider children as sexual.

65 D Bhana *Gender and childhood sexuality in primary school* (2016) 27.

kids … still young'.[66] However, as Bhana remarks, this attitude masks the operation of power because the teachers 'cannot see the child as sexual/gendered and constructing sexuality and gendering with others, nor can they challenge the continual naturalisation of gender differences and unequal relations of power'.[67] Further, such discourses of childhood innocence and asexual justify unwarranted control to prevent children from perceived dangers of (sexual) corruption, which causes teachers, for instance, to avoid addressing the topic of sexuality with children.[68]

Despite constructing children as non-gendered, Bhana found that teachers ascribed certain behaviours as natural to boys and others natural to girls. Boys were perceived to be naturally aggressive, adventurous and better at mathematical subjects, while girls were constructed as shy, reserved and more talkative. By naturalising behaviours as masculine or feminine, teachers unwittingly reinforced hegemonic masculine dominance and the subjugation of girls, on the basis that gender inequality is natural, and efforts to transform would be futile.[69]

Analogously, laws that construct children (and girls) as sexually passive, and as objects for the law to save from danger, including from normative sexual conduct, reinforce hegemonic masculinities. The important step towards law reform is to re-envisage children as gendered and sexual subjects.

5.1.2 Childhood sexual conduct and sexual health

Childhood sexuality is a political and contested topic as it tends to be shaped by moral panic about adults sexually abusing children. Yet, children cannot then be relegated to the asexual zone, as sexuality development is a necessary feature of human development. Sexuality has a wide dimension, and physical sexuality in relationships with others is just one aspect.[70] Sexuality is integral to every person's life, young or old, child or adult. However, as children grow older, physical intimacy may become important for their sexuality development.

There are positive reasons for discouraging early sexual debut. An important question, however, is how to use criminal law to regulate

66 As above.

67 As above.

68 Bhana (n 65 above) 28.

69 Bhana 29.

70 This article adopts the following definition of sexuality in World Health Organisation *Defining sexual health: Report of a technical consultation on sexual health, 28–31 January 2002* (2006) 5: '[A] central aspect of being human throughout life encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships … Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, legal, historical, religious and spiritual factors.'

childhood sexual conduct without infringing on the rights of the child, especially the right to sexual health,[71] which is an important aspect of childhood sexuality development. In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development,*[72] one of the questions the Court addressed was whether criminalising consensual sexual conduct between adolescents was necessary to achieve the aim of protecting adolescents from harmful sexual intercourse. The Court disagreed with the respondents, who argued to maintain criminalisation. Apart from the fact that it infringed on a host of rights, including the rights to dignity, privacy, bodily and psychological integrity and health care services, the Court was concerned that young people who have sexual conduct would be stigmatised, and denied support.[73] This is one of challenges with the formulation of sections 138 and 160B because, by constructing children of below 16 years as incapable of sexual activity or intercourse, the law potentially facilitates the creation of stigmatised identities: children who have sexual intercourse and activity below the age of 16. This could influence parents, educators and health providers to perceive such children as abnormal, failures or deviant.

The Kenyan case of *Martin Charo v The State* illustrates the creation of a stigmatised subjectivity. In this case, a girl of 14 had voluntary sexual intercourse with a man almost 10 years older. He was charged and convicted of the offence of defilement under Kenyan law.[74] On appeal, the Court quashed the conviction. The Court interpreted the law to mean that a child of below the age of 18 had no capacity to consent to sex. Therefore, in the Court's opinion, a girl who voluntarily engages in sex behaved like a grown woman, and did not deserve the protection of the law. The Court effectively constructed the girl as a deviant child because she expressed sexual desire and agency.

Sections 138 and 160B would most likely perpetuate such stigma against children who engage in sexual activity. This has a potentially negative influence on the attitudes of parents, teachers and health providers toward sexually-active children. Therefore, it is submitted that sections 138 and 160B promote harmful practices toward children, defined under the GEA as

71 The definition of sexual health from World Health Organisation (n 70 above) 5 is adopted: '[A] state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence.'

72 CCT 12/13 [2013] ZACC 35 (Constitutional Court of South Africa).

73 In para 45 of the judgment, the Court was of the view that '[w]hat is of utmost importance is ensuring that children are appropriately supported by the adults in their lives, to enable them to make healthy choices … If children are not made to feel that there are safe environments within which they can discuss their sexual experiences, they will be stripped of the benefit of guidance at a sensitive and developmental stage of their lives.'

74 Sec 8(1)(3) Sexual Offences Act 3 of 2006 (Kenya).

> a social, cultural, or religious practice which, on account of sex, gender or marital status, does or is likely to –
>
> (a) undermine the dignity, health or liberty of any person; or
>
> (b) result in physical, sexual, emotional, or psychological harm to any person.[75]

Further, by treating boys and girls differentially, section 138 not only conflicts with the Gender Equality Act, but also with the Constitution. Sections 138 and 160B, therefore, are contrary to the rights of children as envisaged by section 23 of the Constitution, which provides as follows:[76]

> All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting them.
> …
> Children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or is likely to –
> …
> be harmful to their health or to their physical, mental or spiritual or social development.

6 A balancing act: Protection versus self-protection

6.1 Right to protection

In General Comment 20, the Committee on the Convention on the Rights of the Child (CRC Committee) reminds states of the obligation to protect children up to the age of 18 from exploitation of all kinds, and to 'balance protection and evolving capacities in determining the legal age for sexual consent'.[77] The rationale of age of consent laws is to protect children from potentially exploitative sexual relationships. The child's vulnerability is the central concern. The child is vulnerable because he or she has not yet attained the capacity for self-determination in relation to sexual relationships. Failure to protect the child, therefore, would expose the child to risks of harm due to their

75 Sec 3 Gender Equality Act.

76 Sec 23 Constitution (n 7 above).

77 CRC Committee General Comment 20: The implementation of the rights of the child during adolescence UN Doc CRC/C/GC/20 (6 December 2016) para 40. The concept of evolving capacities is articulated in art 4 of the CRC as follows: 'States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.' In the African Charter on the Rights and Welfare of the Child (African Children's Charter), it is defined in art 9(2) as follows: 'Parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.' Malawi has ratified both the CRC and the African Children's Charter.

immaturity. At this stage, the child is wholly reliant on external rather than inherent resources for protection. In this case, therefore, the child is treated as a passive subject.

The right to protection entails that states enact laws that prevent other persons from engaging in sexual activity with the child. Sections 138 and 160B provide this kind of protection. However, the incapacity of the child is not static but evolving. An important challenge, therefore, is where to set the age of consent. If the bar is set too low, it would expose many young children to harm and risk. Setting it too high may also unjustifiably interfere with the adolescent's evolving autonomy.[78] Almost all jurisdictions, therefore, have set a 'minimum age' below which it always is criminal to engage in sexual conduct with a child as they are incapable of consenting to the sexual act, and incapable of protecting themselves from harm.[79]

Some jurisdictions, such as that of South Africa, have opted for a multi-stage age of consent framework rather than a single age of consent model. South Africa recognises that a child of 12 years and above could give some limited consent, and at 16 can give full consent. Sexual activity with a child of below 12 is prohibited, but peers in the age range of 12 and above but below 16 are not criminalised for engaging in non-exploitative sexual activity with peers of within the age range of 12 and 16 years.[80] A person of 16 and above, however, cannot engage in sexual activity with a child more than two years younger.

The advantage of South Africa's multistage model is that it is better able to strike that balance between protection and self-protection. Children within the 12 to 16 years age range are recognised as both vulnerable and in need of protection, and as having an evolving capacity which they can exercise in relation to peers. By contrast, Malawi's model denies sexual capacity to a child of below 16, and criminalises adolescents for engaging in non-exploitative sexual intercourse and sexual activity with peers. Enforcing such a law would result in prosecuting adolescents, as was the case for a boy of 16 years in Kenya who was prosecuted for having sex with a girl of 16. In *CKW v Attorney-General,*[81] the boy challenged the state's action. He argued before the High Court that his prosecution discriminated against him on the basis of age, because adults are not criminalised for engaging in consensual sex. Unfortunately, the Court disagreed with him, and was of the view that the law was there for the protection of children against the harms of sexual intercourse.

78 H Graupner 'Sexual consent: The criminal law in Europe and overseas' (2000) 29 *Archives of Sexual Behaviour* 418.

79 Graupner (n 78 above) 418.

80 Secs 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 as amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 5 of 2015 (South Africa).

81 [2014] eKLR, Petition 6 of 2013 (High Court of Kenya).

