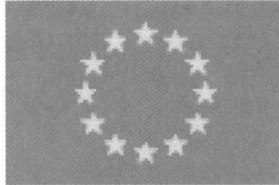


# AFRICAN HUMAN RIGHTS LAW JOURNAL

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**THIS JOURNAL SHOULD BE CITED AS (2005) 5 AHRLJ**

The *African Human Rights Law Journal* publishes peer-reviewed contributions dealing with human rights related topics of relevance to Africa, Africans and scholars of Africa. The *Journal* appears twice a year, in March and October.

### Editorial

This issue of the *African Human Rights Law Journal* is published in the wake of three promising developments in the African human rights system.

The first move forward is the eventual adoption by the African Union Assembly of Heads of State and Government (AU Assembly) of a report resulting from a fact-finding mission undertaken by the African Commission on Human and Peoples' Rights (African Commission) to Zimbabwe. Conducted in 2002, the report served before the AU Assembly in 2004 as part of the African Commission's Seventeenth Activity Report. On that occasion, Zimbabwe thwarted its adoption, on the basis that the Zimbabwean government's comments had not been contained in the Activity Report. (See F Viljoen 'Recent developments in the African regional human rights system' (2004) 4 *African Human Rights Law Journal* 344.) At its subsequent meeting, in 2005, the AU Assembly adopted this report. The Seventeenth Activity Report, which contains not only the Zimbabwean report, but the full text of all findings of the African Commission during the period mid-2003 to mid-2004, is available at [www.chr.up.ac.za](http://www.chr.up.ac.za).

The second positive development is the acceleration towards the launching of the African Court on Human and Peoples' Rights (African Human Rights Court). After the entry into force of the Protocol establishing the African Human Rights Court in January 2004, progress towards its establishment was halted due to a decision of the AU Assembly to the effect that the African Human Rights Court had to be merged with the to-be-established AU Court of Justice. However, the AU Assembly subsequently decided that efforts to integrate the two judicial institutions should not hamper the immediate 'operationalisation' of the African Human Rights Court. Members of the Court therefore are to be elected and the Court's seat assigned at the AU Assembly meeting in mid-2005. (One of the contributions in this issue focuses on the advisory jurisdiction of the Court.)

The advent of the AU saw a proliferation of institutions on the African landscape. Their effective functioning and meaningful contribution largely depend on the people who are appointed or elected to these

institutions. The same is true for the Court. As the terms of four members of the African Commission come to an end in July 2005, elections will also be held to fill these positions. In a third progressive development, highlighting the need to ensure independence and gender balance in the composition of the African Commission, the AU (in *note verbale* BC/OLC/66/Vol XVIII) advised state parties as follows:

As a guide for States Parties in interpreting the question of incompatibility or impartiality, the Advisory Committee of Jurists in the establishment of the Permanent Court of International Justice (now the International Court of Justice (ICJ)) had pointed out that '(A) member of government, a Minister or under-secretary of State, a diplomatic representative, a director of a ministry, or one of his subordinates, or the legal adviser to a foreign office, though they would be eligible for appointment as arbitrators to the Permanent Court of Arbitration of 1899, are certainly not eligible for appointment as judges upon our Court.' (See PCIJ/Advisory Committee of Jurists *Procès-Verbaux of the Proceedings of the Committee. June 16-July 24 1920*, 693, 715-716 (1920)).

States Parties are also reminded to ensure adequate gender representation in their nominations and to bear in mind the need to continue to enhance the independence and operational integrity of the African Commission in the spirit of the Grand Bay Declaration of 1999 and the Kigali Declaration of 8 May 2003.

As in previous issues of the *Journal*, contributions in this issue cover legal developments with both a regional and country-specific scope.

Contributions of Oloka-Onyango as well as Ukhun and Inegbedion focus on cultural rights, an aspect that often has been neglected in the African human rights discourse. In an innovative contribution, Chenwi investigates the need for a regional legal instrument on the death penalty in Africa. The previous issue of the *Journal* contained a report of a seminar on the social, economic and cultural rights in the African Charter on Human and Peoples' Rights. This issue contains the full text of the statement adopted by participants at this seminar.

A number of contributions investigate aspects related to human rights in specific countries (Kenya, Malawi, Nigeria, South Africa and Zimbabwe), which are also relevant to other countries in the region. A good example is Sacco's study of compulsory licensing and parallel importing of HIV/AIDS drugs.

The editors thank the following people who acted as referees over the period since the previous issue of the *Journal* appeared: Gina Bekker, Danwood Chirwa, Alpha Fall, Edward Kwakwa, Olobi Makinwa, Julie Soweto and Nico Steytler.

## Who's watching 'Big Brother'? Globalisation and the protection of cultural rights in present-day Africa

*Joe Oloka-Onyango\**

Professor of Law; Director, Human Rights and Peace Centre (HURIPEC), Faculty of Law, Makerere University, Kampala, Uganda

Globalisation has increased contacts between people and their values, ideas and ways of life in unprecedented ways. People are traveling more frequently and more widely. Television now reaches families in the deepest rural areas of China. From Brazilian music in Tokyo to African films in Bangkok, to Shakespeare in Croatia, to books on the history of the Arab world in Moscow, to the CNN world news in Amman, people revel in the diversity of the age of globalisation.<sup>1</sup>

### Summary

*The forces of globalisation operate in a contradictory, oppositional and even conflictual fashion. The results of the processes are mixed and varied. It is against this background that the author examines the influence of globalisation on the protection of cultural rights in Africa with the aid of analogies drawn from the influence of the 'Big Brother Africa' reality show on the African continent. The paper discusses the challenges posed by globalisation to cultural rights in Africa. In discussing the African human rights regime in relation to cultural rights, the author explores the role that can be played by the African Commission on Human and Peoples' Rights and civil society in preserving cultural rights. The author further highlights the interrelation between culture, globalisation and women's rights and the need to promote and protect the right to African traditional knowledge in a globalised world. The author concludes by making a call that the category of primary duty*

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\* LLB (Hons) (Makerere), LLM, SJD (Harvard), Dip LP (LDC); joloka@law.mak.ac.ug. An earlier version of this paper was presented to the Interights seminar on Economic, Social and Cultural Rights under the African Charter, 13-17 September 2004 in Pretoria, South Africa. I am extremely grateful to Rose Ssengendo for providing the background research material for this study.

<sup>1</sup> UNDP *Human development report: Cultural liberty in today's diverse world* (2004) 85; <http://hdr.undp.org/reports/global/2004/> (accessed 28 February 2005).



*bearers in the protection of human rights must be widened to include trans-national corporations, families and communities over and above the state.*

## 1 Introduction

At the time the invitation to this seminar was first sent to me in the middle of last year, what appeared to be the whole of the African continent was caught up in the throes of the reality TV show, *Big Brother Africa (BBA)*.<sup>2</sup> Following the format of the show elsewhere around the world, 12 housemates, from 12 different countries and walks of life, were secluded in a large house in an upmarket suburb of Johannesburg, South Africa. With a hefty US\$100 000 bounty as the prize for the person who could outlast all the others in terms of their popularity with housemates and viewers, the show pandered to the voyeuristic element in humankind that has proven a great success in the new genre of reality TV. However, the show came with a twist by playing on the fact that the 12 housemates came from different parts of the continent with ostensibly differing cultures, as opposed to sibling shows elsewhere around the world in which all the participants came from the same country. Few programmes in the history of television on the continent have attracted such extensive viewership, with estimates putting the figure at 30 million.

Correspondingly, few TV shows on any topic have generated as much commentary and controversy. At least two African countries, Malawi and Namibia, attempted to ban the show, while Zimbabwe succeeded in removing it from state TV, but was unable to stop private stations from screening it. In several other countries where the show remained on screen, it provided much fodder for discussion by both conservative politicians and radical Pan-Africanists, as much for fire-breathing pastors and evangelists, as it did for academics and civil society activists.<sup>3</sup> The show even drew in African heads of state, with Botswana's President Festus Mogae openly rooting for his country's 'representative' on the show, while eventual winner Cherise Makubale from Zambia was appointed a cultural ambassador by President Levi Mwanawasa. Uganda's Yoweri Museveni caused an uproar among politicians, evangelists and 'moral reformers' of various stripes when he not

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<sup>2</sup> The author was Special Rapporteur on Globalisation and Human Rights of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, for five years (1999 to 2003), and much of the analysis in this paper is drawn from that experience. In particular, see the three reports on the subject issued over the period, namely J Oloka-Onyango & D Udagama *The realization of economic, social and cultural rights: Globalization and its impact on the full enjoyment of human rights*, preliminary report (E/CN 4/sub 2/2000/13); progress report (E/CN 4/sub 2/2001/10), and the final report E/CN 4/sub 2/2003/14.

<sup>3</sup> See eg 'Priest prays for Ugandan eviction' *BBC News* <http://www.news.bbc.co.uk/2/hi/africa/3146931.stm> (accessed 28 February 2005).

only met the 'notorious' Gaetano Kaggwa (Uganda's BBA representative) and his on-screen South African girlfriend Abigail Plaatjes, but also offered them his helicopter for a ride back to the capital after meeting him.<sup>4</sup>

Why all the hullabaloo? Taken at face value, BBA was simply another show that happened to draw the attention of a great many people because it tried something novel, and pandered to humankind's most basic instincts, the desire to peek. Judging by the success of the show, there is a Peeping Tom in every one of us. Viewed more critically, however, the show provides considerable food for thought. Certainly, the show raised many questions relating to how we view the issue of culture in contemporary Africa. It also forced a consideration of the manner in which the forces of globalisation — of which television has become a most potent one — have come to affect the development and expression of 'African culture' in the twenty-first century. When translated to the African context, the notion of a 'Big Brother' — drawn from George Orwell's classic satire about the omniscient state — could be viewed as a metaphor for so many of the issues that arise within current debates about globalisation: ideas about the loss of sovereignty and identity, of the deluge of the indigenous by the foreign; of the one-sided nature of international transactions. Seen from this angle, the show provides a useful commencement point for an examination of the manner in which the contemporary forces of globalisation have impacted on the promotion and protection of cultural rights on the African continent.

For the purposes of this paper, the term 'culture' conveys at least two meanings. First, culture may be defined as the '... integrated pattern of human knowledge, belief, and behaviour ...' which is dependent upon the capacity of human society to learn and transmit knowledge about their values, ideas and beliefs to succeeding generations. In other words, culture may be taken to mean those elements that human society produces in non-materialistic terms, and transmits to posterity. A second definition of the term is more apt, namely the customary beliefs, social forms and material traits of a racial, ethnic, linguistic, religious or social group.<sup>5</sup> While recognising that definitional precision is useful, at the same time it is necessary to be cautious about a dogmatic approach to the notion of culture, and particularly to be sensitive to expressions of diversity within culture. In other words, it may even be an anomaly to speak of an *African* culture, given not only the diversities across cultures, but those within, dictated by considerations of class,

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<sup>4</sup> Gaetano and 'Abby' had drawn the ire of most commentators because they allegedly had sex in front of the cameras.

<sup>5</sup> Both definitions are derived from the Merriam-Webster *Online dictionary*, at: <http://www.m-w.com> (accessed 28 February 2005).

gender, ethnicity and even simple choice, to mention only a few. Culture should not be regarded as a closed box, but rather as an open and broad canvas.

Globalisation is a process that simultaneously brings the countries and peoples of the world closer together just as it pushes them further apart, because it is possessed of qualities that both liberate and empower, as much as it has qualities that marginalise and exclude individuals, communities and whole countries from the benefits of the global bounty.<sup>6</sup> Thus, globalisation has made the flow of capital, products, ideas, people, norms and values ever more rapid. It has made this flow seemingly borderless, consequently among the most prevalent descriptions of globalisation is that it has created a 'global village'. The processes of globalisation often operate in contradictory, oppositional and even conflictual fashion. In that regard, the result of these processes has sometimes been positive, especially where it has led to the liberation of oppressed individuals and communities. For example, internet usage has enabled instantaneous and continent-wide appeals against oppressive state practices. Each one of us has used the internet to connect with sources of information that are empowering, that help us do our jobs of promoting and protecting human rights better.

At the same time, many of the images portrayed through the internet, on television or via the radio can be demeaning and disempowering, even racist, thereby impugning the development of holistic notions of an African culture or of African womanhood.<sup>7</sup> In this way, it has wrecked many of what were once concentrated, deeply rooted and positive African cultural values. Leaving aside the content of Big Brother Africa, the show demonstrated how the media of television has become such a dominant and powerful force for defining what should be viewed as the province of the cultural. It also demonstrated (or rather confirmed) the nearly exclusive single lane traffic of the forces of globalisation: from the north to the south. One is hard put to think of any recent screen depiction of events in the south that have had as profound an influence on the media in the north. The problem is compounded by the fact that depictions of the situation in the south are typically designed by media houses in the north. Unfortunately, those kinds of depictions are very often coloured by factors of race, perspective and bias. Very rarely do such depictions care to sensitively and authentically portray the true image of those it is covering.<sup>8</sup>

<sup>6</sup> See World Commission on the Social Dimension of Globalisation *A fair globalisation: Creating opportunities for all* (2004).