In *State v Brian Masuku*,[82] Tsanga J of the High Court of Zimbabwe lamented the harshness of the law on adolescents:[83]

> The facts upon which he was convicted are commonplace among sex experimenting youths. He was 17. She was 15. They were boyfriend and girlfriend … Unlike in some jurisdictions, ours does not exempt from prosecution adolescent violators of such provisions when the parties are within a similar age bracket by two or three years above the minimum. Youthful violators over 16 have to deal with the actuality of punishment which is often tempered down due to their age where the circumstances permit. Sentences however, can still be harsh.

Rubin reminds us that this harshness of sex laws is not because laws of nature demand it, but because societies choose to enforce hegemonic notions of sexuality in the name of preserving dominant notions of social morality.[84] This needless harshness toward adolescents was one of the concerns Justice Sisi Kampepe considered in the *Teddy Bear Clinic* case, that adolescents were unjustifiably exposed to the harshness of the justice system, and labelled as sexual offenders for engaging in developmentally normative sexual conduct.[85] Justice Kampepe accepted the applicants' argument that it was not necessary to prosecute adolescents who have non-exploitative sexual conduct with other adolescents, to achieve the public policy aim of protecting children from sexual abuse. The CRC Committee has also similarly advised states that they should avoid criminalising adolescents who engage in consensual and non-exploitative sex.[86]

It could be argued that sections 138 and 160B be maintained but tempered by a policy of non-prosecution of adolescents who engage in non-exploitative sex. This, however, still leaves children in precarity, because the law could still be enforced at any time. Most importantly, the law influences social attitudes and practices, and the existence of legal provisions that construct adolescents below 16 as without sexual agency can stigmatise children who are sexually active. Reference is again made to the Charo case discussed above, where the Court's opinion rendered a sexually-active girl deviant.

6.2 Right to self-protection

Commenting on the right to participation of the child, the CRC Committee has stated that '[b]y being guaranteed the right to be heard, to challenge rights violations and to seek redress, adolescents are enabled to exercise agency progressively in their own protection'.[87] As capacity is evolving, children should be protected,

82 [2015] ZWHHC 106, CRB B467/14 (High Court of Zimbabwe).

83 *Masuku* (n 82 above) (judgment not paragraphed).

84 G Rubin 'Thinking sex: Notes for a radical theory of the politics of sexuality' in C Vance (ed) *Pleasure and danger: Exploring female sexuality* (1984) 277.

85 *Teddy Bear Clinic* (n 72 above) para 54.

86 CRC Committee General Comment 20: The implementation of the rights of the child during adolescence UN Doc CRC/C/GC/20 (6 December 2016) para 40.

87 CRC Committee General Comment 20 (n 86 above) para 19.

and simultaneously, supported to progressively protect themselves. The role of the state, therefore, is to nurture and support the child as the child progressively attains the capacity to avoid and manage risks to sexual health in negotiating sexuality development. In interpreting article 24 of the CRC on right of the child to the enjoyment of the highest attainable standard of health, the CRC Committee affirmed that the right to health of the child entails freedoms and entitlements, and that these 'freedoms, which are of increasing importance in accordance with growing capacity and maturity, include the right to control one's health and body, including sexual and reproductive freedom to make responsible choices'.[88] The 'entitlements include access to a range of facilities, goods, services and conditions that provide equality of opportunity for every child to enjoy the highest attainable standard of health'.[89] While protection requires criminal law to limit sexual access and activity with the child, self-protection requires states to create a supportive environment for the adolescent to safely relate to other adolescents.

For children, therefore, the right to protection and self-protection should operate simultaneously in harmony. The challenge is that sections 138 and 160B emphasise the right to protection only, in which the child of below 16 years is treated as a sexually-passive subject. Therefore, these sections potentially preclude the aspect of self-protection, and thus fail to envisage the creation of a supportive environment for the sexually-active child, where 'sexually active' should be understood more broadly than just sexual intercourse.

Constructing children as legally incapable of consenting to sexual activity when in fact they have an evolving capacity to make certain decisions about their sexuality is not merely unfortunate. It conjures limitations on the child's enjoyment of sexual health and sexual rights. Sexually-active children may not receive the guidance and support necessary for them to develop their capacity for sexual self-determination.[90] Caregivers and parents may assume restrictive attitudes around children's sexuality and fail to provide this support. Anxiety about adolescent sexuality that sometimes forms the basis of public policy on childhood sexuality creates a self-fulfilling prophecy, as the disconnect with children results in failure to support them. The consequence of failure to support children is unwanted or unprotected sex, and the *sequelae* are common knowledge; unwanted pregnancies, unsafe abortions and sexually-transmitted infections, including HIV.

88 CRC Committee General Comment 15: The right of the child to the enjoyment of the highest attainable standard of health (art 24) UN Doc CRC/C/GC/15 (17 April 2013) para 24.

89 As above.

90 *Teddy Bear Clinic* (Constitutional Court) (n 72 above) para 47.

The Gender Equality Act recognises the sexual health and rights of all, including children, in section 20(1), which provides that every health officer (provider) shall

(a) respect the sexual and reproductive health rights of every person without discrimination;

(b) respect the dignity and integrity of every person accessing sexual and reproductive health services;

(c) provide family planning services to any person demanding the services irrespective of marital status or whether that person is accompanied by a spouse.[91]

Section 20(1)(c) of the Gender Equality Act is designed to ensure the inclusion of unmarried adolescents who have historically been discriminated against in the provisions of sexual health services. Section 138 of the Penal Code, however, might send a conflicting message for the health provider who is expected to comply with section 20 of the Gender Equality Act. For instance, a health provider may face a dilemma if confronted by 15 year-old girl seeking sexual health care, who has an active sexual relationship with her 16 year-old boyfriend, as the health provider may consider prioritising protecting the girl from sexual intercourse rather than supporting her to protect herself.

7 Rethinking age of consent provisions in Malawi's Penal Code

For the reasons set out in the article, and in line with General Comment 15 of the CRC Committee, advising states that laws be assessed and repealed where necessary, if they have a potentially discriminatory impact on the right to heath of the child,[92] as well as the exhortation of the ICPD Programme of Action to promote responsible sexual behaviour, sensitivity, and equity in gender relations from early childhood,[93] it is submitted that sections 138 and 160B, as well as associated provisions, be reviewed. Their formulation potentially negates the efforts to promote gender equality and the sexual health and rights of the child.

This article recommends that in reviewing the age of consent provisions, and any associated provisions, the relevant bodies undertaking the review processes should aim at involving children to the extent possible in creating age of consent laws that are child-centric, so that the law does not over-represent adult anxieties and moral panics about children's sexual activities. The new law must be aligned to gender equality, and principles of the rights of the child,

91 Gender Equality Act (n 7 above) sec 20.
92 CRC Committee General Comment 15 (n 88 above) para 94.
93 ICPD Programme of Action (n 63 above).

and should avoid inheriting patriarchal, gender-stereotypical and heterosexist meanings of sexuality that informed the 2011 amendments.

Finally, it ought to be acknowledged that criminalisation is a blunt tool for promoting gender equality and the sexual health of children.[94] Indeed, as Skelton comments, '[i]f the state wants to play a role in delaying sexual debut, its tools should not be police and courts, but rather increased provision of education, counselling, and reproductive health services'.[95] Overreliance on criminal law to guarantee optimum sexual health development of children, or as a magic bullet to solve the 'rampant' child sexual abuse, is misplaced and will achieve blunted results. Criminal law should best be envisioned as support for other promotional measures that include providing sexuality education and sexual health services to children, and from early childhood, not just at the onset of puberty. Criminal law and other policies on gender equality and sexual health of children, therefore, must be harmonised to ensure the right of the child to protection from the harms of sexual intercourse, and support to children to exercise choice about sexual relationships to the extent of their evolving capacities.[96] Most importantly, in developing laws and policies on gender and sexuality, children ought to be conceptualised as partners in promoting gender equality and sexual health, rather than objects of adult-centred interests and control.

94 Archard (n 16 above) 151.

95 A Skelton 'Balancing autonomy and protection in children's rights: A South African account' (2016) 88 *Temple Law Review* 88 904.

96 An example of harmonisation is that the Children's Act 38 of 2005 (South Africa) grants all children the right to access health information, and children of 12 years and older the right to access condoms, which is in harmony with the age of consent provisions in the criminal law which recognises that a child of 12 years and above may have capacity to engage in sexual conduct. However, having a good law is one thing, but implementing it with all the stakeholders is quite another; eg, to have children access condoms in schools is a still a challenge, as the authors attest in J Han & ML Bennish 'Condom access in South African schools: Law, policy, and practice' (2009) 6 *PLoS Medicine*.