<sup>7</sup> J Oloka-Onyango 'Globalization in the context of increased incidents of racism, racial discrimination and xenophobia' E/CN 4/Sub 2/1999/8 para.15.

<sup>8</sup> A great debate broke out when Prof Henry Gates produced a series on Africa in 2000. Particularly vitriolic exchanges were made between Prof Ali Mazrui and Nobel prize-winning author Wole Soyinka.

But Big Brother Africa should also compel us to view the issue of culture as something dynamic and evolving — a point that immediately comes into tension with the idea that many of the commentators reacting to the show argued that the behaviours displayed were decidedly 'un-African'. Such a criticism is insufficient, because even if BBA was a clone of those done elsewhere, it also elicited several dynamics that differed from the shows conducted in other contexts, precisely because it was placed in an African setting. At the same time, the show demonstrated in stark relief the fact that the culture of the contemporary youth is quite distinct from that of their parents. Conversely, criticisms of the show cannot simply be dismissed as the loud cries of defensive conservatives: a marriage between the African 'Moral Majority' and neo-Rastafarians. Rather, they also reflected a genuine fear over the adoption of foreign (read 'Western') social values, and correspondingly of the threat posed to the positive attributes of African culture posed by the forces of globalisation represented by Western TV. These criticisms should also force us to inquire how the rest of the continent would consider some of the practices displayed on the show. Given that the majority of the continent's people are rural based peasants, to what extent are the cultural practices in that sphere given due cognisance and respect by the forces of globalisation?

The title of this paper is thus chosen to capture the multi-edged meanings of the term 'Big Brother' and of the show, and to explore its link to the processes of globalisation and to the notion of cultural space. First, it is to convey a sense of the manner in which the forces and processes of globalisation have come to influence the discussion about the promotion and protection of cultural rights today, whether we are speaking about language, dress, music, literature or dance. Secondly, it is to sound a caution against a dogmatic approach to the notion of culture and its contemporary expression in Africa. The caution is issued, given that so many of the BBA participants were elevated to super-hero status among the youth and even among the not so youthful of their respective countries simply from being in the show. It is also issued so that our interpretation of the notion of culture is at all times subjected to critical interrogation. In other words, we need to be awake to the question: *What is African culture?* And whose culture are we talking about anyway?

Furthermore, we need to ask how the right to culture should be understood and protected in a fashion that promotes the rich heritage of the African condition, but also enables it to meet the challenges presented by a globalised twenty-first century world that literally 'takes no prisoners'? Finally, we also need to find ways in which the right to culture — especially of those peoples and communities that are most threatened by the negative forces of globalisation — can be promoted in such a manner that it does not foster discrimination, inequal-

ity or marginalisation. In this respect, issues such as the protection of traditional knowledge (TK), the trade in cultural goods and the protection of rights such as those to food, to health and to the environment are especially critical in the African context of the debate.

## 2 Cultural rights, globalisation and self-determination

Debating the nexus between globalisation and the right to culture immediately brings to the fore the notion of the right to self-determination, whether in its economic or political expression.<sup>9</sup> The range and impact of the forces of globalisation continue to have a profound effect on life in the twenty-first century, and as such, no area of human existence has been left untouched by this phenomenon. Globalisation is a process possessed of many attributes, and indeed, definitions given to the phenomenon are to a large extent dependent on the angle of the approach of the person seeking to define it. For example, Holm and Sorensen define globalisation as 'the intensification of economic, political, social and cultural relations across borders'.<sup>10</sup> Sholte refers to globalisation as 'processes whereby social relations acquire relatively distanceless and borderless qualities, so that human lives are increasingly played out in the world as a single place'.<sup>11</sup> Yet another author suggests that the world today can be characterised by 'the concurrence of globalisation and marginalisation'.<sup>12</sup>

The processes of globalisation — privatisation, deregulation and economic liberalisation — have profound implications for the ability of states and peoples to determine their economic and political destinies; in a nutshell their rights to self-determination. The cultural influences of globalisation — whether presented in the global media or via the increase in consumerism — have profound implications for the protection and promotion of African cultures. When all these factors are taken into account, we can arrive at the conclusion that globalisation has brought tremendous benefits by way of scientific and technological progress, the enhanced dissemination and circulation of information and the increased social mobility of people. However, it has also led to significant social and cultural dislocation, particularly in the develop-

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<sup>9</sup> See A Orford 'Self-determination after intervention: The international community and post-conflict reconstruction' [http://www.jeanmonnetprogram.org/seminar/03/Orford\\_Chapter\\_4\\_final.rtf](http://www.jeanmonnetprogram.org/seminar/03/Orford_Chapter_4_final.rtf) (accessed 28 February 2005).

<sup>10</sup> H Holm & G Sorensen *Whose world order? Uneven globalisation and the end of the Cold War* (1995), quoted by RJ Holton *Globalisation and the nation-state* (1998) 11.

<sup>11</sup> JA Sholte 'The globalisation of world politics' in D Baylis & S Smith *The globalization of world politics — An introduction to international relations* (1997) 14.

<sup>12</sup> A Aden 'No connection under this number: Africa and internet' (2000) 5 *D & C Development and Cooperation* 24; <http://www.inwent.org/E+Z/1997-2002/de500.5.htm> (accessed 31 March 2005).

ing areas of the world. Because television is an industry — albeit one deeply connected to cultural constructions of society — it is thus important to ask who owns and controls this medium. As noted in the 1999 Human Development Report:<sup>13</sup>

Weightless goods — with high knowledge content rather than material content — now make for some of the most dynamic sectors in today's most advanced economies. The single largest export industry for the United States is not aircraft or automobiles, it is entertainment — Hollywood films grossed more than \$30 billion worldwide in 1997.

Such 'weightless goods' as the electronic media (from music to movies to websites) have become an indispensable part of human existence in the present century. Moreover, through the tremendous amounts of capital that the captains of globalisation are able to mobilise, they also control a substantive portion of the literary and artistic worlds, which in turn have a great influence on both global and local culture. As the 1999 Human Development Report noted, 'Today's flow of culture is unbalanced, heavily weighed in one direction, from rich countries to poor.'<sup>14</sup> It is a singular task to counter-balance this flow, and also to ensure that the rights of those most marginalised by these processes are given greater protection. And yet, the percentage of any of these industries that is owned by individuals or corporate actors from the non-industrialised part of the world is miniscule. We are consequently forced to ask not only what the agents and instrumentalities of contemporary globalisation are transmitting, but also how alternative messages and images can be transmitted. In other words, how can the instrumentalities of globalisation be converted to the positive expression of the cultural values of marginalised groups and individuals?

In seeking answers to this question, it is crucial to appreciate that the processes of globalisation are not divinely ordained, nor are its basic tenets foreclosed from negotiation. 'Globalisation is not a natural event, an inevitable global progression of consolidated economic growth and development.'<sup>15</sup> We do not subscribe to the 'TINA syndrome', as in 'There Is No Alternative' to globalisation. Rather, it is our view that the phenomenon of globalisation is the product of human society, motivated by specific ideologies, interests and institutions. In other words, globalisation has no *a priori* or inevitable existence independent of the structures humankind has put in place. It then becomes essential to encounter and engage globalisation while taking these factors into consideration. In this way, we can identify varied outlets for negotiating and reviewing its terms and consequences. In doing so, we

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<sup>13</sup> UNDP *Human development report* (1999) 4.

<sup>14</sup> As above.

<sup>15</sup> BK Murphy 'International NGOs and the challenge of modernity' (2000) 10 *Development in Practice* 332.

must ask ourselves what the possibilities and limitations presented by globalisation are and how we can strategically and creatively engage them, especially to enhance those aspects of African culture that are positive, and to struggle against those which are not.

## 2.1 The human rights framework

Against the preceding background, we need to ask ourselves: Which human rights framework is relevant to the debate about those aspects of globalisation and the right to culture with which we are most concerned? Several international instruments enshrine the right to culture among their provisions, including the Universal Declaration of Human Rights (Universal Declaration). Article 27 of the Universal Declaration stipulates as follows:<sup>16</sup>

- 1 Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- 2 Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The International Covenant on Economic, Social and Cultural Rights (CESCR) elaborates on this by enjoining states to take steps necessary for the '... conservation, the development and the diffusion of science and culture'.<sup>17</sup> Closer to home, the African Charter on Human and Peoples' Rights (African Charter) speaks of the right to culture within an omnibus provision that also refers to the rights of 'all peoples' to '... their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'.<sup>18</sup> Thus, by combining the literal meaning of the term culture with its expression within international instruments, the parameters of the discussion become more definitive. A number of other instruments refer specifically to the right, either within the context of particular categories of people, or in relation to international cooperation, education, and development.<sup>19</sup> The United Nations Educational, Cultural and Scientific Organisation (UNESCO) is the world body designated with the task of ensuring that cultural rights are

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<sup>16</sup> <http://www.un.org/Overview/rights.html> (accessed 28 February 2005).

<sup>17</sup> See art 15 of CESCR, [http://www.unhchr.ch/html/menu3/b/a\\_cescr.htm/](http://www.unhchr.ch/html/menu3/b/a_cescr.htm/) (accessed 28 February 2005).

<sup>18</sup> See art 22 of the African Charter, <http://www1.umn.edu/humanrts/instreet/z1af-char.htm> (accessed 28 February 2005); also reprinted in C Heyns (ed) *Human Rights Law in Africa* (2004) 134

<sup>19</sup> Eg, see the Declaration of the Principles of International Cultural Co-operation proclaimed by the General Conference of UNESCO (4 November 1966) and the Declaration on the Right to Development (GA Resolution 41/128 of 4 December 1986).

given due recognition and respect, and in this respect it in 2001 promulgated the Universal Declaration on Cultural Diversity.<sup>20</sup>

Besides recognising the individual right to culture, article 15 of CESCR provides for everyone's right to enjoy the benefits of scientific progress and its applications and to benefit from the protection of their scientific, literary or artistic works. Much of what could be described as the 'scientific world' today is brought about by the processes of globalisation. In particular, information and communications technology (ICT) is the most visible face of globalisation that we know.

The following is a framework that emphasises four key platforms upon which the discussion of the link between human rights and the processes of globalisation and its impact on the right to culture should be based:<sup>21</sup>

- 1 The International Bill of Human Rights, comprising the Universal Declaration and the International Covenant on Civil and Political Rights (CCPR), together with CESCR;
- 2 Regional and sub-regional initiatives and contexts that are having an increasingly important role to play in the debate on both the processes of economic liberalisation and the promotion and protection of human rights. These include the African Charter and the many instruments of the sub-regional groups (SADC, ECOWAS and the EAC) which are cropping up around the continent;
- 3 More recent instruments designed to address the situation of special groups marginalised by history or status such as those on women, indigenous peoples and minorities. The Protocol on the Rights of African Women is a prime example of this; and
- 4 The right to development — encompassed in the 1986 Declaration but further enunciated at a number of world conferences, commencing with the World Conference on Human Rights in Vienna in 1993, stemming from which has been derived the notion of the indivisibility, interconnectedness and interrelatedness of all categories of human rights.

This framework enables us to review how the processes of globalisation have had a tremendous impact on both the processual and the substantive content of the different human rights that have been elaborated over the past half-century, whether in treaties or under the rubric of customary international law. It allows us to establish how the right to

<sup>20</sup> <http://www.cesmap.it/ifrao/unescodoc.htm> (accessed 28 February 2005). The adoption of the Declaration was specifically linked to the challenges presented by the 'growing pace of globalisation'. See Report of the 166th session of the Executive Board of UNESCO, 12 March 2003, <http://unesdoc.unesco.org/images/0012/001297/129718e.pdf> (accessed 28 February 2005).

<sup>21</sup> See E/CN.4/sub.2/2000/13 (n 2 above) and J Oloka-Onyango & D Udagama 'Human rights as the primary objective of international trade, investment and finance policy and practice' working paper submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/sub.2/1999/11.



culture is articulated in these instruments and the ways in which that right is best promoted and protected.

From a human rights perspective, therefore, our main concern must be with the profound consequences that globalisation has produced or enhanced and the way in which these relate to the overall promotion and protection of the right to culture in Africa. While understanding that human rights is an important tool for the liberation of individuals and peoples around the world, the project by which it has been defined is oftentimes rather narrow, and it is thus important to also problematise what can be described as the human rights project. As Makau Mutua has argued:<sup>22</sup>

The transplantation of the narrow formulation of Western liberalism cannot adequately respond to the historical reality and the political and social needs of Africa. The sacralisation of the individual and the supremacy of the jurisprudence of individual rights in organised political and social society is not a natural, 'transhistorical' or universal phenomenon, applicable to all societies, without regard to time and place. The ascendancy of the language of individual rights has a specific historical context in the Western world. The rise of the modern nation-state in Europe and its monopoly of violence and instruments of coercion gave birth to a culture of rights to counterbalance the invasive and abusive state.