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Protecting adolescent girls with intellectual disabilities from involuntary sterilisation in Nigeria: Lessons from the Convention on the Rights of Persons with Disabilities

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Summary

Adolescent girls with intellectual disabilities are highly susceptible to involuntary sterilisation in Nigeria. Existing Nigerian laws contain no provisions expressly prohibiting involuntary sterilisation and the provisions that could be indirectly applied are inadequate. Accordingly, this article seeks to draw lessons from the provisions of the Convention on the Rights of Persons with Disabilities that are pertinent to protecting adolescent girls with intellectual disabilities from involuntary sterilisation in Nigeria. In doing this, it examines four provisions of the CRPD, namely, the rights to respect for home and the family (article 23); health (article 25); equality and non-discrimination (article 5); and equal recognition before the law (article 12). The right to retain fertility in article 23 can unequivocally be construed as prohibiting involuntary sterilisation of persons with disabilities. In Nigeria, the recognition of people's right to consent to medical procedures, including sterilisation, determines whether or not they are allowed to consent to such procedures. Accordingly, a lack of informed consent results in third parties making decisions about sterilisation without consulting those about whom the decisions are made. Also, involuntary sterilisation is an issue of inequality and discrimination and, thus, the right to equality and non-discrimination is very important in protecting adolescent girls with intellectual disabilities from involuntary sterilisation. The article contends that the CRPD provides an avenue for challenging the discrimination and inequality that sterilisation presents for adolescent girls with intellectual disabilities in Nigeria, and makes recommendations based on the provisions of the CRPD.

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Key words: *adolescent; Convention on the Rights of Persons with Disabilities; girls; intellectual disabilities; sterilisation*

1 Introduction

Sterilisation is a permanent form of preventing pregnancy and involves situations where girls and women are sterilised without their knowledge, or are coerced, deceived or misinformed to undergo sterilisation.[1] Involuntary sterilisation, therefore, regulates a person's fertility, with the intent to permanently end the person's capability to reproduce, shorn of his or her approval and/or knowledge.[2] It is an 'act of violence and discrimination' that infringes on the right of adolescent girls with intellectual disabilities to the integrity of their bodies.[3] It has far-reaching implications on their rights to equality, dignity and autonomy as well as their rights to sexual and reproductive health.[4] It has generally been justified on the grounds of eugenics; menstruation management; the prevention of sexual abuse; the prevention of unplanned pregnancies; and the financial burden on family members; all of which are unfounded.[5] The involuntary sterilisation of women and girls, including those with intellectual disabilities, has in the last decade been a topical issue and a subject of remarks from treaty-monitoring bodies and UN Special Rapporteurs. For instance, the African Commission on Human and Peoples' Rights

1 American Congress of Obstetricians and Gynaecologists 'Sterilization for women and men' https://www.acog.org/~/media/For%20Patients/faq011.pdf (accessed 12 November 2017); 'What every woman should know about female sterilization' https://www.healthline.com/health/birth-control-female-sterilization# about1 (accessed 12 November 2017); K Krase 'History of forced sterilization and current US abuses' http://www.ourbodiesourselves.org/health-info/forced-sterili zation/ (accessed 12 November 2017); C Frohmader 'Briefing paper: Sterilisation of women and girls with disabilities: An update on the issue in Australia' http://wwda.org.au/wpcontent/uploads/2013/12/Sterilisation_of_Women_and_Girls_with_Disabilities_UpdateDec2012.pdf (accessed 8 October 2016).

2 Open Society Foundations 'Against her will: Forced and coerced sterilisation of women worldwide' 2 http://www.opensocietyfoundations.org/sites/default/files/against-her-will-20111003.pdf (accessed 8 October 2016); Advocates for Human Rights 'Forced/coerced sterilisation' http://www.stopvaw.org/forced_coerced_sterilization (accessed 08 October 2016); Forced sterilisation http://www2.webster.edu/~woolflm/forcedsterilization.html (accessed 8 October 2016); R Coomaraswamy 'Violence against women (addendum): Policies and practices that impact women's reproductive rights and contribute to, cause or constitute violence against women' Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences E/CN.4/1999/68/Add. para 51, http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4cad275a8b5509ed8025673800503f9d?Opendocument (accessed 8 October 2016).

3 Coomaraswamy (n 2 above) para 51; C Spicer 'Sterilisation of women and girls with disabilities – A literature review' http://www.wwda.org.au/issues/sterilise/sterilise1995/steril/ (accessed 8 October 2016).

4 C Stimpson 'Involuntary sterilisation of people with disabilities – A response to the senate report' (2013) 22 *Human Rights Defender* 14.

5 OHCHR et al 'Eliminating forced, coercive and otherwise involuntary sterilisation – An interagency statement' http://www.who.int/reproductivehealth/publications/gender_rights/eliminating-forced-sterilization/en/ (accessed 8 October 2016).

(African Commission) declared, among others, that it violates the right to 'equality and non-discrimination, dignity, liberty and security of the person'.[6] Similarly, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) confirmed that it is a violation of the rights to informed consent, dignity and integrity.[7] The CEDAW Committee also stated that the sterilisation of girls, including girls with disabilities, against their knowledge, should be proscribed.[8] The United Nations (UN) Special Rapporteur on Violence Against Women and the Committee on the Rights of the Child (CRC Committee) have also acknowledged that that involuntary sterilisation of girls with disabilities violates their bodily integrity.[9] In the same way, the UN Special Rapporteur on Torture has emphasised that involuntary sterilisation constitutes torture and cruel or inhuman treatment.[10]

Adolescent girls with intellectual disabilities in Nigeria are highly susceptible to sterilisation, which in many cases is carried out without their knowledge or without their proper understanding of what it entails. In addition, anecdotal evidence reveals that in Nigeria sterilisation is more likely to be sought for girls with intellectual disabilities than their male counterparts, their counterparts with other forms of disabilities or their non-disabled counterparts. Thus, it is not merely a gendered issue, but also an issue of discrimination and unequal treatment, reinforced by legal, traditional and social values. Hence, it is imperative that adolescent girls with intellectual disabilities are protected from involuntary sterilisation as it infringes on their rights to equality and freedom from discrimination. The Convention on the Rights of Persons with Disabilities (CRPD)[11] provides an avenue for challenging the discrimination and inequality that sterilisation presents for adolescent girls with intellectual disabilities. Accordingly, the article aims at drawing lessons from the provisions of the CRPD for Nigeria in terms of protecting adolescent girls with intellectual disabilities from involuntary sterilisation. Part 1 of the article is an

6 African Commission on Human and Peoples' Rights Resolution 260 on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services http://www.achpr.org/sessions (accessed 8 October 2016).

7 CEDAW Committee General Recommendation 24: Article 12 of the Convention (women and health) A/54/38/Rev.1, ch 1 para 22.

8 CEDAW Committee Concluding Observations of the Committee on the Elimination of Discrimination against Women: Australia' CEDAW 46th session, 12-30 July 2010 CEDAW/C/AUS/CO/7.

9 CRC Committee 'Article 19: The right of the child to freedom from all forms of violence' General Comment 13 (2011) CRC/C/GC/13 paras 16 & 21; R Manjoo 'Special Rapporteur on Violence against Women, Its Causes and Consequences 'Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences (2012) UN Doc A/67/227 para 28; M Nowak 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2008) A/HRC/7/3 paras 38 & 39.

10 Nowak (n 9 above) paras 38 & 39.

11 Convention on the Rights of Persons with Disabilities (CRPD) (2006) 46 ILM 443.

introduction; part 2 discusses the sterilisation of adolescent girls with intellectual disabilities in Nigeria in the context of equality and non-discrimination. Part 3 discusses the articles of the CRPD pertinent to protecting adolescent girls with intellectual disabilities from involuntary sterilisation. Part 4 discusses the challenges inherent in protecting adolescent girls with intellectual disabilities from involuntary sterilisation along the lines of the discussed provisions of the CRPD. Part 5 makes recommendations with regard to the implementation of the provisions of the CRPD discussed in part 3. Part 6 concludes the article.

2 Involuntary sterilisation of adolescent girls with intellectual disabilities in Nigeria as inequality and discrimination

The Nigerian Constitution provides for 'equality of rights, obligations and opportunities before the law' for every Nigerian citizen.[12] Similarly, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 provides for equality and 'equal protection of the law'. The Nigerians with Disability Act 1993 (NWDA), the only federal legislation specifically dealing with disability rights in Nigeria, also provides for equal rights, obligations and prospects for persons with disabilities.[13] These provisions guarantee equal treatment to all Nigerians, including adolescent girls with intellectual disabilities on an equal basis as other adolescents. However, the right to equality contained in the Constitution is enshrined within the fundamental objectives and directive principles of state policy which are non-justiciable.[14] Likewise, the NWDA contains no provisions prohibiting involuntary sterilisation and protecting the rights of girls to retain their fertility. Nonetheless, section 42 of the Constitution, which is a fundamental human right, provides for freedom from discrimination on grounds including circumstance of birth for all Nigerians.[15] Thus, the involuntary sterilisation of adolescent girls with intellectual disabilities on account of their disability infringes on section 42.

In spite of these provisions, evidence reveals that adolescent girls with intellectual disabilities are subjected to involuntary sterilisation at the instance of family members. Although there is a lack of data indicating the incidence of involuntary sterilisation of girls with

12 Constitution of the Federal Republic of Nigeria of 1999 Cap C.34, LFN 2004, sec 17(2)(a).

13 The Nigerians with Disability Act of 1993 (NWDA), secs 1 & 2(a). The NWDA was originally a decree but by virtue of sec 315 of the 1999 Constitution, the NWDA, like other existing Federal Decrees, became an Act. It is yet to be repealed by any law and is still in force.

14 Ch 2 Constitution of the Federal Republic of Nigeria (n 12 above).

15 Sec 42(3) Nigerian Constitution.

intellectual disabilities, it can be deduced that it occurs in Nigeria.[16] For instance, Animashaun discussed the criteria and indications for sterilisation of girls with disabilities as seen from past clinical practice in Nigeria. According to him, sterilisation can be carried out on request by parents or guardians; if there is a severe handicap so incapacitating as to impede effective parenthood; if there is a high risk of hereditary conditions such as Down syndrome; as well as the presence of a low level of intelligence or psychiatric disorders.[17] Similarly, in a 2015 report, it was stated that girls with intellectual disabilities were involuntarily sterilised to prevent them from falling pregnant, especially in situations of sexual abuse. More so, in a recent empirical research involving 224 respondents, 87 (38,8 per cent) of respondents acknowledged that they had heard of or knew of instances where adolescent girls with intellectual disabilities had been sterilised.[18] The prevention of pregnancy, especially in situations where the girl has fallen pregnant a few times, and financial incapability, were the reasons most selected by the respondents.[19] In fact, 81 (36,1 per cent) respondents believed that pregnancy, especially where girls with intellectual disabilities have fallen pregnant a few times, was enough reason to sterilise the girls. Likewise, 52 (23,2 per cent) respondents believed that financial incapability was enough reason to sterilise the girls.[20] The discrimination inherent in these responses is that sterilisation usually is not carried out on adolescent girls without disabilities to prevent pregnancy or because of financial incapability.[21]

The gendered aspect to sterilisation in Nigeria is underlined by the fact that the Penal Code, which is applicable in the northern part of Nigeria, penalises emasculation, which is categorised as grievous hurt, with a prison term of up to seven years.[22] Emasculation, in this context, means rendering a man incapable of reproduction There is no such corresponding provision for women or girls. Therefore, it can be inferred that the provision protects males from sterilisation, at least in northern Nigeria, but not females. Undoubtedly, sterilisation places adolescent girls with intellectual disabilities in a position of inequality and discrimination contravening the provisions of the aforementioned

16 A Animashaun 'Indications for the sterilisation of the handicapped adolescent' (1978) 8 *Nigerian Medical Journal* 253-254; D Olubukola 'Intellectually retarded education in Nigeria: Past, present, and future' (2007) 22 *Essays in Education* 75.

17 Animashaun (n 16 above) 254.

18 The research is the empirical component of the author's ongoing PhD research. Ethical clearance was obtained from the Ethics Committee of the Faculty of Law, University of Pretoria. The research involved the administration of questionnaires to the parents of adolescent girls with intellectual disabilities aged 13 to 18 years in 17 schools for children with intellectual disabilities and 144 professionals, including teachers and doctors working with these girls in Anambra, Edo, Ekiti, Imo, Lagos and Rivers State in Nigeria.

19 As above.

20 As above.

21 As above.

22 Cap P3, LFN, 2010, secs 244 & 247.

Nigerian laws. Nonetheless, law reform still is required to ensure that the aforementioned laws adequately protect the rights of adolescent girls with intellectual disabilities. The inclusion of disability as a ground for discrimination in the Nigerian Constitution and the NWDA as well as the inclusion of a provision on reasonable accommodation in line with the CRPD is necessary.

3 Convention on the Rights of Persons with Disabilities and the protection of adolescent girls with intellectual disabilities from involuntary sterilisation

Nigeria has signed and ratified the CRPD and its Optional Protocol as well as other internal human rights laws, thus evincing a clear intention to be bound by the duties imposed by international law.[23] Nigeria operates a dualistic system that requires the CRPD to be incorporated into national law before taking effect. However, no law has been enacted at the federal level to reflect the provisions of the CRPD as the NWDA was enacted before the CRPD came into force. Notwithstanding this limitation, some states in Nigeria, such as Lagos, Rivers and Plateau states, have enacted disability laws given that disability is within the legislative competence of states. Yet, none of the state laws contains provisions prohibiting involuntary sterilisation. At best, they contain provisions prohibiting discrimination, harmful practices and cruel and inhuman treatment which implicitly can be relied on to prevent sterilisation.[24] Recent federal disability bills also contain no provisions prohibiting involuntary sterilisation or recognising the right to equality before the law and legal capacity, but only contain provisions on discrimination and harmful practices.[25] Consequently, lessons could be drawn from the CRPD in the subsequent enactment or amendments of laws in Nigeria.

The CRPD contains many provisions that could be construed as prohibiting involuntary sterilisation and protecting girls with intellectual disabilities from involuntary sterilisation. However, this section only examines four rights in the CRPD which directly impact on the protection of girls with intellectual disabilities from involuntary

23 Nigeria signed the CRPD on 30 March 2007 and ratified it on 24 September 2016. See The United Nations Treaty Collection Chapter IV 15 (status as at 6 July 2016) https://treaties.un.org/ (accessed 6 July 2016).

24 Lagos State Special People's Law of 2010, secs 26, 27 & 31 https://www.lagoshouseofassembly.gov.ng/download/special-peoples-law-vol-5/ (accessed 6 July 2016).

25 Discrimination Against Persons with Disabilities (Prohibition) Bill 2015, sec 1, http://placng.org/wp/wp-content/uploads/2016/07/SB22.pdf (accessed 6 July 2016); Nigerians with Disabilities Bill Act 2016, secs 1 & 2 http://placng.org/wp/wp-content/uploads/2016/07/SB22.pdf (accessed 6 July 2016); Kwara State People with Disabilities Bill 2016, secs 11 & 12 http://www.kwha.gov.ng/KWHA/Pages/_ peoplewithdisabilitiesbill2016 (accessed 6 July 2016).

sterilisation, specifically in relation to equality and non-discrimination for the purpose of drawing lessons from them. These rights are the rights to respect for home and the family; equality and non-discrimination; equal recognition before the law; and health. These rights are interconnected as involuntary sterilisation usually occurs without the consent of the person sterilised and usually emanates from a position of inequality, discrimination and incapacity.

3.1 Article 23 – The right to respect for home and family

Article 23 of the CRPD contains a number of rights guaranteeing respect for the home and family of persons with disabilities. Article 23(1)(c) unequivocally protects adolescent girls with intellectual disabilities from involuntary sterilisation.[26] It provides that persons with disabilities, including children (which include adolescents), have the right 'to retain their fertility on an equal basis with others'.[27] Thus, the Committee on the Rights of Persons with Disabilities (CRPD Committee) observed that involuntary sterilisation contravenes the right to retain fertility as provided for in article 23 of the CRPD.[28] Similarly, the Committee acknowledged that laws, policies and practices that allow involuntary sterilisation violate the provisions of article 23 of the CRPD and should be amended or repealed.[29]

The provisions of article 23 are generally non-discriminatory requirements that ensure that persons with disabilities are subject to the same standards as other members of society.[30] Consequently, it enables adolescent girls with intellectual disabilities to be accorded the right to retain their fertility and be free from involuntary sterilisation on the same basis as other adolescents. It enjoins state parties to ensure that 'effective and appropriate measures' are adopted at the national level, so as to eliminate discrimination against persons with disabilities in terms of their rights to retain their fertility on the same basis as others.[31] Such measures include the enactment, amendment or repealing of laws; sensitisation and awareness raising; as well as access to age-appropriate information and contraceptive services and support.[32] Yet, there are no provisions in Nigerian law

26 Art (1)(c) CRPD.

27 Art 23(1)(c) Convention on the Rights of Persons with Disabilities (n 11 above).

28 CRPD Committee 'Concluding Observations on the initial report of Hungary' UN Doc CRPD/C/HUN/CO/1, para 38; CRPD 'Concluding Observations on the initial report of China' UN Doc CRPD/C/CHN/CO/1, para 34; CRPD Committee 'Concluding Observations on the initial report of Peru' UN Doc CRPD/C/PER/CO/1, para 35.

29 Concluding Observations on the initial report of China (n 28 above) para 34.

30 'Letter dated 2005/10/07 from the Chairman to all Members of the Committee' A/AC.265/2006/1 para 85 https://daccess-ods.un.org/TMP/9879887.7000808.html (accessed 8 October 2016); V Della Fina 'Article 23 [Respect for Home and the Family]' in V Della Fina et al (eds) *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (2017) 417 428.