How has the human rights regime come to the rescue of those who have been most adversely affected by the processes of globalisation? How have African peoples benefited from all the spectacular developments heralded by globalisation? To what extent have the processes of globalisation protected women, children, minority and indigenous peoples, and other marginalised and vulnerable communities from the ravaging despoilation of their cultures? Finally, are those institutions — whether local, national, regional or international — tasked with the function of protecting human rights equipped with the tools necessary to meet the challenges posed by the varied processes of globalisation? As we review the global communications and technological developments heralded by those who can only see the bright side of globalisation, African peoples need to explore further the negative effects that continue to threaten the existence of those cultures that are positive.

## **2.2 Understanding globalisation as a socio-economic and cultural force**

A quick look at the statistics of economic growth and development in the world today clearly demonstrates that while one section of humanity is growing and developing — literally basking in the glow of globalisation — the other wallows in increasing despondency and despair. In other words, the processes most closely associated with globalisation

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<sup>22</sup> M Mutua *Human rights: A political and cultural critique* (2002).

are rife with contradiction.<sup>23</sup> For example, globalisation has broken down many of the social and cultural barriers that have traditionally stood in the way of increased harmony among the peoples of the world. The global spread of music, literature and dress styles (to mention a few), coupled with the increased use of 'global' languages like English and French, have seen people from vastly different parts of the world still find several areas of common interest. Thus, in spite of the different countries from which the Big Brother Africa contestants were drawn, they shared much more in common than what would appear on first sight to hold them apart, among those commonalities being a love for Nike shoes, Levi jeans and rap music, influences which could be described as 'benign'.<sup>24</sup>

On closer scrutiny, however, one cannot fail to observe the marginalising contradictions that the processes of globalisation have cut through national cultures, particularly those of the African people. Connecting the rise of Shari'a militancy in Northern Nigeria in part to the growing influence of globalisation, Ali Mazrui has argued that '[o]ne of the repercussions of globalisation is that it both promotes enlargement of economic scale and stimulates fragmentation of ethnic and cultural scale'.<sup>25</sup> People are forced into their ethnic and cultural cocoons so as to fend off the emasculating forces of globalisation. A collapse is then quickly made between culture and tradition, the latter being the dogmatic and unwavering defence of inherited and time-honoured practices and principles regardless of what impact they have on society. In sum, having lost everything else, tradition becomes the last preserve of one's humanity. At the same time, it is important not to seek an explanation for every negative reaction in things traditional; even tradition (or the claim about its supremacy) does not exist independently of the economic, the social and the political.<sup>26</sup> Moreover, the choice of which tradition to valorise and uphold is a very

<sup>23</sup> Othman & Kessler argue that globalisation processes '... do not together add up to any simple, obvious, natural, irresistible good ... They may just amount to a very mixed, contingent, jumbled and mutable 'package': One whose various contents may change in intensity and even character, independently of one another, over time.' N Othman & C Kessler 'Capturing globalisation: Prospects and projects' (2000) 21 *Third World Quarterly* 1025.

<sup>24</sup> The UNDP describes these as 'global brands' in demand, especially among 'global teens' who '... inhabit a "global space", a single pop culture world, soaking up the same videos and music and providing a huge market for designer running shoes, T-shirts and jeans'. See UNDP (n 1 above) 87.

<sup>25</sup> A Mazrui 'Shari'acracy and federal models in the era of globalisation: Nigeria in comparative perspective' paper presented at the International Conference on the Restoration of Shari'a in Nigeria: Challenges and Benefits, London, 14 April 2001 3.

<sup>26</sup> This is a caution most recently articulated by Mahmood Mamdani in his book on the social and political roots of global terrorism. See M Mamdani *Good Muslim, bad Muslim: America, the Cold War, and the roots of terror* (2004).

conscious political process that often serves to reinforce patriarchy and conditions of discrimination.

In so far as the African situation is concerned, the effects of globalisation have largely been lopsided, with a greater tendency to suppress rather than to liberate or emancipate. In my view, this is because globalisation in its contemporary expression essentially represents *corporate* culture — the culture that puts profit above every other human value, and a culture concerned much more with form than it is with substance. The advertisement for the soft drink Sprite tells it all: 'Thirst is nothing; image is everything!' Corporate culture is not concerned with detail, but the bigger picture; let the world grow richer. Corporate culture is not concerned with who is benefiting from this largesse, or even how that bounty is distributed. It is in this regard, in particular, that the Big Brother Africa show raises fundamental questions about whether globalisation is a force for good or otherwise. This is a point to which we now turn.

### 3 The challenges of globalisation to cultural rights

The broad focus of the preceding sections of the paper allows us to narrow our lenses somewhat to the challenges presented by the processes of globalisation to the promotion and protection of cultural rights within the African context. In so doing, it is important to make the preliminary point that, in many respects, the right to culture encompasses and impacts on many related rights. For example, cultural or traditional knowledge (TK) and its exploitation or misappropriation have implications for the right to health and the right to food, not to mention the right to an adequate standard of living. The protection of the right to a healthy environment is obviously threatened by actions to exploit minerals and other natural resources, actions which have the consequence of disrupting communal life. At the same time, the connection between the land in which these resources are found and the people that live there have profound cultural, religious and spiritual implications. Threats to language will have implications for the right to freedom of expression and also for the right to education. The right to learn and use the language of one's choice is a basic human right.<sup>27</sup> In other words, the interconnectedness of cultural rights is legion. Dinah Shelton has argued that globalisation can affect cultural and linguistic rights, although the evidence seems contradictory, in that globalisation:<sup>28</sup>

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<sup>27</sup> See art 2 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, [http://www.unhchr.ch/html/menu3/b/d\\_minor-i.htm](http://www.unhchr.ch/html/menu3/b/d_minor-i.htm) (accessed 28 February 2005).

<sup>28</sup> D Shelton 'Protecting human rights in a globalised world' (2002) 25 *Boston College International and Comparative Law Review* 297.

... facilitates the transfer of cultural manifestations and cultural property. A study by the UN Economic and Social Council (UNESCO) indicates that commerce in cultural property tripled between 1980 and 1991 under the impulse of satellite communications, internet and video cassettes. Yet in this field, as in others, mergers and acquisitions have concentrated ownership to the detriment of local industry. The Hollywood film industry represented 70% of the European market in 1996, more than double what it was a decade earlier, and constituted 86% of the Latin America market. In the opposite direction, traditional cultures across the world are being transmitted and revived in multi-ethnic states through the movement of peoples, their languages, and their beliefs.

But it is also important to remember that there are not only inequities in the flow of cultural products, but also in the mechanisms of trade liberalisation designed to manage them. Represented in the main by the World Trade Organisation (WTO) and transnational corporations (TNCs), these institutional mechanisms of globalisation are greatly implicated in promoting the lopsided flow of goods and services, including those of a cultural nature. Thus, whereas the WTO is presented as a bureaucratic or technocratic institution devoted only to the promotion of economic objectives, it is in fact greatly influenced by the political context in which it operates.<sup>29</sup> Practices that are considered anathema in countries in the south — protectionism, government subsidies and state support to weak industries — are still widely tolerated in the north, without any remorse or guilt over this duplicity. An issue that has dogged the WTO since inception in 1995 has been the provision of agricultural subsidies by the United States and the European Union to farmers who are clearly not competitive on the world market. For example, in 2001 and 2002, American farmers received cotton subsidies of US\$4 billion for a crop worth only US\$3 billion. In spite of the commitment to development (including a pledge to substantially reduce or end subsidies to agriculture) made at the Fourth Ministerial Meeting in the Qatari capital Doha, movement in this area has been painfully slow. Although the WTO ostensibly operates on the basis of consensus, powerful states are better able to exercise their influence in determining trade policy and practice even if they are numerically fewer.<sup>30</sup> Fresh attention will have to be paid to one of the principle side effects of the processes of globalisation — the globalisation of English as the international *lingua franca*. The international communications industry that includes television, the internet, radio, film and video, have promoted English as the language of communica-

<sup>29</sup> For a critical analysis of the operations of the organisation, see BL Das *The WTO and the multilateral trading system: Past, present and future* (2003).

<sup>30</sup> Developing and underdeveloped countries have recently woken to the need to challenge developed countries at their own game. Thus, Brazil successfully challenged the United States on the issue of cotton subsidies. See 'Cotton subsidies must go' (editorial) *The New Vision* 23 June 2004; <http://newvision.co.ug/D/8/14/36775> (accessed 28 February 2005).

tion. The old saying 'a lost language is a lost culture; a lost culture is invaluable knowledge lost'<sup>31</sup> is becoming a growing reality in Africa. In Kenya alone, it has been observed in a report by UNESCO that 16 out of Kenya's 42 languages are in serious risk of disappearing.<sup>32</sup> At the end of the twentieth century, according to researchers at the Nigerian Centre for Endangered Languages, out of 6 800 languages classified as threatened, being spoken by roughly six billion people around the world, 2 400 of them (35%) are indigenous to Africa.<sup>33</sup> The consequences of such a development in terms of promoting and protecting the right to culture are indeed profound.

At the same time, it is important not to forget the way in which the processes and instruments of globalisation have a positive effect on culture and its expression, especially for the protection of the cultural rights of minorities and indigenous peoples. For example, the internet has been an essential tool of mobilisation and empowerment for contemporary civil society movements, whether for human rights, the protection of children or the environment. Consequently, the internet has provided an immeasurable instrument of conscientisation and concerted civil society action. The immense power of this 'globalisation from below' was apparent when civil society played a critical role in ensuring that the Third Ministerial Meeting of the WTO in Seattle in 1999 was aborted. Despite the limitations in the scope and perspectives of the global media, the fact that corporations like CNN and the BBC are able to produce news in real time (and that they sometimes cover issues relating to endangered peoples and the illicit practices of TNCs) is certainly a positive development attributable to globalisation. Such power should not be underestimated.

But in order to fully understand the implications of these developments, we need to turn to an examination of the way in which they have been played out within the African human rights context. In so doing, we need to concretely tackle the issue of the promotional, protection and enforcement roles of the African Commission on Human and Peoples' Rights (African Commission) in dealing with the phenomenon of globalisation and guardianship over the right to culture.

### **3.1 Revisiting the role of the African human rights regime in relation to cultural rights**

African governments have devoted considerable attention to the articulation of the right to culture, and have in some instances drawn criticism for doing so. Such criticism has mainly been made over the African

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<sup>31</sup> See K Cheruiyot 'Our languages are dying' *One World* 24 February 2003, <http://www.globalpolicy.org/globaliz/cultural/2003/0224language.htm> (accessed 28 February 2005).

<sup>32</sup> As above.

<sup>33</sup> As above.

Charter. It has also been made with regard to instruments like the more recent African Union Model Law for the Protection of Local Communities Farmers and Breeders and the Regulation of Access to Biological Resources — an instrument designed to protect and enhance Africa's biodiversity from indiscriminate corporate exploitation, and to secure farmers' rights.<sup>34</sup> The latter instrument is Africa's response to the loopholes in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) with regard to the protection of traditional knowledge and also as a counter-point to existing regimes of intellectual property rights (IPRs) protection that give priority to plant breeders' rights (PBRs) as opposed to the rights of farmers.<sup>35</sup>

The criticisms that have been made are largely on account of the fact that the African Charter — perhaps more than any other international human rights instrument — attempted to grapple with the tensions introduced by the universalisation of human rights ideals, and their practical enforcement within local contexts. In other words, the African Charter straddles some of the most contentious issues in the discussion about cultural relativism — the argument that challenges the local application of ostensibly universal human rights standards.<sup>36</sup> The introduction of the single word 'peoples' into the title of the instrument both reflected and generated a considerable debate on the extent to which the rights and interests of the individual should be subjected to the welfare and cohesion of the community.<sup>37</sup> It continues to be an issue of concern.

Article 17(2) of the African Charter confers the right on every individual to freely take part in the cultural life of the community in which they live. Article 17(3) calls upon all states to promote and protect the traditional values recognised by the community. The right to cultural development is guaranteed under article 22(1) of the same Charter. A good number of the Constitutions of African states — among them

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<sup>34</sup> For an analysis of the rationale and contents of the law, see JA Ekperé 'The African Union model law for the protection of the rights of local communities, farmers and breeders and the regulation of access to biological resources' in C Bellmann *et al* (eds) *Trading in knowledge: Development perspectives on TRIPS, trade and sustainability* (2003) 232-237.

<sup>35</sup> The main international organisation that protects the rights of plant breeders is the Union pour la Protection des Obtentions Végétales (UPOV), translated as the International Union for the Protection of New Varieties of Plants. The Convention was signed in Paris in 1961 and entered into force in 1968, and has been revised thrice since (in 1972, 1978 and 1991). For a comprehensive analysis, see ICTSD/UNCTAD *Intellectual property rights: Implications for development* (2003) 52-55.

<sup>36</sup> For an analysis of the arguments on cultural relativism, see DL Donoho 'Relativism in international human rights law' unpublished LLM dissertation, Harvard Law School, 1989.