31 Art 23(1) CRPD; Della Fina (n 30 above) 434-435.

32 Della Fina (n 30 above) 434.

guaranteeing the right to retain fertility for women and girls. As such, incorporating provisions guaranteeing the right to retain fertility into Nigerian law could prove to be a veritable mechanism in protecting adolescent girls with intellectual disabilities from involuntary sterilisation.

3.2 Article 25 – Right to health

Sterilisation has adverse health effects as it impacts negatively on the mental, physical and reproductive health of adolescent girls with intellectual disabilities.[33] Article 25 of the CRPD recognises that persons with disabilities are entitled to the utmost standard of health shorn of discrimination on the basis of their disability.[34] By contrast, the NWDA merely provides that 'free medical and health services' be made available to persons with disabilities and shall be provided in all public health institutions.[35]

The nature of the consent given by a person determines whether or not the sterilisation is involuntary. If consent to sterilisation is forced or coerced, it amounts to involuntary sterilisation.[36] In view of this, the CRPD requires that persons with disabilities be accorded the opportunity to provide free and informed consent in healthcare.[37] It requires state parties to prohibit discrimination in healthcare on the basis of disability by including persons with disabilities in the process of making decisions concerning their treatment through informed consent.[38] Hence, any non-consensual treatment, including involuntary sterilisation, would contravene the provisions of article 25. As a result, the CRPD Committee stated that laws allowing involuntary treatment based on the consent of third parties such as family members or guardians should be repealed.[39] This reinforces the standards contained in article 12 pertaining to equality before the law and the right to legal capacity.[40]

33 C Frohmader 'Dehumanised: The forced sterilisation of women and girls with disabilities in Australia' Human Rights Watch 'Sterilization of women and girls with disabilities' https://www.hrw.org/news/2011/11/10/sterilization-women-and-girls-disabilities (accessed 8 October 2016); WWDA Submission to the Senate Inquiry into the involuntary or coerced sterilisation of people with disabilities in Australia (2013) 11 http://wwda.org.au/wp-content/uploads/2013/12/WWDA_Sterilisation_Sub_Summary_and_Recs.pdf (accessed 8 October 2016).

34 Art 25 CRPD.

35 Sec 4(1)(a) The Nigerians with Disability Act (n 13 above).

36 C Frohmader *Moving forward and gaining ground: The sterilisation of women and girls with disabilities in Australia* (2012) 5. See also Open Society Foundations (n 2 above) 4; A d'Espallier 'Cutting the ties: Sterilisation of persons with disabilities new perspectives after the introduction of the CRPD' 3 http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-mdc/wccl/papers/ws7/w7-despallier%20.pdf (accessed 8 October 2016).

37 Art 25(d) CRPD.

38 IR Pavone 'Article 25 [Health]' in in Della Fina et al (n 30 above) 471 478.

39 Concluding Observations on the initial report of China (n 28 above) para 23.

40 Pavone (n 38 above) 478.

Nonetheless, persons with intellectual disabilities by comparison often are considered incapable of free and informed consent in healthcare. This gives rise to their unequal treatment and discrimination against them.[41] In Nigeria, medical practice is evolving to allow adolescents to consent independently to being given contraception as long as they can understand the nature, risks and benefits of the contraceptives.[42] However, for adolescent girls with intellectual disabilities consent often emanates from their parents, guardians or, in some cases, healthcare professionals. Substituted decision making[43] generally is used to justify involuntary contraception and sterilisation on the paternalistic that ground they are incapable of making decisions for themselves and, thus, should be protected.[44] Therefore, contrary to the human rights standards in the CRPD, they are subjected to a practice that their non-disabled counterparts are not subjected to, thereby placing them in a position of inequality and being discriminated against.

3.3 Article 5 – Right to equality and non-discrimination

The right to equality and non-discrimination is fundamental to the human rights of persons with disabilities because most issues affecting persons with disabilities, including involuntary sterilisation, may be framed within the context of equality and non-discrimination.[45] It underpins the notion that all persons are equal irrespective of their station in life and are entitled to the same set of rights. [46]

Article 5 provides for the right to equality and non-discrimination. It recognises that all persons are 'equal before and under the law' and are 'entitled to equal protection and benefit of the law' without discrimination.[47] It prohibits discrimination on the basis of disability.[48]

41 D'Espallier (n 36 above) 3.

42 n 18 above.

43 Substituted decision making involves a third party making a decision for a person without any input or without consulting the person for whom the decision is being made. See Office of the Public Advocate (OPA) South Australia 'Making decisions for others – Substitute decision making' http://www.opa.sa.gov.au/making_decisions_for_others/substitute_decision_making (accessed 8 October 2016).

44 Mental Disability Advocacy Centre and the World Network of Users and Survivors of Psychiatry 'Submission to the UN Special Rapporteur on Torture on his upcoming thematic paper on torture in the context of healthcare' para 22 http://www.wnusp.net/documents/2012/2012_11_06_TortureInHealthcare_submission.doc (accessed 8 October 2016).

45 J Kumpuvuori & M Scheinin 'Treating the different ones differently – A vehicle for equality for persons with disabilities? Implications of article 5 of the Convention on the Rights of Persons with Disabilities' in J Kumpuvuori & M Scheinin (eds) *United Nations Convention on the Rights of Persons with Disabilities – Multidisciplinary perspectives* (2010) 54.

46 R Cera 'Article 5 [Equality and Non-Discrimination]' in Della Fina et al (n 30 above) 158.

47 Art 5(1) CRPD.

48 Arts 5(2) & 5(3) CRPD.

Discrimination on the basis of disability is defined in the CRPD as follows:[49]

> Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

Article 5 also urges state parties to ensure that persons with disabilities are provided reasonable accommodation to promote equality and eliminate discrimination against them.[50] Reasonable accommodation is defined as

> necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.[51]

Sterilisation infringes on the right to equality and discrimination contained in article 5 since sterilisation in most cases occurs on the basis of their disability and results in unequal treatment. Article 5, therefore, is useful in addressing the discriminatory beliefs that give rise to the sterilisation of girls with intellectual disabilities in Nigeria. It goes beyond the provisions of section 42 of the Nigerian Constitution by providing for reasonable accommodation. As Lord observes, the CRPD's right to provide reasonable accommodation applies to a wide range of actors, including the state and health care providers, requiring them to adjust policies and practices that allow the exclusion and lack of participation of persons with disabilities.[52] It requires the enactment and revision of laws and policies as well as concrete comprehensive action on the part of the government to prevent or stop discrimination by government authorities, the judiciary, institutions or private individuals.[53]

3.4 Article 12 – Right to equal recognition before the law

Article 12, which is at the core of the CRPD, reaffirms the ubiquitous nature of equality. It reaffirms the rights of persons with disabilities to respect as 'persons before the law'.[54] It acknowledges their 'right to legal capacity on an equal basis with others in all aspects of life' and to be supported in realising their legal capacity.[55] It also requires that

49 Art 2 CRPD.
50 Arts 5(2) & 5(3) CRPD.
51 Art 2 CRPD.
52 JE Lord & R Brown 'The role of reasonable accommodation in securing substantive equality for persons with disabilities: The UN Convention on the Rights of Persons with Disabilities' 5 https://ssrn.com/abstract=1618903 (accessed 12 November 2016).
53 Cera (n 46 above) 166.
54 Art 12(1) CRPD.
55 Arts 12(2) & (3) CRPD.

such support be in line with the 'rights, will and preferences of the person'.[56] As Frohmader points out, the significance of article 12 is that an individual's right to decision making cannot be substituted by that of a third party, and the individual has the right to make his or her own choices.[57]

The CRPD Committee, in interpreting article 12, states that 'equality before the law' is an innate human rights tenet which is crucial to the implementation of other human rights.[58] In other words, the right in article 12 to equal recognition before the law with its attendant right to legal capacity and support in the exercise of legal capacity is vital to the realisation of other rights in the CRPD. Therefore, article 12 is necessary for the implementation of article 23 and the protection of adolescent girls with intellectual disabilities from being sterilised involuntarily. For the Committee, equality before the law indicates that legal capacity is universal and upholds the full legal capacity of persons with disabilities, which hitherto had been denied.[59] However, the CRPD Committee observed that the deprivation of the legal capacity of persons with disabilities has also resulted in the deprivation of their fundamental rights, including their reproductive rights.[60] The CRPD Committee also construed legal capacity as the 'capacity to be both a holder of rights and an actor under the law'. Capacity to hold rights ensures that a person's rights are safeguarded by the legal system while capacity to act grants the person authority to enter into, alter and terminate legal relations.[61]

The Committee further differentiated legal capacity from mental capacity. According to it, legal capacity, which underlies significant involvement in society, involves the aptitude to hold and exercise rights and duties.[62] Conversely, mental capacity refers to the decision-making abilities of a person, which differ from person to person as a result of factors such as environmental and social factors.[63] It further acknowledged that both concepts usually are conflated to the effect that impaired decision making due to the presence of disability results in the removal of a person's legal capacity.[64] This is particularly true for adolescent girls with intellectual disabilities who particularly are assumed to lack decision-making skills because of their disability, particularly in terms of health care and this often is enough reason for their sterilisation without their knowledge or consent. It reiterated that

56 Art 12(4) CRPD.
57 Frohmader (n 33 above) 71.
58 CRPD Committee 'Article 12: Equal recognition before the law' General Comment 1 (2014) CRPD/C/GC/1 para 1, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement (accessed 8 October 2016).
59 Para 8 CRPD (n 58 above) para 8.
60 As above.
61 Para 12 CRPD Committee.
62 Para 13 CRPD Committee.
63 As above.
64 Para 15 CRPD Committee.

article 12 does not allow the denial of legal capacity on grounds of a person having a disability or the existence of impairment but, rather, entails the provision of support in the exercise of legal capacity.[65] Indeed, in a recent survey in Nigeria it was recommended that support be provided to persons with disabilities to suitably prepare and empower them to be autonomous citizens who make their own choices.[66] So, such support in turn must have regard for 'the rights, will and preferences' of the person and never give rise to decision making by third parties.[67] This challenges the traditional approach of denying legal capacity and vesting it in third parties on account of the presence of a disability (status approach), the effect of a person's decision (outcome approach) or perceived deficiencies in decision-making skills (functional approach).[68]

Article 12 also does not specify what form such support should take, but the CRPD Committee states that 'support' is a broad term that comprises informal and formal support measures, of different types and degrees.[69] To Quinn, support entails 'capacity building' regarding 'social capital/community, widening opportunity to share

65 Paras 9 & 15 CRPD Committee.

66 Federal Ministry of Women Affairs and Social Development 'Report of the National Baseline Survey on Persons with Disabilities (PWDs) in Nigeria' (2011) http://www.womenaffairs.gov.ng/index.php/news-updates/169-report-of-the-national-baseline-survey-on-persons-with-disabilities-pwds-in-nigeria (accessed 8 October 2016).

67 Para 17 CRPD Committee.

68 Para 15 CRPD Committee. For detailed discussions on traditional approaches to legal capacity, see A Dhanda 'Legal capacity in the Disability Rights Convention: Stranglehold of the past or lodestar for the future?' (2006-2007) 34 *Syracuse Journal of International Law and Commerce* 429 431; B Collier et al *Mental capacity: Powers of attorney and advance health directives* (2005) 62-63; G Quinn 'Personhood and legal capacity perspectives on the paradigm shift of article 12 CRPD' presented at Harvard Law School Project on Disability (HPOD) Conference on Disability and Legal Capacity under the CRPD, Harvard Law School, 20 February 2010, http://www.nuigalway.ie/cdlp/documents/publications/ Harvard%20Legal%20Capacity%20gq%20draft%202.doc (accessed 8 October 2016); E Flynn & A Arstein-Kerslake 'Equal recognition before the law: Exploring a support model of legal capacity' paper presented at the Kent Critical Law Society Conference on 10 March 2012 at the University of Kent, Canterbury 5 http://www.nuigalway.ie/disability-rights/downloads/kent_presentation.docx (accessed 8 October 2016); E Flynn & A Arstein-Kerslake 'The support model of legal capacity: Fact, fiction, or fantasy?' (2014) 32 *Berkeley Journal of International Law* 124 129; Gibson (n 58 above) 232; D Gibson 'Conceptual and ethical problems in the Mental Capacity Act 2005: An interrogation of the assessment process' (2015) 4 *Laws* 229 231; K Purser *Capacity assessment and the law: Problems and solutions* (2017) 67; Centre for Disability Law and Policy NUI Galway 'Submission on legal capacity: The Oireachtas Committee on Justice, Defence and Equality' http://www.nuigalway.ie/cdlp/documents/cdlp_submission_on_legal_capacity_the_oireachtas_committee_on_justice_defence_and_equality_.pdf (accessed 8 October 2016); Council of Europe Commissioner for Human Rights 'Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities' 19 https://www.coe.int/16806da5c0 (accessed 8 October 2016).

69 Para 17 CRPD Committee.

personhood and grow as well as support in making decisions'.[70] It includes measures relating to universal design and accessibility.[71] It could also constitute various, alternative means of communication, especially for persons who cannot verbally express their 'will and preferences'.[72] So, the nature and extent of support to be provided will differ considerably from person to person because of the diversity of persons with disabilities.[73] Interestingly, the American Association on Intellectual and Developmental Disabilities (AAIDD), in its recent revised manual, was guided by the ideology of the CRPD and the social model of disability in classifying intellectual disability by levels of support rather than the level of severity.[74] As Hatton points out, the AAIDD's reliance on support is important because, while a person may be capable of functioning well in a supportive environment, the same person may have difficulties in a less supportive environment.[75] It could be argued that the right to 'support in the exercise of legal capacity' recognises that humans are inherently relational. As such, decision making and legal capacity should not be denied a person because human beings, disabled or non-disabled, are essentially relational and rely on the input of their families and friends in decision making.[76] As Nedesky points out, individuals are structured by networks of relationships and usually are dependent on others and on the webs of relations of which they are part.[77] According to her, Human beings are constituted by their relationships such that those relationships define the means through which their capacities are fostered, their rights are protected and their well-being is promoted.[78] Hence, such relationships may be used to enhance the abilities of girls with intellectual disabilities by providing them with support in decision making, to protect them from involuntary sterilisation and guarantee their well-being.

With specific reference to children with disabilities (which includes adolescents with disabilities), the CRPD Committee also acknowledges that the right to legal capacity applies to them.[79] According to the

70 G Quinn 'Some reflections on legal capacity: Is article 12 CRPD an evolution or a revolution?' http://www.mc.rs/upload/documents/saopstenja_izvestaji/2011/281011-MDRI-Gerard_Quinn.ppt (accessed 8 October 2016).

71 Para 17 CRPD Committee.

72 As above.

73 Para 18 CRPD Committee.

74 R Schalock et al *Intellectual disability: Definition, classification, and systems of support* (2010) 5.

75 C Hatton 'Intellectual disabilities – Classification, epidemiology and causes' in E Emerson et al (eds) C*linical psychology and people with intellectual disabilities* (2012) 3 6-7.

76 AL Pearl 'Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and the legal capacity of disabled people: The way forward?' (2013) 1 *Leeds Journal of Law and Criminology* 18.

77 J Nedelsky *Law's relations – A relational theory of self, autonomy and law* (2011) 20-28.

78 Nedelsky (n 77 above) 121.

79 Para 36 CRPD Committee.

Committee, article 12 safeguards the 'equality of all persons before the law, irrespective of their age'.[80] It also states that article 12 must be read together with article 7 which provides for the 'evolving capacities of children' and that 'due weight' is accorded their views in line with their age and development.[81] However, the Committee, in adopting article 7 as the criterion for children with disabilities, adopts the functional approach to legal capacity which it condemns for adults with disabilities because it attempts to assess decision-making capacity.[82] Moreover, the assessment of 'due weight' is left to the discernment of the person evaluating the legal capacity of a child in a particular context.[83] However, it could be argued that the Committee's rationale for adopting the functional approach for children with disabilities could be to maintain the same standards as contained in the Convention on the Rights of the Child (CRC).[84]

Consequently, the legal capacity regime for adolescent girls with intellectual disabilities will differ from that of adult persons. According to Minkowitz, there is a need for the development of a system of legal capacity and support for children.[85] Similarly, the Partnership to Ensure Reform of Supports in Other Nations (PERSON) was of the view that, although applicable to all persons, legal capacity may require some modification in the context of children.[86] Thus, legal capacity for adolescents with disabilities, as garnered from the CRC and CRPD Committee, is tied to their understanding of the decision to be made, their age and to the rights accorded to their non-disabled counterparts. This functional approach, albeit with its shortcomings, is useful, as the presence of intellectual disability does not automatically entail a lack capacity for adolescent girls with intellectual disabilities. In fact, research shows that with age-appropriate support, adolescents with mild and moderate intellectual disabilities can consent to medical treatment.[87] Indeed, Bogden and Levison have highlighted that a perceived disability is no reason to disregard a child's view or validate substituted decision-making by parents, guardians, carers or public

80 As above.
81 As above.
82 Para 15 CRPD Committee.
83 A Broderick 'Article 7 [Children with Disabilities]' in Della Fina et al (n 30 above) 195 209.
84 Art 7 of the CRPD is equivalent to art 12 of the CRC. See United Nations Convention on the Rights of the Child (CRC) (1989) 28 ILM 1448, art 12.
85 T Minkowitz 'CRPD article 12 and the alternative to functional capacity: Preliminary thoughts towards transformation' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2371939 (accessed 8 October 2016).
86 Partnership to Ensure Reform of Supports in Other Nations (PERSON) 'Principles for legal capacity reform' Preamble http://www.eu-person.com/publication/person-principles-english/wppa_open/ (accessed 8 October 2016).
87 JM Rey & B Birmaher *Treating child and adolescent depression* (2007) 314.

authorities.[88] They also stress that in keeping with their evolving capacities, children with disabilities, like other children, have valid insights into their wellbeing.[89] Similarly, the United Nations Children's Fund (UNICEF) Report on the State of the World's Children recommends the inclusion of children (adolescents) with disabilities in decisions that affect them.[90] Thus, the non-inclusion of adolescent girls with intellectual disabilities in decision making that affects their reproduction or discriminatorily sterilising them amounts to inequality and violates article 12.