<sup>37</sup> For an articulation of the arguments surrounding how the issue of culture was manifested in the Charter, see M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1996) 35 *Virginia Journal of International Law* 339.

the Ethiopian, South African and Ugandan ones — recognise the individual and the collective right to different forms of cultural expression, which can be extended to custom, language and religious practices.<sup>38</sup> In other words, the issue of cultural expression is considered to be fundamental. A more complicated issue is the way in which the right should be protected, and especially how a balance should be drawn between the protection of the right to culture and a host of other rights. In particular, there have been tensions between the protection of what is argued to be a right to culture and women's human rights — a point that we shall turn to later. For the present, it may be most appropriate to examine the issue with regard to the implementation of the right in the African situation. This necessitates a look at how the African Commission — the main institution for the promotion and protection of human rights on the continent — has approached the tensions generated by the forces of globalisation versus the protection of human rights.

### 3.2 The African Commission

A useful starting point for this analysis would be a recent case decided by the African Commission which involved a number of issues related to the definition of the term 'peoples' in the African Charter and to the obligation of the state within the context of globalisation. The decision in question is the case of *SERAC and Another v Nigeria*.<sup>39</sup> The case involved an examination of the situation of human rights violations in the Niger delta, and is the perfect case for a study of how the forces of globalisation impinge on the protection of human rights. It will be recalled that disputes over the exploitation of the oil resources of this region of Nigeria have been of considerable duration. They culminated with the mid-1990s execution of poet and social activist Ken Saro Wiwa of the Movement for the Survival of the Ogoni Peoples (MOSOP) by the Sani Abacha military government. The petition brought to the African Commission sought redress for the actions of the Nigerian government (and private oil companies) in exploiting and damaging the environment of the Delta. The petitioners argued that such exploitation violated a host of economic, social and cultural rights, including the right to housing, the right to food, and (most importantly for

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<sup>38</sup> See K Henrard & S Smis 'Recent experiences in South Africa and Ethiopia to accommodate cultural diversity: A regained interest in the right of self-determination' (2000) 44 *Journal of African Law* 17.

<sup>39</sup> Communication 155/96. I have extensively examined this case elsewhere. See J Oloka-Onyango 'Reinforcing marginalized rights in an age of globalization: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review* 851.

present purposes) the right — enshrined in Article 21 — of all peoples to '... freely dispose of their wealth and natural resources'.<sup>40</sup> The African Commission largely agreed with the petitioners, making orders as to what the Nigerian government had to do in order to provide redress to the affected peoples.

The Commission's decision did not directly refer to the notion of self-determination — in part a reflection of a degree of uneasiness about the use of the term, given the volatility of issues relating to statehood and sovereignty (often interpreted as secession) in the African context.<sup>41</sup> Indeed, a reading of the African Charter will reveal a certain degree of coyness by its drafters in using terms such as 'minorities' or 'indigenous peoples'.<sup>42</sup> Neither did the Commission consider the case as primarily one involving the protection of cultural rights. However, a closer reading of the decision illustrates that, by stating that the Nigerian government violated the rights of the Niger Delta *peoples*, a critical advance was made with respect to the adoption of a more holistic approach to the notion of peoples, and by extension, to the protection of their cultural rights. By implication, the case has fairly profound implications for the application of the idea of the right to self-determination in the African context — the right which we have argued to be at the foundation of all rights, including the right to culture.<sup>43</sup> The traditional point of view considers the term 'peoples' as used in the African Charter to apply principally to states, in the same way that 'self-determination' has been applied only with regard to the principle of liberation from colonial domination, or the external dimensions of self-determination.<sup>44</sup> Put another way, the language of the Charter (and the initial intent of its drafters, who were African heads of state) is very much state-centred and patronising. For example, it is not by accident that attention to the issue of minorities and indigenous persons in the

<sup>40</sup> *SERAC & Another v Nigeria*, para 58.

<sup>41</sup> There has only been one decision made by the African Commission on the issue of self-determination, and the petition failed. See *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995). For a good examination of the various conceptions of the term 'peoples', see R Kiwanuka 'The meaning of 'people' in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80.

<sup>42</sup> See NB Pityana 'The challenge of culture for human rights in Africa: The African Charter in a comparative context' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 234.

<sup>43</sup> n 42 above, 233-234.

<sup>44</sup> See J Oloka-Onyango 'Heretical reflections on the right to self-determination: Prospects and problems for a democratic global future in the new millennium' (1999) 15 *American University International Law Review* 151.



African context is only a recent, late-1990s development.<sup>45</sup> The *SERAC* decision clearly demonstrates that the Commission was not shy to read into the words of the Charter a meaning different from that traditionally ascribed to them.

In other words, if we pursue the logic of the *SERAC* decision to its rational conclusion, then minorities, indigenous persons and other categories of peoples who find no explicit mention in the African Charter, but are the subject of considerable human rights violations — especially with regard to matters of a social, economic and cultural nature — can find redress. There is no reason to believe that such methods of analysis cannot be applied to the realisation of the right to culture with respect to a host of other issues in the African context. In an extensive article on this issue, Barney Pityana (formerly a member of the African Commission) has argued that there is a need for the ‘... legitimising of all cultures as sources of rights’.<sup>46</sup> And he continues: ‘More importantly, rights — or understandings of them — change and vary; they are vibrant and dynamic.’ Thus, in the context of globalisation, special attention needs to be given to how best to protect those vulnerable individuals, groups and communities from the adverse consequences of globalisation. In the following section of the paper, we turn to a consideration of how globalisation has come to play a critical role in both the exploitation and the protection of indigenous peoples’ traditional knowledge and way of life.

### 3.3 Promoting and protecting the right to traditional knowledge

The Ogoni decision demonstrates that one of the most challenging issues in the age of globalisation is the matter of how to deal with the tensions generated by pursuing the goals of globalisation (liberalisation, privatisation and increased trade), and the protection of a host of human rights, including the right to culture. As globalisation promotes industries such as tourism, mineral extraction and forest and other natural resource exploitation, the livelihoods and cultural mores of many peoples in Africa are placed under threat. No other issue more clearly illustrates these tensions than that between globalisation and the

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<sup>45</sup> The first time that the African Commission began to consider the issue of minorities and indigenous peoples was at a meeting organised by the United Nations High Commissioner for Human Rights. The result of the meeting was the Kidal Declaration on Indigenous Peoples and Minorities (E/CN.4/Sub.2/AC.5/2001/3) of January 2001. That Declaration recognised the complexity of the concept ‘minorities’ and ‘indigenous peoples’ as applied in the African context; it encouraged further dialogue on the subject and made several other recommendations. Soon thereafter, the African Commission established a Working Group on the Rights of Indigenous Peoples and Communities in Africa, whose final report will be reviewed at the next meeting of the Commission.

<sup>46</sup> See Pityana (n 42 above) 227.

protection of the right to traditional knowledge, considered a critical component of the right to cultural expression. According to Susan Hawthorne, this has been the natural progression of the capitalist system of development:<sup>47</sup>

Export for its own sake, as a prop to uphold a global economic system which brings profit only to entrenched elites, also brings increased poverty, dispossession, dislocation and an imposed homogeneity of culture to the poor and dispossessed. With each new period new forms of exploitation are invented to maintain the access of capitalists to free resources. In the colonial era, it was land and natural resources; in the post-colonial era the focus was on cheap labour resources in agriculture and other areas of primary production such as mining and forestry. In the era of globalisation the trend is toward the exploitation of knowledge resources.

The WTO's TRIPS agreement (the instrument designed to provide regimes of protection for IPRs) is of critical concern to an understanding of how knowledge resources are affected by globalisation.<sup>48</sup> Although part of the regime of trade liberalisation put in place under the WTO agreements, TRIPS in fact runs in a direction entirely opposite to the professed objective of the organisation. This is because TRIPS is quite clearly an instrument of monopoly, with serious implications for the rights to health and to food.<sup>49</sup> However, it came within the WTO framework on account of the operation of large and influential transnational corporations and the lobbying of their governments to ensure increased protection for intellectual property rights.<sup>50</sup> The film, music and pharmaceutical industries were particularly influential in this regard. In this respect, TRIPS is a major instrument in the universalisation and homogenisation of products and consumption patterns.

However, in furthering the protection of this category of rights, TRIPS not only adopted developed country standards of protection and sought to apply them to the rest of the world, but it made several additional changes to the IPR regime that have had far-reaching consequences. For instance, TRIPS does not recognise traditional or intellectual knowledge. In contrast, the Convention on Biological Diversity (CBD) does, but unlike the former, it does not have mechanisms for enforcement.<sup>51</sup> In

<sup>47</sup> S Hawthorne 'The politics of farming and global theft: Africa and feminism from an Australian perspective' (2003) 55 *Agenda* 95.

<sup>48</sup> For a broad discussion, see S Ricketson 'Intellectual property and human rights in S Bottomley & D Kinley (eds) *Commercial law and human rights* (2002) 187-213.

<sup>49</sup> On the general situation with respect and the protection of these rights, see P Drahos 'The rights to food, health and intellectual property in the era of "biogopolies"' in Bottomley & Kinley (n 48 above) 215-233. On the African situation, see F Mangeni 'Implementing the TRIPS agreement in Africa' in Bellman *et al* (n 34 above) 220.

<sup>50</sup> This point is appreciated even by scholars who are otherwise very much in support of the liberalisation of global trade. See eg J Bhagwati *In defence of globalisation* (2004).

<sup>51</sup> The CBD entered into force in 1993, and is concerned, *inter alia*, with the 'equitable sharing of the benefits arising out of the utilisation of genetic resources'. See especially arts 8(j) & 15.

order for indigenous peoples to protect their secrets, they must place them in the public domain, amounting to a '... Catch-22 trap, which allows the unscrupulous to exploit the knowledge'.<sup>52</sup>

Secondly, although the problem of *bio-piracy* (the theft of such knowledge and its patenting by multinational corporations) has been in existence for a long time, under the propulsion of the forces of globalisation, it has assumed new dimensions.<sup>53</sup> Thus, patents have been issued in respect of 'inventions' already in the public domain such as turmeric, neem, ayahuasca (yage) and basmati,<sup>54</sup> and in the case of Africa, with respect to the snake-bean tree in Zimbabwe<sup>55</sup> and the hoodia cactus from among the San peoples of the Kalahari. Although some of these patents have been successfully challenged, there is no way of knowing how many other products are similarly affected.<sup>56</sup> Moreover, the old adage 'prevention is better than cure' clearly applies in this instance, especially because neither developing countries nor those indigenous groups most affected by such violations have the resources to challenge those who take out such patents. There is also a clearly gendered dimension to the issue of the exploitation of traditional knowledge. Women in many African societies are the repositories of such knowledge, particularly in terms of its relationship to medicinal, food or other properties. However, when that knowledge enters the public domain, whether legitimately or not, it is doubtful that the women from whom this knowledge principally came are

<sup>52</sup> A Kirby 'Traditional knowledge "in peril"' *BBC News* 19 February 2004, <http://news.bbc.co.uk/1/hi/sci/teach/3496629.stm> (accessed 28 February 2005); UNU-IAS 'The role of registers and databases in the protection of traditional knowledge: A comparative analysis' January 2004, [http://www.ias.unu.edu/binaries/UNUIAS\\_TK-RegistersReport.pdf](http://www.ias.unu.edu/binaries/UNUIAS_TK-RegistersReport.pdf) (accessed 28 February 2005).

<sup>53</sup> For a critical analysis of this issue, see RL Gana 'Has creativity died in the third world? Some implications of the internationalisation of intellectual property' (1995) 24 *Denver Journal of International Law and Policy* 143.

<sup>54</sup> For an analysis of the gaps in the protection of traditional knowledge, see D Weissbrodt & K Schoff 'Human rights approach to intellectual property rights protection: The genesis and application of Sub-Commission Resolution 2000/7' (2003) 5 *Minnesota Intellectual Property Review* 15-21, <http://mipr.umn.edu/archive/v5n1/Weissbrodt.pdf> (accessed 28 February 2005).

<sup>55</sup> See MM Phillips 'Bitter remedies: The search for plants that heal generates international feuding' *The Wall Street Journal* 8 June 2001, [http://www.lind.org.zw/people/herbs/snake\\_bean.htm](http://www.lind.org.zw/people/herbs/snake_bean.htm) (accessed 28 February 2005).

<sup>56</sup> In respect of the hoodia, following a challenge to the patenting of the cactus without acknowledging the San's contribution by Pfizer, an agreement was reached between the San and the government, under which the agreement and some 100 000 San peoples in four countries — Angola, Botswana, Namibia and South Africa — will receive at least three more payments during the clinical testing of the drug. See G Thompson 'Bushmen squeeze money from a humble cactus' *New York Times* 1 April 2003, <http://www.williams.edu/go/native/san.htm> (accessed 28 February 2005). See also T Mangold 'Sampling the Kalahari cactus diet,' *BBC News* 30 May 2003, <http://news.bbc.co.uk/1/hi/programmes/correspondent/2947810.stm> (accessed 28 February 2005).

duly rewarded. It is necessary to turn to a broader consideration of this issue, as it is fundamental to the comprehensive understanding of the tensions involved in promoting and protecting the right to culture.