4 Challenges in the protection of adolescent girls with intellectual disabilities from involuntary sterilisation

Negative stereotypes and beliefs are factors that cause girls with intellectual disabilities to be involuntarily sterilised. An example of such beliefs is that intellectual disability has spiritual and/or religious inferences, and that it is hereditary.[91] So also are the assumptions that women and girls with intellectual disabilities are 'child-like', 'asexual', 'hyper-sexual', 'dependent', 'incompetent' and helpless.[92] It is also widely believed that persons with intellectual disabilities are incapable of parenthood and have the potential to harm their children.[93] Although these beliefs and stereotypes are unfounded, they are discriminatory as they are used to justify the sterilisation of women and girls with intellectual disabilities on an unequal basis with other adolescents.

The inability of parents and family members to provide financially for their intellectually-disabled children or their offspring is another challenge to protecting adolescent girls with intellectual disabilities from involuntary sterilisation.[94] Empirical research shows that financial incapacity is acknowledged by parents as a reason to sterilise girls with intellectual disabilities in Nigeria.[95] The provision of care and

88 J Boyden & D Levison 'Children as economic and social actors in the development process' (2000) Working Paper 1, Expert Group on Development issues, Stockholm http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.120.1198&rep=rep1&type=pdf (accessed 8 October 2016).

89 Boyden & Levison (n 88 above).

90 UNICEF 'The state of the world's children 2013: Children with disabilities' Executive Summary, key recommendations, para 8 http://www.unicef.org/publications/files/SOWC2013_Exec_Summary_ENG_Lo_Res_24_Apr_2013.pdf (accessed 8 October 2016).

91 G Llewellyn 'The involuntary or coerced sterilisation of people with disabilities in Australia' https://sydney.edu.au/health-sciences/cdrp/Sterilisation_Submission%2021.pdf (accessed 8 October 2016).

92 Frohmader (n 33 above) 43.

93 As above.

94 L Dowse 'Moving forward or losing ground? The sterilisation of women and girls with disabilities in Australia' http://wwda.org.au/issues/sterilise/sterilise2001/steril3/ (accessed 8 October 2016); Frohmader (n 33 above) 38-42.

95 n 18 above.

support for adolescents with intellectual disabilities usually is done by parents and/or family members and such care may be extremely onerous and financially tasking.[96] This problem is further aggravated by the lack of social welfare and support systems for parents and family members, the unavailability and inaccessibility of reproductive health services and the economic dependence of adolescents with disabilities on their families. As such, families regard sterilisation as the only available option.[97]

Although the provisions of article 12 are laudable particularly in relation to addressing involuntary sterilisation, there is growing criticism arising from the CRPD Committee's conceptualisation of legal capacity and support in the exercise of legal capacity. One criticism is that article 12 may actually facilitate the violation of the rights of persons with intellectual disabilities, including adolescent girls with intellectual disabilities. The reality is that while adolescents with mild and moderate intellectual disabilities may be able to make decisions, including medical decisions, for themselves with support, those with severe and profound disabilities may not be able to do so. The presumption as proposed by the CRPD Committee[98] that their will and preferences or the best interpretation of their will and preferences may always be discernible could result in substituted decision making which the CRPD sought to address. This is especially applicable to those with no support network, such as those in institutions, or those who cannot communicate their will and preferences, especially where assistive devices are lacking as in the case of developing countries like Nigeria.[99] Tobin and Luke are of the view that in such cases substituted decision making is inevitable, irrespective of the support accorded to them, or allowance provided for their capacities to evolve.[100] Quinn also acknowledges that that there may be instances where substituted decision making would be employed with respect to people whose will and preferences are imperceptible.[101] Another concern is about the manipulation or inordinate control of adolescents with disabilities by the persons

96 K Del Villar 'Should supported decision-making replace substituted decision-making? The Convention on the Rights of Persons with Disabilities and coercive treatment under Queensland's Mental Health Act 2000' (2015) 4 *Laws* 173 192.

97 Frohmader (n 33 above) 42.

98 Paras 20 & 21 CRPD Committee.

99 OF Akinpelu et al 'Perspectives from the drafting of the UN Convention on the Rights of Persons with Disabilities' Discussion Paper for Side Event at UN Open-ended Working Group on Ageing 3-4.

100 J Tobin & E Luke 'The involuntary, non-therapeutic sterilisation of women and girls with an intellectual disability – Can it ever be justified?' (2013) 3 *Victoria University Law and Justice Journal* 27 37.

101 G Quinn 'Personhood and legal capacity: Perspectives on the paradigm shift of article 12' (2010) 13 http://www.nuigalway.ie/cdlp/documents/cdlp_submission_on_legal_capacity_the_oireachtas_committee_on_justice_defence_and_equality_.pdf (accessed 8 October 2016).

meant to support them, especially in medical decision-making.[102] The possibility of persons with disabilities deferring to their supporter altogether is also a challenge as it could result in the will of the person being supported not being reflected in the ensuing decision.[103] Therefore, there is potential for support in decisions amounting to substituted decision making, especially for those with severe and profound intellectual disabilities who are vulnerable to the influence of others, thereby defeating the purpose of article 12.[104] In such situations, it may be difficult to determine whether a supported decision is not a substitute decision.[105] Therefore, the challenge is how to develop a model of support for adolescents with intellectual disabilities which does not result in paternalism even for those who can make decisions for themselves.

5 Way forward

Guaranteeing the effective implementation of the provisions of the CRPD is challenging, especially in the context of a developing country like Nigeria. Government plays a critical role in ensuring that human rights standards are implemented. It is their duty to promote, protect and fulfil human rights. In order to do this, the government must enact new laws or amend existing laws in Nigeria along the lines of the CRPD. As Dinnerstein pointed out, the enactment of laws will not automatically transform extant regimes 'but they are a start'.[106] Thus, the government must enact laws to prohibit the sterilisation of adolescent girls with intellectual disabilities to ensure their right to equality and non-discrimination in line with the provisions of the CRPD. Anti-discrimination legislation is also crucial to protecting and promoting the rights of these girls, especially their right not to be discriminated against in retaining their fertility. Such law must also provide for the right to reasonable accommodation to aid them in making contraceptive decisions and prevent them from being sterilised. Such laws must prohibit the sterilisation of adolescent girls with intellectual disabilities. It must also guarantee the right of adolescents with intellectual disabilities to support in the exercise of legal capacity, especially in the context of decision making. If such support is provided by law, it goes a long way in mitigating the

102 P Gooding 'Navigating the "flashing amber lights" of the right to legal capacity in the United Nations Convention on the Rights of Persons With Disabilities: Responding to major concerns' (2015) 15 *Human Rights Law Review* 45 58-60.

103 Gooding (n 102 above) 58-60.

104 The Cambridge Intellectual and Developmental Disabilities Research Group 'Submission to the Committee on the Rights of Persons with Disabilities' 2 http://www.psychiatry.cam.ac.uk/ciddrg/files/2014/02/Article-12-CRPD-12-07-11.pdf (accessed 8 October 2016).

105 As above.

106 *RD* Dinerstein 'Implementing legal capacity under article 12 of the UN Convention on the Rights of Persons with Disabilities: The difficult road from guardianship to supported decision-making' (2012) 19 *Human Rights Brief* 12.

involuntary sterilisation of girls with intellectual disabilities. The government must also not to permit substitute decision-makers to provide consent to sterilisation on behalf of girls with disabilities. All health and medical personnel should ensure that third parties, including family members, do not make decisions about the sterilisation of the girls. The government must take steps to prevent the infringement of the right by non-state actors.[107] In developing a supported decision-making regime, it must ensure that other rights such as the right to autonomy, informed consent, to retain fertility and human dignity are protected and ensure that the support provided is not used as a justification for limiting their rights.[108]

Although supporting adolescent girls with intellectual disabilities, especially where they cannot make decisions, may be challenging, an approach that still promotes their human rights, especially their rights to retain their fertility, equality and non-discrimination are required. Perhaps an approach that recognises that the child is situated within a network of relations and that shares the decision making between the child and the network is required. This could consist of 'support networks' consisting of a 'small group of individuals' that have a personal relationship and are well acquainted to the girl, such as family members, and friends, undertaking to assist her in making decisions.[109] Thus, in as much as the child may not be able to make decisions, there are people who love and understand the child and who can enable or facilitate decisions on behalf of the child in a way that fosters the child's right to support. This relational conceptualisation of legal capacity allows us to appreciate children with severe and profound disabilities as both individuals with rights to be protected and as dependent on others for care.[110] Such an approach also emphasises the importance of providing support for the child and fostering relationships between those involved in caring for the child and the child.[111] According to Bridgeman, it requires 'an understanding of the child as both an individual and as situated within a web of relationships such that the insights, knowledge and experiences of parents' and others involved in the child's life are important.[112] It would ensure that girls with intellectual disabilities are not subjected to involuntary sterilisation.

The support networks require a legal and policy framework, capacity building and provision of infrastructure as well as 'a

107 Para 24 CRPD Committee.

108 Para 29 CRPD Committee.

109 M Bach 'Supported decision making under article 12 UN Convention on the Rights of Persons With Disabilities: Questions and challenges' presented at the Conference on Legal Capacity and Supported Decision Making at Athlone, 3 November 2007 11.

110 J Bridgeman 'Caring for children with severe disabilities: Boundaried and relational rights' in M Freeman (ed) *Children's health and children's rights (*2006) 99 113.

111 Bridgeman (n 110 above) 113.

112 Bridgeman 116.

registration process for designated supporters' to be regarded as legitimate.[113] There are, however, some instances where the support network may not be feasible such as where the girls are institutionalised and lack 'familial relationships' and as such may result in substituted decision making may be inevitable.[114] Nonetheless, substitute decision making in the context of sterilisation of adolescents with severe and disabilities should never be considered as a means of assisting the adolescent.

There also is a need for awareness-raising programmes in society to promote the rights and dignity of persons with disabilities, to stimulate positive outlooks about them and to tackle stereotypes, preconceptions and harmful traditions involving them.[115] Such programmes should be directed at families, communities, grassroots and urban alike, policy makers, law enforcement agencies and stakeholders, including adolescents with intellectual disabilities and their advocacy groups. It entails collaboration between different sectors, including government and governmental agencies, non-governmental organisations (NGOs), community leaders, medical professionals and the media.[116] This would promote a constructive image of persons with disabilities as part of human diversity with diverse abilities and personalities. An example of a multi-personal awareness-raising strategy is walks and road shows as have been organised in Nigeria by the Down Syndrome Foundation Nigeria, Children's Developmental Centre and Mo Rainbow Foundation.[117] Other awareness-raising strategies include celebrating designated days, such as Down Syndrome Day, public presentations, workshops, seminars, fund-raising events, musical and theatrical shows, campaigns and media reports. Training programmes for policy makers and relevant stakeholders, including adolescent girls with intellectual disabilities themselves, governmental officials, health care personnel,

113 Bach (n 109 above) 13-14.

114 Tobin & Luke (n 100 above) 37; Gooding (n 99 above) 58-60.

115 Art 8 CRPD.

116 I Worm *A human rights-based approach to disability in development: Entry points for development organisations* (2012) 26; K Scior et al 'Intellectual disabilities: Raising awareness and combating stigma – A global review' (2015) 84 https://www.ucl.ac.uk/ciddr/documents/Global_ID_Stigma_Report_Final_July_15.pdf (accessed 8 October 2016).

117 D Sadiq 'Walkabout for Down syndrome' https://worlddownsyndromeday.org/wakabout-down-syndrome-nigeria (accessed 8 October 2016); C Obinna 'Walk with us, save 12 babies' http://www.vanguardngr.com/2015/03/walk-with-us-save-12-babies/ (accessed 8 October 2016); 'Down Syndrome Foundation focuses on awareness' http://www.vanguardngr.com/2014/10/ syndrome-foundation-focuses-awareness/ (accessed 8 October 2016); 'Down Syndrome Foundation Nigeria holds awareness week' http://www.transparentnigeria.com/news_entries/8228/Down-Syndrome-Foundation-Nigeria-Holds-Awareness-Week (accessed 8 October 2016); Scior (n 116 above) 84; E Ijewere-Kalejaiye 'I will do my best and give hope to children living with Down syndrome' https://guardian.ng/guardian-woman/i-will-do-my-best-and-give-hope-to-children-living-with-down-syndrome/ (accessed 8 October 2016).

teachers and other providers of services on the rights of persons with disabilities, are also of the essence.[118]

Civil societies similarly are crucial in ensuring the enforcement of human rights; holding governments accountable for the non-promotion of rights; challenging existing discriminatory norms; and facilitating the implementation of revolutionary norms and standards.[119] Article 33 requires state parties to establish implementation and monitoring mechanisms at the domestic level, with the participation of civil society, including persons with disabilities and their representative organisations.[120] This would enable civil societies and disabled persons' organisations (DPOs) in Nigeria to keep watch on the government's compliance with the CRPD and in turn report to the CRPD Committee in line with article 33. Civil societies and DPOs, therefore, could be catalytic in ensuring that adolescent girls with intellectual disabilities are not sterilised without their knowledge or consent and promoting their rights.

6 Conclusion

The article has sought to learn from the provisions of the CRPD with regard to protecting adolescent girls with intellectual disabilities from involuntary sterilisation. It emphasises the importance of the provisions of the CRPD in ensuring that adolescent girls with intellectual disabilities are protected from the inequality and discrimination characterised by involuntary sterilisation. The article shows that involuntary sterilisation is discriminatory and involves the unequal treatment of adolescent girls with intellectual disabilities. It also shows that the involuntary sterilisation of the girls is reified by socio-economic, cultural and even legal factors. The shortcomings of extant laws in Nigeria and the lack of commitment on the part of the Nigerian government in promoting and protecting girls from involuntary sterilisation also are highlighted. It was also emphasised that the rights to respect for the home and family, equality and non-discrimination, equal recognition before the law and health contained distinct provisions that are useful in protecting adolescent girls with intellectual disabilities from involuntary sterilisation. Measures such as the enactment and revision of laws, awareness raising and NGO action were recommended. It is therefore hoped that legislators and policy makers resort to the provisions of the CRPD when enacting laws or designing policies and programmes and apply them in the Nigerian

118 Dinnerstein (n 106 above) 12.

119 As above; 'Civil society provides the critical foundation for promoting all human rights' https://geneva.usmission.gov/2011/09/15/civil-society-promoting-all-human-rights/ (accessed 8 October 2016); Kingdom of Morocco National Human Rights Council 'Promotion and protection of human rights: Role of civil society' http://www.cndh.org.ma/an/bulletin-d-information/promotion-and-protection-human-rights-role-civil-society (accessed 8 October 2016).

120 Arts 33(1) & 33(3) CRPD.

context. Undoubtedly, implementing some of the provisions of the CRPD in Nigeria may be challenging, but the benefits outweigh the challenges as they would prevent the unequal treatment and discrimination against adolescent girls with intellectual disabilities.

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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.

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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

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- 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 Moot Court
- Nelson Mandela World Human Rights Moot Court
- African Disability Rights Moot Court
- Extractive Industries (African Commission Working Group)
- Human Rights Clinics
- Human Rights Conferences
- Annual African Trade Moot

Research

- AIDS & Human Rights Research Unit
- Business and Human Rights Unit
- Disability Rights Unit
- Ending Mass Atrocities in Africa Conference
- FRAME
- Freedom of Expression & Access to Information
- Gender Unit
- Impact of the Charter/Protocol
- Implementation and Compliance Project
- International Development Unit (IDLU)
- International Law in Domestic Courts (ILDC)
- Unlawful Killings Unit
- Children's Rights Unit
- African Coalition for Corporate Accountability (ACCA)

Regular publications

- *AfricLaw.com*
- *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 July 2017
Compiled by: I de Meyer
Source: http//www.au.int (accessed 15 December 2017)

	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	20/11/16	**10/01/17**
Angola	02/03/90	30/04/81	11/04/92		30/08/07	
Benin	20/01/86	26/02/73	17/04/97	10/06/14	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	09/12/14	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	27/01/16		11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	30/11/16
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	23/02/14
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05			**23/02/17**
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	**16/06/17**	
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	23/08/16
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		03/07/15	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		04/12/13				13/04/15
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**	**46**	**48**	**30**	**39**	**30**

* Additional declaration under article 34(6)
Ratifications after 31 December 2016 are indicated in bold