### 3.4 Culture, globalisation and the issue of women's human rights

A gendered analysis, i.e. a discussion of the manner in which promoting and protecting the right to culture has implications for relationships between men and women, is critical to an understanding of how the processes of globalisation impact upon the right to culture. This is because an important dimension of culture regards the formation of notions of masculinity and femininity. The widespread diffusion of communication technologies prompted by globalisation has largely enhanced ideas about gender equality and equity: 'The personal is political' is becoming a more globally accepted premise for understanding the manner in which violations of women take place at all levels of society. The application of the principle has politicised and galvanised many women, some of whom were never active before. It has also enabled many of those who were already active to develop more independent and self-defined relationships to politics.<sup>57</sup> Through the influence in part of the globalisation of human rights standards, cultural practices that violate human dignity and personhood have also been subjected to critical exposure, eventually leading to their curtailment and abolition. The most commonly cited is the practice of female genital mutilation (FGM), which is in clear violation of a host of human rights standards, albeit that the notion of 'culture' or 'tradition' is often invoked to justify the practice.<sup>58</sup> Other practices include dowry payments, levirate marriage (wife inheritance) and discriminatory regimes of inheritance. The FGM issue clearly demonstrates that the expression of culture is not value-neutral or even ungendered. Many cultures either valorise highly masculinist practices or they marginalise, demean or victimise women, children and minorities. Finding a balance between ensuring that in the midst of the challenges presented by the processes of globalisation, the promotion and protection of the right to culture is a delicate task. This is because there are additional dangers in emphasising a right to culture approach which omits consideration of the gendered nature of the societies within which such a right is being promoted or protected. At the same time it is important to be aware of the complex interface of the racial and patronising elements that have influenced the debate about such cultural practices.

African cultures and traditions as they presently exist are in the main made *for, of and by* men! Many features of customary law effectively

<sup>57</sup> AR Miles *Integrative feminism: Building global visions 1960s-1990s* (1996) 3.

<sup>58</sup> H Lewis & I Gunning 'Cleaning our own house: 'Exotic' and familiar human rights violations' (1998) 4 *Buffalo Human Rights Law Review* 123.

operate (to borrow the words of the 1995 Uganda Constitution) '... against the dignity, welfare or interests of women [and] undermine their status'.<sup>59</sup> Many constitutions of countries around the continent (such as Zimbabwe) incorporate contradictory provisions on the application of culture that have the effect of negating the promotion and protection of women's human rights.<sup>60</sup> Perhaps the case that has drawn most commentary with regard to the discriminatory application of cultural practices is the decision in *Venia Magaya v Nakayi Shonhiwa Magaya*,<sup>61</sup> the main issue in which was whether a woman could inherit her father's estate if he died without a will. Denying that a woman could indeed inherit on account of the custom of the community from which she came, the learned judge in the case observed that '[t]he woman's status is therefore basically the same as that of any junior male in the family'.<sup>62</sup> In an earlier article that covered this issue, I have stated:<sup>63</sup>

Upholding discrimination against women simply on account of their sex has several implications for their enjoyment of human rights, both civil and political and economic, social and cultural. Among the reasons why the *Magaya* decision is important are issues relating to participation in both economic and political life. But even more importantly is that deeming a woman a minor means that actions such as 'chastisement', better known as domestic violence, would also be deemed acceptable means of subjecting women to the traditional 'discipline' of their husbands *cum* guardians.

Unfortunately, the *Magaya* decision is not an isolated one. Numerous jurisdictions around the continent regularly give more weight to cultural practices that support patriarchy and discrimination than they do to the rights of women. In such a context, and particularly when added to some of the ravages invoked by the varied processes of globalisation, the situation of women becomes even more precarious. There is consequently a need for concerted action to ensure that domestic legislation is reformed to guarantee that cultural practices that violate the rights of women are subjected to a rigorous test of their conformity to international human rights principles, and especially to the African Charter provisions on non-discrimination. In the age of globalisation, such action is imperative. Most importantly, how do we ensure that in

<sup>59</sup> Art 33(6) & 32(1); cultural objective number xxiv of the National Objectives and Directive Principles of State Policy encourages the incorporation into aspects of Ugandan life all cultures and customary values consistent with fundamental rights and freedoms and human dignity.

<sup>60</sup> See Pityana (n 42 above) 237-239.

<sup>61</sup> Judgment No SC 210/98/Civil Appeal No 635/92 of the Supreme Court of Zimbabwe (unreported).

<sup>62</sup> n 61 above, 10.

<sup>63</sup> J Oloka-Onyango 'Human rights and sustainable development in contemporary Africa: A new dawn, or retreating horizons?' (2000) 6 *Buffalo Human Rights Law Review* 65.

the discussion about globalisation and its impact on human rights, we adhere to the principles of meaningful participation and inclusion in the decision-making processes that give shape and impetus to the phenomenon and recognise the diversity of views that seek an audience?<sup>64</sup>

However, it is not only the conceptual formulation of the laws and constitutions that is a problem, but also the fact that African political, social and economic institutions continue to be dominated by men and marginalise women. For example, Africa is yet to have a female head of state. The Organization of African Unity (and its successor, the African Union) have never been headed by a woman. In a feminist analysis of the implementation of the African Charter, Murray has argued that in a comparative sense the African Commission is '... the most representative of all regional human rights bodies ...'.<sup>65</sup> However, the instances in which the institution has covered issues relating to the promotion and protection of women's human rights are few and far between. For example, despite the very progressive tenor of the *SERAC* decision, it elicited a marked degree of blindness to the gendered nature of virtually all the violations that took place in the Delta. And yet, throughout the history of the struggles over the resources and environment of the region, women have been critical actors in protesting the processes of environmental despoilation and in decrying the dearth of the provision of social services by way of basic education, clean and potable water and adequate health facilities. Although the Commission correctly focused on the violation done to rights in the family and to several other economic and social rights, to omit a gendered analysis from a consideration of these violations is to do only half the job.<sup>66</sup> The Commission needs to be aware that the differential status of men and women — even during the course of a process of human rights violations that affected the community as a whole — will more often than not result in more adverse consequences for women.

It is hoped that the African Commission will evolve to become more sensitive to issues concerning the rights of women. In some respects, positive steps have been taken. An example is the appointment of a Special Rapporteur on the Rights of Women in Africa, who is acknowledged to have made some critical improvement to the Commission's approach to the situation of women on the continent.<sup>67</sup> The promul-

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<sup>64</sup> See D Gantz 'Failed efforts to initiate the "millennium round" in Seattle: Lessons for future global trade negotiations' (2000) 17 *Arizona Journal of International and Comparative Law* 351-352.

<sup>65</sup> R Murray 'A feminist perspective on reform of the African human rights system' (2001) 1 *African Human Rights Law Journal* 207.

<sup>66</sup> For a gendered critique of this aspect of the decision, see Oloka-Onyango (n 39 above).

<sup>67</sup> See AK Wing & TM Smith 'The new African Union and women's rights' (2003) 13 *Transnational Law and Contemporary Problems* 59-64.

gation of the Protocol to the African Charter on the Rights of Women in Africa is another important development, although the instrument is yet to come into force.<sup>68</sup> The real test of the pudding will come through the ability of African civil society actors to ensure that the lofty ideals of the Protocol are implemented in practice. There are additional problems in the fact that in the same way that it has internationalised human rights standards and thus greatly empowered women, globalisation has also led to the increased incorporation of women in the labour market. As such, many women have been liberated from the drudgery and oppression of unpaid household labour. Given that many negative cultural practices exercise an influence over women because of their economic dependence on men, the ability to be economically autonomous helps in expanding their space of operation. At the same time, the conditions under which they toil in many of the export promotion zones that have sprung up around Africa to meet the pressures of global capitalism leave a great deal to be desired. A report by the Kenya Human Rights Commission on the cut flower industry provides shocking testimony of the Dickensian conditions under which employees — the majority of whom are women — operate.<sup>69</sup> Although there is a clamour for the establishment of these kinds of industry — prompted in large part by schemes such as the African Growth and Opportunities Act — there is a need for considerable caution in embracing what may turn out to be a poisoned chalice. And in this respect, the role of civil society is critical.

### 3.5 Buttressing African civil society

The complex implications of the processes of globalisation for the realisation of the right to culture are becoming more apparent by the day. However, if institutions such as the African Commission, governments and international organisations are to pay increased attention to those implications, civil society must play a more active role. The World Bank was persuaded by concerted civil society action not to provide the financing for the construction of the Bujagali Dam in Uganda. Although the project was ultimately abandoned on account of allegations of bribery, it was a result of the coming together of grassroots environmental activists and threatened minorities in the region of the dam. The

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<sup>68</sup> As at the end of April 2005, 10 of the 15 countries required to bring the instrument into force had ratified the Protocol.

<sup>69</sup> See Kenya Human Rights Commission *Beauty and agony: An advocacy research on the working conditions in the flower plantations in Kenya* (2001). See also C Majtenyi 'Thorny issue: Flower firms accused of exploiting workers' *The East African* 18 February 2002.

formula for the sharing of proceeds on the Chad-Cameroon oil project was greatly influenced by the operations of civil society and its trans-continental mobilisation, which argued that the needs and interests of the indigenous peoples affected by the project needed to be taken into account. Civil society was instrumental in both the case of the hoodia cactus, as well as in the Zimbabwean snake-bean tree dispute. In other words, civil society must play a more active role in ensuring that the processes of globalisation do not adversely affect the promotion and the protection of the right to culture.

Particular attention needs to be paid to issues such as the promotion and protection of languages, land rights, the rights of pastoralists, the protection of traditional knowledge from biopiracy, and the application of exclusionary environmental policies that affect forest dwellers and other hunter-gatherers. What becomes clear is that many African activists are rather shy of involving themselves in these issues, and in many instances it is international non-governmental organisations that carry the mantle. Consequently, there is a need for African civil society to be more proactive, and especially to become more engaged in the many discussions taking place on issues such as traditional knowledge in organisations like the WTO and the World Intellectual Property Organisation. African civil society needs to more actively engage with African governments in the articulation of progressive positions on these issues and especially in making sure that international financial institutions (the World Bank and the International Monetary Fund) are more attuned to the various dimensions of the issue.

At the same time, international bodies such as the African Commission need to review their approach to non-state actors. For example, in the *SERAC* decision, the main focus of condemnation for the commission of the violations complained of was the Nigerian government. Little attention was given to the obligations and responsibilities (in human rights terms) of the companies that were intimately involved, not only in the exploitation of the resources of the region, but in many of the human rights violations that occurred there. It is imperative that in the age of globalisation, institutions such as the African Commission are compelled to consider the human rights obligations of non-state actors such as TNCs with enhanced attention.<sup>70</sup> Through the combined effort of civil society and the monitoring and promotional bodies that are in existence, globalisation can be turned into a force for the progressive realisation of all human rights, but in particular, as a force for the promotion and protection of the right to culture.

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<sup>70</sup> For an analysis of this issue, see Oloka-Onyango (n 39 above) 895-905.



## 4 Conclusion and recommendations

This paper has focused on only a handful of the many issues that arise in the debate over the impact of globalisation on the promotion and protection of cultural rights in the African context. What is clear is that in the era of globalisation, it is not enough to look only to the state as the primary obligor with respect to either dealing with the negative consequences of globalisation, or to the enhanced protection of the right to culture. A considerable number of actors, other than states, should equally be obliged to respect, protect and fulfil the individual or group rights to a cultural life. Among these are transnational corporations, the family and communities. There is consequently a need to develop a framework within which the responsibility for human rights violations should not only be that of the state, but also that of other actors. In this arrangement, it would be possible to bring claims of human rights violations (including violations of the right to culture) against the state as much as it would be possible to do so against other (non-state) actors. The challenge that face us as human right activists is to critically reflect on the most appropriate manner to enhance the positive and confront and eliminate the negative aspects of globalisation. Only then can we ensure that the processes of globalisation are sensitive to the goals of sustainable human development of which the promotion and protection of human rights are paramount.

Many of the processes that we know as globalisation will in all probability continue to mark the trends of human social and economic development for the near future. Needless to say, none of these processes are divine or pre-ordained; they emanate from (and are influenced by) human agency. As such, what is critical is the manner in which human society arranges itself and guarantees that these processes are made sensitive to the better protection of human rights. It is necessary to check these processes in order to ensure that they are in line with international human rights law. A great need exists to review the law to ensure that human rights are respected, protected and fulfilled in the globalisation process by all actors involved, namely the state, multi-lateral institutions, transnational corporations, families and communities.

# The advisory jurisdiction of the African Court on Human and Peoples' Rights

*AP van der Mei\**

Lecturer, Department of International & European Law, University of Maastricht, The Netherlands

## Summary

*The entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court of Human and Peoples' Rights on 25 January 2005 came as a huge achievement for the protection of human rights in Africa. The creation of an institution that would deliver binding decisions on human rights issues has evaded the African system since the advent of the African Charter. This article looks critically at the provision of the African Court Protocol, paying particular attention on the Court's competence to give advisory opinions. This is in the light of the fact that access to the Court is limited in that individuals and NGOs do not have direct access thereto. This article argues that individuals and NGOs can have access to the Court via seeking advisory opinions, as the provision dealing with this aspect is broadly worded. It is also observed that in exercising its advisory opinion powers, the Court can be able to address a wide range of human rights issues. In this article, three areas of the Court's advisory competence is looked into: Firstly, who can request an advisory opinion; secondly, what forms the subject matter of a request for an advisory opinion; and thirdly, what is the effect of an advisory opinion on the compatibility of domestic laws with international law. This article contends that due to the limited nature of access to the Court, the Court should adopt a very flexible approach in exercising its powers to enable more accessibility, because in any event the complaints procedure under the African Commission is virtually open to anybody.*

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\* Master of Law (Groningen), Doctor of Law (Maastricht); AP.vanderMei@IR.unimaas.nl. The author wishes to thank Eva Rieter (Department of International & European Law, University of Maastricht) for her comments on the first draft of this article.

## 1 Introduction

Although legal commentators have welcomed the creation of the African Court on Human and Peoples' Rights (Court), they have generally been quite sceptical about its added value.<sup>1</sup> The main reason for this concerns the limited accessibility of the Court for individuals. The Court's constituent treaty, the Protocol<sup>2</sup> to the African Charter on Human and Peoples' Rights<sup>3</sup> on the establishment of the African Court on Human and Peoples' Rights, does not even come close to the initial goal of offering Africans 'recourse to judicial process on command'.<sup>4</sup> It only entitles individuals to institute proceedings if the Court grants them permission to do so and, more troublesome, if the state they accuse of having violated international human rights law has

<sup>1</sup> For comments on (earlier drafts of) the Protocol, see eg AP van der Mei 'The new African Court on Human and Peoples' Rights: Towards an effective human rights protection mechanism for Africa?' (2005) *Leiden Journal of International Law* (forthcoming); J Harrington 'The African Court on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights — The system in practice, 1986-2000*, (2001) 305; A O'Shea 'A critical reflection on the proposed African Court on Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 285; N Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45; J Mubangizi & A O'Shea 'An African Court on Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 256; M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342; G Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' 1998 (16) *Netherlands Human Rights Quarterly* 431; A Stemmet 'A future African Court for Human and Peoples' Rights and domestic human rights norms' (1998) 23 *South African Yearbook of International Law* 233; G Naldi & K Magliveras 'The proposed African Court on Human and Peoples' Rights: Evaluation and comparison' (1996) 9 *African Journal of International and Comparative Law* 944.

<sup>2</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III), available on <http://www.achpr.org> (accessed 28 February 2005) and reprinted in *inter alia* R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001). The Protocol was signed in June 1998 and, 30 days after the requisite 15th ratification (art 34(3) of the Protocol) by the Union of the Comoros on 26 December 2003, it entered into force on 25 January 2004.

<sup>3</sup> The African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3 rev 5-21 (1982) 58 *International Legal Materials*, available on <http://www.achpr.org> (accessed 28 February 2005) and reprinted in *inter alia* Murray & Evans (n 2 above) and C Heyns (ed) *Human rights law in Africa* (2004) 134. On the African Charter, see eg F Ouguerouz *The African Charter on Human and Peoples' Rights — A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003); Evans & Murray (n 1 above) and V Nhemielle *The African human rights system — Its laws, practice and institutions* (2001).

<sup>4</sup> Nhemielle (n 3 above) 250, quoting the former Secretary-General of the International Commission of Jurists (ICJ), Adama Dieng. NGOs, and the ICJ in particular, were the driving force behind the creation of an African human rights court. For an excellent overview of the role of NGOs in the negotiation process, see Harrington (n 1 above).

accepted the Court's jurisdiction.<sup>5</sup> So far, only 19 African states<sup>6</sup> have ratified the Protocol and only one of them has been willing to accept the Court's jurisdiction in cases brought by private parties.<sup>7</sup> The critics thus have a point when they argue that one should not expect too much from a court that, at least in the near future, will not be directly accessible for the vast majority of those for whom it has been established: the victims of human rights violations.

Fortunately, there are also reasons to be more optimistic. To be successful, international or regional human rights courts do not necessarily have to be accessible for individuals. Firstly, as the Inter-American system<sup>8</sup> and the former European system<sup>9</sup> have demonstrated, such courts may contribute to human rights protection where they co-exist with human rights commissions that can receive complaints from individuals and refer cases to the court. The African Charter and the Protocol now provide for such a dual system. The Court has not been established to replace, but to complement and reinforce the African Commission on Human and Peoples' Rights (African Commission or Commission),<sup>10</sup> which enjoys under the Protocol an unconditional right to submit cases to the Court. This right is potentially of great significance. Commission practice shows that many of the cases before it are relatively easy in the sense that they clearly involve human rights violations and that states often wholly disregard the Commission's findings and decisions. Upon the request of parties or its own initiative, the Commission can now refer such 'easy' cases to the Court. The pressure on the Court to admit these cases will be particularly great, and often the Court may have no other choice than to confirm the Commission's conclusions and condemn the state in question. The right to submit cases to the Court may thus enable the Commission to have its own non-binding recommendations transformed into legally binding convictions of the state party involved. For victims this implies that, in spite of the absence

<sup>5</sup> Art 5(3) *juncto* art 34(6) of the Protocol.

<sup>6</sup> See further [http://www.africa-union.org/Official\\_Documents/Treaties](http://www.africa-union.org/Official_Documents/Treaties) (accessed 28 February 2005).

<sup>7</sup> Burkina Faso. This country was the only of the first 15 states that ratified the Protocol that was also willing to accept jurisdiction in cases initiated by private parties. This author has no information on whether or not the four most recent states have been willing to follow the Burkina Faso example.

<sup>8</sup> See further JM Pasqualucci *The practice and procedure of the Inter-American Court of Human Rights* (2003).

<sup>9</sup> Ie the European system as it existed prior to entry into force of Protocol No 11 on 1 November 1998.

<sup>10</sup> On the Commission, see EA Ankumah *The African Commission on Human and Peoples' Rights — Practice and procedures* (1996); Ouguergouz (n 3 above) and Nhemielle (n 3 above).

of an own right to lodge a case, the Court may constitute a forum where they might be able to obtain, albeit indirectly, justice.<sup>11</sup>

Secondly, dispute settlement or resolution is not the only function that international oversight organs fulfil.<sup>12</sup> They are also entrusted with the task of interpreting and clarifying the treaties by which they have been created and other instruments.<sup>13</sup> By developing an international or regional human right jurisprudence, human rights organs are able to assist states in applying and obeying international human rights norms and guide national courts and human rights commissions in resolving human rights disputes. For this purpose, human rights oversight organs usually possess the power to give advisory opinions. This holds true, for example, for the African Commission,<sup>14</sup> the Inter-American Court of Human Rights<sup>15</sup> and the European Court of Human Rights.<sup>16</sup>

Advisory opinions lack the legally binding force of judgments in contentious cases, and for this reason they may carry less weight than judgments. However, they may have alternative or additional value. Firstly, in advisory cases, courts are not bound by the specific facts or legal details of the dispute under consideration. This enables them, more than in contentious cases, to clarify or to establish general legal principles or rules that impact upon many more states or other actors than the few parties in a contentious case. Secondly, advisory proceedings are less confrontational than contentious proceedings. States are not placed in the position of the 'accused'. They are not ordered to alter a given rule or behaviour. They are advised and encouraged to do so, and this 'soft' method of promoting respect for human rights norms may sometimes be just as effective as the 'hard' method of condemning states in contentious cases.

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<sup>11</sup> Much will depend on the answer to the question whether the Commission will see itself as a defender of the rights and interests of individual victims of human rights violations or whether it, like the previous European Commission, will consider its main task to be to act 'in the public interest'. R Murray 'A comparison between the African and European Courts of Human Rights' (2002) 2 *African Human Rights Law Journal* 202.

<sup>12</sup> International human rights oversight organs may fulfil various roles. The first is to provide individual justice. This concerns a retroactive function. The violator is retroactively condemned and the victims may, where necessary and possible, be awarded some kind of reparation. The second function is pro-active and involves the deterrent effect that a judgment in a given case may have on future human rights violators. The third role concerns the interpretation and clarification of human rights instruments. See H Steiner 'Individual claims in a world of massive violations: What role for the Human Rights Committee?' in P Alston & J Crawford *The future of UN human rights treaty monitoring* (1999).

<sup>13</sup> See further art 3 of the Protocol.

<sup>14</sup> Art 45(3) African Charter.

<sup>15</sup> Art 64 American Convention.

<sup>16</sup> Art 47 European Convention on Human Rights and Fundamental Freedoms.

Viewed from the latter perspective, there is indeed reason to be quite positive about the Protocol. It confers upon the new African Court an advisory competence that seems to be broader than that of any other international human rights tribunal. The relevant provision of the Protocol, article 4, reads as follows:

- 1 At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any relevant human rights instruments, provided the subject matter of the opinion is not related to a matter being examined by the Commission.
- 2 The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting opinion.

Of course, this advisory jurisdiction can never fully compensate for the absence of jurisdiction in disputes brought by individuals, and it will remain meaningless if the Court, like the European Court of Human Rights and the African Commission, is never or only rarely consulted. Nonetheless, as in particular the advisory practice of the Inter-American Court of Human Rights has demonstrated, advisory jurisdiction may, if properly used, significantly contribute to human rights protection. This article analyses article 4 of the Protocol and seeks to establish the extent to which the advisory power may enable the Court to strengthen Africa's human rights protection mechanism. Comparisons will be drawn with the advisory practice of the Inter-American Court,<sup>17</sup> with a view to exploring how the African Court's advisory power could be given maximum effect.

Upon completion of this article, it became known that the Assembly of the African Union (AU) has decided that the new human rights court and the Court of Justice of the African Union should be integrated into one court.<sup>18</sup> The details will be worked out in a Protocol on the merger, which had not been adopted at the time this contribution was submitted to the publisher. There are no indications, however, that the new Protocol will introduce significant changes in relation to the advisory jurisdiction of the Court in human rights related matters.<sup>19</sup>

<sup>17</sup> See further JM Pasqualucci 'Advisory practice of the Inter-American Court of Human Rights: Contributing to the evolution of international human rights law' (2002) 38 *Stanford Journal of International Law* 241 and T Buergenthal 'The advisory practice of the Inter-American Human Rights Court' (1985) 79 *American Journal of International Law* 1.

<sup>18</sup> Assembly/AU/Dec 45(III).

<sup>19</sup> On the need for such a merger, see F Viljoen & E Baimu 'Courts for Africa: Considering the co-existence of the African Court on Human and Peoples' Rights and the African Court of Justice' (2004) 22 *Netherlands Human Rights Quarterly* 241 and NJ Udombana 'An African Human Rights Court and an African Union Court: A needful duality or a needless duplication' (2003) 28 *Brooklyn Journal of International Law* 811.

## 2 Scope *ratione personae*: Who can request an advisory opinion?

A first point that will determine the significance of the Court's advisory jurisdiction concerns standing: Who may request an opinion of the Court? Article 4(1) indicates that such a request can be made by the Organisation of African Unity (OAU), OAU member states, OAU organs and African organisations recognised by the OAU. As known, the OAU has now been replaced by the AU,<sup>20</sup> and this implies that the references in article 4 to the OAU, its member states and its organs now must be read as references to the AU, AU member states and AU organs.

The scope *ratione personae* of article 4 is broad. It goes further than article 45(3) of the African Charter, which entitles AU member states, AU organs and African organisations recognised by the AU to ask the African Commission to give an interpretation of the Charter. On its face, article 4 of the Protocol also exceeds article 64(1) of the American Convention on Human Rights, which entitles member states of the Organisation of American States (OAS) and, 'within their spheres of competence', OAS organs, to consult the Inter-American Court regarding the interpretation of human rights treaties. The practical significance of differences with the African Commission's and Inter-American Court's advisory powers, however, is likely to be minimal.

That the AU itself can request an advisory opinion is innovative in the sense that neither the OAS nor, to the knowledge of this author, any other international organisation enjoys a comparable right. The added value of the inclusion of the AU in article 4, however, would seem to be minimal, if not zero. By definition, the AU will have to be represented by one of its organs which, in its own right,<sup>21</sup> enjoys the right to seek advisory opinions from the Court. The drafting history of the Protocol nowhere reveals why the AU has been granted standing and one wonders whether the issue was well thought through.

Comparably, the fact that the Protocol, unlike the American Convention, does not explicitly require from AU organs to act within their sphere of competence is unlikely to have much, if any, practical meaning. Firstly, it can safely be assumed that AU organs, if they were to have the right, will only rarely seek an opinion on an issue falling outside the

<sup>20</sup> The Constitutive Act of the AU entered into force on 26 March 2001. The text of the Act is available on <http://www.africa-union.org> (Official Documents) (accessed 28 February 2005). The AU replaces the OAU, which was established in 1963 and formally abolished in 2002. See further C Heyns, E Baimu & M Killander 'The African Union' (2003) 46 *German Yearbook of International Law* 252; C Parker & D Rukare 'The new African Union and its Constitutive Act' (2002) 96 *American Journal of International Law* 365 and NJ Udombana 'The institutional structure of the African Union: A legal analysis' (2002) 33 *California Western Law International Law Journal* 69.

<sup>21</sup> See, however, nn 29-34 below and accompanying text.

field entrusted to them. Secondly, the fact that the Protocol does not explicitly limit AU organs' right to request opinions to issues they are made responsible for does not imply that they are entitled to do so. In fact, it would seem that they are not. The powers of AU organs are first and foremost conferred, defined and, thus, limited by the Constitutive Act (CA) of the AU. All AU organs may be confronted with human rights issues, but the principle of speciality<sup>22</sup> governing the CA would seem to preclude, for example, the AU Specialised Technical Committees<sup>23</sup> from asking the human rights court an opinion on a human rights issue having no connection with the area they work in. Thirdly, the African Court is likely to apply the requirement that AU institutions act within the scope of their powers when asking for an opinion.<sup>24</sup> If it would not do so, it would leave it up to the AU organs to determine whether a given AU organ can request an advice. It is, however, a rule of international customary law that international tribunals possess the *compétence de la compétence*: They themselves are empowered to decide whether or not a given matter or actor falls within their jurisdiction.<sup>25</sup>

If the African Court indeed will apply this requirement, it will have to decide how to establish the contours or limits of the competencies of the AU organs. The Inter-American Court requires from OAS organs a showing of a 'legitimate institutional interest',<sup>26</sup> which may vary according to the powers and tasks conferred upon these organs and must be deduced from the legal instruments and norms applicable to them. The Inter-American Court has held that, because of its broad mandate in the human rights field, the Inter-American Human Rights

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<sup>22</sup> Advisory Opinion of the International Court of Justice of 8 July 1996 concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Reports 1996 84 para 25 ('International organisations are governed by the "principle of speciality", that is to say they are invested by the states which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them').

<sup>23</sup> Art 14 CA.

<sup>24</sup> Ouguergouz (n 3 above) 752.

<sup>25</sup> Nottebohm (*Liechtenstein v Guatemala*), ICJ Reports 1953 111 paras 119-120 (Preliminary Objections of 18 November). As Judge Cançado Trindade of the Inter-American Court explained: 'Whenever the [Inter-American] Court decides to respond or not to a request for an advisory opinion, it is exercising the power to determine its own competence, derived from a principle of general international law ... Such principle rests on the intrinsic nature of the international judicial organ.' I/A Court HR *Reports of the Inter-American Commission of Human Rights (art 51 of the American Convention of Human Rights)*, Advisory Opinion OC-15/97 of 14 November 1997, Series A No 15, Opinion Judge Cançado, para 27.

<sup>26</sup> I/A Court HR *The effect of reservations on the entry into force of the American Convention (arts 74 & 75)*, Advisory Opinion OC-2/82 of 24 September 1982, Series A No 2 para 17 & para 23.



Commission 'unlike some other OAS organs, . . . enjoys, as a practical matter, an absolute right to request advisory opinions'.<sup>27</sup> The same has been said to hold true for the OAS General Assembly.<sup>28</sup>

Assuming that the African Court will follow a comparable approach, it will have to establish AU organs' standing under article 4(1) on the basis of the relevant provisions of the AU Constitutive Act, the Protocols adopted thereunder and, in relation to the African Commission, the African Charter. Looking at the relevant provisions of these documents, AU organs can be divided into three groups.

The first consists of organs that would seem to have a virtually unlimited right to request advisory opinions. It applies next to the Assembly, the Executive Council, the AU Commission, the Pan-African Parliament (PAP) and the Peace and Security Council. Each of these political organs has a particular broad and general mandate, which explicitly includes the promotion and protection of human rights.<sup>29</sup> The Court will have to admit any request of these organs, provided it involves a legal matter that is not being examined by the Commission.

The second group includes organs whose mandate covers specific policy areas such as the AU Financial Institutions,<sup>30</sup> the Specialised Technical Committees and the Economic, Social and Cultural Council.<sup>31</sup> The right to request an advisory opinion is limited to human rights matters occurring in the area entrusted to them. On a case-by-case basis, upon examining the relevant provisions of the CA, their rules of procedure and other possible documents governing the functions of these organs, as well as the subject matter of the requests, the Court will have to decide on the admissibility of these organs' requests.

The last group consists of organs that probably do not have the right to consult the Court. This concerns first of all the African Court itself. The Court is an AU organ and, taken literally, this would imply that the Court, on its own motion, might identify issues for interpretation and decide to issue an opinion. If the Court were to have this right, however, then it would, to use the words of a judge of the Inter-American

<sup>27</sup> Buergenthal (n 17 above) 4.

<sup>28</sup> n 27 above & Pasqualucci (n 17 above) 255.

<sup>29</sup> Assembly: art 3 *juncto* art 9 CA, Executive Council: art 13 CA *juncto* art 5 of the Rules of Procedure of the Executive Council (available on <http://www.africa-union.org> (accessed 28 February 2005)), PAP: art 3 CA *juncto* art 17 CA *juncto* art 3(2) of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (available on <http://www.africa-union.org> (accessed 28 February 2005)) and Peace and Security Council: art 5(2) CA *juncto* art 3(f) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (available on <http://www.africa-union.org> (accessed 28 February 2005)).

<sup>30</sup> Ie the African Central Bank, the African Monetary Fund and the African Investment Bank; art 19 CA.

<sup>31</sup> Art 22 CA.

Court, 'be tantamount to transforming itself, *ultra vires*, into an international legislator'.<sup>32</sup> The background and text of article 4(1) make it clear that advisory proceedings *motu proprio* were not intended and, indeed, are not provided for. Further, the AU Committee of Permanent Representatives, which is entrusted to prepare and implement the work of the AU Executive Council, probably cannot request advisory opinions.<sup>33</sup> This Committee is meant to be the equivalent of the Committee of Permanent Representatives of the European Union,<sup>34</sup> which suggests that the Committee does not occupy an own independent legal position within the AU institutional framework. If this is indeed so, the Committee probably does not have the right to initiate an advisory proceeding before the African Human Rights Court.

All AU member states, that is, all African states, with the exception of Morocco,<sup>35</sup> can ask the Court for an advisory opinion. Unlike article 5 on contentious jurisdiction, which only allows state parties to the Protocol to initiate a case against another state party, article 4 does not impose the condition that a state must have ratified the Protocol. The difference makes sense. Article 5 underlies the notion that a state that is unwilling to accept the Court's jurisdiction in cases that might be brought against it, should also not have the right to initiate a case against another state. That rationale does not extend to article 4. The purpose of advisory proceedings is to enable states to obtain a judicial interpretation on human rights matters, which might also assist other states in fulfilling their human rights obligations. If the Protocol would have denied a state the right to request an advisory opinion on the sole ground that it has not ratified the Protocol, it would have done a disservice to other states, including those that have ratified the Protocol.

The potentially most important difference from the American Convention concerns the inclusion in article 4(1) of African organisations recognised by the AU. It is plain that these include governmental organisations, such as the Economic Community of West African States (ECOWAS)<sup>36</sup> or the Southern African Development Community (SADC).<sup>37</sup> Article 4, however, does not make clear whether non-governmental organisations (NGOs) can be regarded as organisations recognised by the AU. On the one hand, it could be argued that this

<sup>32</sup> Advisory Opinion OC-15/97 (n 24 above); concurring Judge Cançado Trindade, para 37.

<sup>33</sup> Art 21 Constitutive Act of the AU.

<sup>34</sup> Art 207 Treaty Establishing the European Community.

<sup>35</sup> See further [http://www.africa-union.org/Official\\_Documents/Treaties](http://www.africa-union.org/Official_Documents/Treaties) (accessed 28 February 2005).

<sup>36</sup> See further <http://www.ecowas.int> (accessed 28 February 2005).

<sup>37</sup> See further <http://www.africa-union.org/usefullinks> (accessed 28 February 2005).

provision, unlike article 5 on contentious jurisdiction,<sup>38</sup> does not make a distinction between governmental and non-governmental organisations and that the latter therefore have the right to request a legal opinion.<sup>39</sup> On the other hand, one could reason that because NGOs in principle have no direct access to the Court in contentious cases,<sup>40</sup> they (should) have no right to request an opinion, since this would enable them to initiate a disguised contentious case against a member state that has not accepted the Court's jurisdiction in cases brought by private parties. The Court is advised to opt for the first interpretation. Particularly in Africa, NGOs play a very significant role in the promotion of human rights, and without them the African Commission would probably never have evolved into the organ it is today. Due to the limitations on the Court's contentious jurisdiction, NGOs' will, at least in the short term, not be able to make a comparable contribution to the Court, but precisely for this reason it is desirable that they can request advisory opinions. That (some) NGOs might possibly use their right to ask for an advisory opinion to bring a disguised case against a state that has not accepted the Court's jurisdiction cannot, as such, be a reason to deny (all) NGOs the right to request an opinion altogether. Rather, the proper response would be a case-by-case approach according to which the Court, upon examination of the motives for, and the subject matter of, the request, as well as other relevant circumstances, will only decline requests for advisory opinions where it concludes that a specific request in fact constitutes a contentious case.

If the Court indeed were willing to receive requests for advisory opinions from NGOs, it will have to take a position on a number of issues. The first concerns the NGOs that will have standing. Article 4(1) contains the condition that African organisations must be recognised by the AU. This could either be read as to imply a formal recognition by the AU, or that the recognition must be inferred from a *de facto* working relationship between the AU and the NGO involved.<sup>41</sup> Secondly, should NGOs' right to request an opinion be limited to issues falling within their mandate, as defined by their statutes or foundational documents? Whatever the proper answer to these two questions may be, it would make sense if the Court would apply the criterion of having obtained

<sup>38</sup> By virtue of art 5(1) of the Protocol, African intergovernmental organisations enjoy an absolute right to submit cases to the Court. From art 5(3) *juncto* art 34(6) of the Protocol, however, it follows that non-governmental organisations only have direct access to the Court when the state in question has made a declaration accepting the Court's jurisdiction.

<sup>39</sup> Ouguergouz (n 3 above) 750.

<sup>40</sup> RW Eno 'The jurisdiction of the African Court on Human and Peoples' Rights' (2002) 2 *African Human Rights Law Journal* 223 227-228.

<sup>41</sup> Ouguergouz (n 3 above) 750.

observer status with the African Commission.<sup>42</sup> *De facto* this would imply that standing would be limited to NGOs whose objectives and activities are aimed at human rights protection and meet the criteria for observer status.<sup>43</sup> Further, the Court will have to determine whether it will admit in principle any request from NGOs having obtained observer status or whether it will be selective. The Court is not obliged to admit any request<sup>44</sup> and, perhaps depending on the number of NGO requests, the Court could decide to filter these requests and only issue an opinion where the questions raised by the NGOs are novel and significant for human rights law in Africa.

### 3 Scope *ratione materiae*: Subject matter of advisory opinions

According to article 4(1), the Court may provide an opinion on 'any legal matter relating to the Charter or any relevant human right instruments, provided the subject matter of the opinion is not related to a matter being examined by the Commission'. The substantive scope of the Court's advisory jurisdiction is much broader than that of the African Commission's interpretative power, which is restricted to the Charter.<sup>45</sup> It also exceeds that of the Inter-American Court, which has jurisdiction over the American Convention and 'other treaties concerning the protection of human rights in the American States'.<sup>46</sup> Firstly, unlike the American Convention, article 4(1) does not refer to other

<sup>42</sup> Compare art 5(3) on contentious jurisdiction, which contains this requirement.

<sup>43</sup> See further Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the Field of Human Rights with the African Commission on Human and Peoples' Rights, available on <http://www.ach-pr.org> (accessed 28 February 2005).

<sup>44</sup> The Court's power is a discretionary one ('may'). This is not to say that the Court is wholly free to either render an advisory opinion or to decline a request. Firstly, in light of the purpose of the advisory power, and the entire Protocol, it may be assumed that the Court has a *prima facie* obligation to give the requested opinion. Drawing inspiration from the Inter-American Court, it would seem that the advisory jurisdiction is 'permissive in character in the sense that it empowers the Court to decide whether the circumstances of a request for an advisory opinion justify a decision rejecting the request' and that the Court 'must have compelling reasons founded in the conviction that the request exceeds the limits of its advisory jurisdiction before it may refrain from complying with a request for an opinion'. See Advisory Opinion OC-1/82, 'Other Treaties' subject to the Consultative Jurisdiction of the Court 9 art 64 of the American Convention on Human Rights, Inter-Am Ct HR (ser A) para 17 & para 23 (24 September 1982). Furthermore, although art 4(2) of the Protocol merely states that the Court must give reasons for its advisory opinions, it may be assumed that is under a similar obligation when it decides to reject a request for opinion.

<sup>45</sup> Art 45(3) African Charter.

<sup>46</sup> Art 64(1) American Convention.

*treaties* but to human rights *instruments*. This could be interpreted to imply that the African Court is also empowered to give interpretations of non-binding instruments such as resolutions or recommendations of relevant bodies.<sup>47</sup> Secondly, article 4(1) does not formally require that other treaties should protect human rights *in African states*. This suggests that the African Court can also express its view on, for example, questions concerning the diplomatic protection to be offered to Africans in the diaspora or African states' treatment of nationals in exile. However, probably neither one of these differences with the American Convention will have much practical meaning. One may expect that questions concerning resolutions and other non-binding measures or alleged human rights violations outside African soil will not often be referred to the Court.

The notion of 'relevant human rights instruments' needs further clarification. In exploring how it could possibly be construed, it is useful to take a look across the Atlantic and consider how the Inter-American Court in Costa Rica has interpreted the notion of 'other treaties' used in article 64(1) of the American Convention. In the first ever advisory proceeding before this Court, it was suggested that 'other treaties' would refer (a) only to treaties adopted within the context of the inter-American system, (b) to treaties in which only American states are parties, or (c) to all treaties to which one or more American states are parties. The Inter-American Court chose none of these options. It held that 'other treaties' include:<sup>48</sup>

[a]ny provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the purpose of such a treaty, and whether or not non-member states of the inter-American system are or have become parties thereto.

The Inter-American Court can, and is willing to, interpret any treaty provision, the sole condition being that it is 'directly related to the protection of human rights in a member state of the inter-American system'.<sup>49</sup> In exercising its advisory power, the Court cannot be

<sup>47</sup> I Österdahl 'The jurisdiction *ratione materiae* of the African Court on Human and Peoples' Rights' (1998) 7 *Revue Africaine des Droits de l'Homme* 132 144. To be sure, this does not imply that the Inter-American Court wholly refuses to interpret instruments other than treaties. For example, the Court interprets the American Declaration of the Rights and Duties of Man, adopted in 1948 in the form of a resolution, when necessary to clarify the OAS Charter or the American Convention. I/A Court HR Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 on the American Convention of Human Rights, Advisory Opinion OC-10/89 of 14 July 1989, Series A No 10 para.44.

<sup>48</sup> I/A Court HR 'Other Treaties' Subject to the Consultative Jurisdiction of the Court (art 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82 of 24 September 1982, Series A No 1, para 52.

<sup>49</sup> n 48 above, para 21.

restrained by the fact that the subject matter of a request coincides with that of a case pending before another international court or organ or the possibility that it might interpret a given treaty provision differently than another international organ. The Inter-American Court is an 'autonomous judicial institution',<sup>50</sup> which considers itself competent to interpret 'other treaties' in the way it deems the most appropriate and does not seem to be very concerned about the possibility of inconsistencies with other oversight organs:<sup>51</sup>

[T]he possibility of conflicting interpretations is a phenomenon common to all those legal systems that have certain courts which are not hierarchically integrated. Such courts have jurisdiction to apply and, consequently, interpret the same body of law. Here it is, therefore, not unusual to find that on certain occasions courts reach conflicting or at the least different conclusions in interpreting the same rule of law. Even a restrictive interpretation of article 64 would not avoid the possibility that this type of conflict might arise.

It is submitted that the African Court can and should interpret article 4(1) of the Protocol in a comparably broad manner. One could object. Unlike the American Convention, article 4(1) does not speak of 'treaties concerning the protection of human rights' but of 'human rights instruments', and this, so it could be argued, implies that the Court can only interpret treaties primarily or exclusively adopted to protect human rights. However, the choice of words in article 4 does not seem to reflect a deliberate choice of the drafters<sup>52</sup> to deny the Court the power to deliver advisory opinions on human rights issues arising within the context of, for example, treaties primarily striving at economic integration.<sup>53</sup> The Protocol's objective commands, and the text of article 4(1) leaves room for a broad reading allowing the Court other treaties than 'typical' human rights treaties. Further, it could be argued that the Inter-American Court too easily dismisses concerns about inconsistent interpretations and that the African Court, to avoid legal uncertainty and a 'jurisprudential chaos',<sup>54</sup> should strive at similar or at least comparable conclusions as

<sup>50</sup> I/A Court HR The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of 1 October 1999, Series A No 16 para 61.

<sup>51</sup> Advisory Opinion OC-1/82, n 47 above para 50.

<sup>52</sup> The sole conclusion that can be drawn from the drafting history of the Protocol is that the phrase 'any relevant human rights instruments' was chosen by the drafters to confer upon the Court a broader jurisdiction than the African Commission, which can only be asked to clarify the meaning of the Charter (art 45(3) of the Charter).

<sup>53</sup> Compare, in relation to art 3 on contentious jurisdiction, which also uses the term 'human rights instruments', E Quasigah 'The African Court of Human Rights: Prospects, in comparison with the European Court of Human Rights and the Inter-American Court of Human Rights' in: African Society of International and Comparative Law *Proceedings of the Tenth Annual Conference, held in Addis Ababa 3-5 August 1998* 61-62.

<sup>54</sup> Compare, in relation to art 3 on contentious jurisdiction, C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155 166-168.

other international or regional organs. This author does not support this argument. Fears for a jurisprudential chaos are largely exaggerated. There are simply no indications that the proliferation of international oversight organs in the last decades has led to great or disturbing discrepancies.<sup>55</sup> Further, differences in interpretation are not necessarily problematic. They are not only inevitable but, especially in relation to non-African courts and organs, they might even be desirable. In interpreting for example the International Covenant on Civil and Political Rights, the African Court ought to consider and follow the views expressed by the United Nations Human Rights Committee, but the possibility to deviate from the reasoning and conclusions of European, Inter-American or other international bodies may enable the African Court to have regard to specific 'African concerns, African traditions and African conditions'.<sup>56</sup> The Court should not seek originality for originality's sake and follow other non-African jurisprudence where it deems this is in Africa's and Africans' interests. Where, however, it is convinced that human rights protection in Africa demands another interpretation than the one given elsewhere, the Court should not hesitate to do so and even emphasise this.

To sum up, like the Inter-American Court, the African Court is an independent and autonomous organ that is not subordinated to, or formally bound by judgments, decisions or opinions of other regional or international courts or organs. Its powers are conferred by its constituent treaty only and, unless expressly provided otherwise by any other treaty adopted within the framework of the AU, not confined by any other treaty. The Court can, and when asked it should not hesitate to, interpret any universal,<sup>57</sup> regional<sup>58</sup> or sub-regional instruments, regardless of their purpose, main subject matter and state parties, for as long as the provision in question has 'bearing upon, affects or is in the interest' of human rights protection in Africa.<sup>59</sup>

The above is not to say that the Court can express its view on any issue concerning these instruments. Article 4 contains two limitations. Firstly, the Court can only give an opinion on legal matters. The Court might be faced with the objection that a question phrased in legal terms is in essence a political matter. The Court is advised to draw inspiration from the International Court of Justice (ICJ). Responding to the argument that the question of whether the threat or use of nuclear weapons is compatible with international law is political rather than legal in nature, the ICJ held that the fact that a question also has 'political aspects, as, in the

<sup>55</sup> See eg J Charney 'Is international law threatened by multiple international tribunals?' (1998) *Recueil des Cours* 101.

<sup>56</sup> T van Boven 'The relationship between peoples' rights and human rights in the African Charter' (1986) 7 *Human Rights Law Journal* 183.

<sup>57</sup> Eg the 1966 International Covenants.

<sup>58</sup> Eg the African Charter on the Rights and Welfare of the Child.

<sup>59</sup> Advisory Opinion OC-16/99 (n 50 above) para 72.

nature of things, is the case with so many questions which arise in international life', does not suffice to deprive it of its character as a 'legal question' and to deprive the Court of its competence. According to the ICJ, questions 'framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law . . . [and] appear . . . to be questions of a legal character'.<sup>60</sup>

Secondly, article 4(1) expressly denies the Court the power to give an opinion where the subject matter of the request is related to a matter under examination by the Commission. This institutional conflict rule is designed to prevent the Court from inflicting upon the quasi-judicial function of the Commission and to protect the latter organ's freedom of decision.<sup>61</sup> The Protocol is silent on a possible substantive overlap between a request and a contentious case pending before the Court itself. In such cases the Court is formally entitled to give an opinion, but, where necessary to preserve the integrity of contentious proceedings or to protect human rights, it may decide to decline the request.

#### **4 Advisory opinions on the compatibility of domestic laws with international human rights law**

Next to its power to interpret human rights treaties, the Inter-American Court, at the request of an OAS member state, may provide that state with opinions regarding the compatibility of its domestic laws with those treaties.<sup>62</sup> Such advisory opinions may help states to obey their human rights obligations and incite them to withdraw or not to adopt<sup>63</sup> legislation at odds with the American Charter or other instruments. The drafters of the African Protocol had not intended to grant the African Court a comparable power. The wording of article 4(1), however, does not preclude such a power. The provision speaks of legal matters relating to the African Charter and other relevant human rights instruments. There is no doubt that the compatibility or incompatibility of domestic laws with international human rights law constitutes such a matter.

Of course, this does not guarantee that the Court indeed will read article 4(1) as to provide itself the power to give opinions on domestic legislation. It has been suggested that the Court might refuse to do so because of the traditional resistance of African states to interference in their domestic affairs.<sup>64</sup> This is true, but it is submitted that such poli-

<sup>60</sup> Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons of 8 July 1996, ICJ Reports 1996 p 66, para 13.

<sup>61</sup> Ouguergouz (n 3 above) 751.

<sup>62</sup> Art 64(2) American Convention.

<sup>63</sup> n 65 below and accompanying text.

<sup>64</sup> Naldi & Magliveras (n 1 above 440).



tical resistance should be no reason for the Court to conclude that it lacks the power to give an advice on the legality of domestic laws altogether. In addressing the issue, the Court, arguably, should look at who submits the request.

In case a member state submits a request for an opinion on the compatibility of one of its own domestic laws, there simply is no unwanted intrusion in internal affairs. Denying such a request would imply an unnecessary refusal to provide a service to a state that presumably takes human rights seriously. The Court should respond positively to the request of such a state, unless compelling reasons, whatever they might be, require otherwise.

The Court ought to do the same where the request is submitted by the African Commission, another state party to the Protocol that has previously challenged the domestic law in question before the Commission or a state party whose nationals are affected by that law. These requestors are also entitled to initiate a contentious procedure against a(nother) member state. It is up to them to decide either to follow the path of a confrontational contentious procedure or, in the spirit of amicable settlement or preserving smooth inter-state relations, to initiate an advisory proceeding.

The Court would find itself in a different position when a request for an advice on a domestic law is submitted by AU organs other than the African Commission or AU member states lacking a specific interest in the law in question. Such organs and member states cannot initiate a contentious procedure against the state in question. A request for an advisory opinion on domestic legislation might constitute a disguised attempt to bring that state before the Court. In such cases, the Court would seem to have two options. It could either decide that it has no power to give an opinion on the compatibility of domestic laws or, on a case-to-case basis, decide to decline the request for an opinion.

If the Court were willing to give, as it arguably can and should, opinions on the compatibility of domestic laws with international human rights law relevant to Africa, it is likely to be confronted with various interpretation issues. Two of them are briefly pointed out here. The first involves the question whether the Court can also render an opinion on proposed or draft legislation. The Inter-American Court has been willing to do so, reasoning that the purpose of the advisory function is to assist OAS member states and organs to comply with their international human rights obligations. This purpose would be frustrated if a state could only get an opinion after the law in question has entered into force. The consequence, so the Inter-American Court asserted, would be that a state is forced to violate the American Convention by adopting a law that is or might be incompatible with it, before it can ask clarification of the Court. Such a requirement, the Court concluded, would not give effect to the objective of human rights

protection.<sup>65</sup> The Court recognised the risk that by granting an opinion on draft national legislation it might be embroiled in internal politics, but it did not consider this a sufficient reason for denying as such advisory jurisdiction over legislation not yet in force. Rather, the Court decided that, looking at the reasons for and the circumstances in which a request is made, it would exercise great care to ensure its advisory jurisdiction will not be resorted to with a view to affecting the outcome of the national legislative process for partisan political ends.<sup>66</sup> It is submitted that the African Court, if confronted with a question on the compatibility of draft legislation with the African Charter or other treaties, should follow the same or a comparable line of reasoning. African human rights jurisprudence is still comparatively underdeveloped and those responsible for drafting legislation are not always sufficiently trained in human rights law. By accepting advisory jurisdiction on the compatibility of draft legislation with international human rights law, the Court could assist African states in ensuring that their legislation is human rights compatible.

Another question the Court might be faced with is whether national judges may also request advisory opinions on the compatibility of domestic legislation with international human rights law.<sup>67</sup> This is a potentially very significant point.<sup>68</sup> Even if the current restrictions on the Court's contentious jurisdiction were eliminated, the application of human rights treaties will first and foremost be the task of national courts. The possibility for these organs to get clarification from the African Court on the compatibility of national rules and measures could contribute to the objective application of human rights treaties in Africa and the development of universal human rights jurisprudence for the African continent. Important lessons could possibly be learnt from the preliminary ruling procedure before the Court of Justice of the European Communities (ECJ).<sup>69</sup> In all cases where individuals claim that national acts or measures are at odds with European Community law, they will have to bring a case before a national court. When such a court has doubts about the specific meaning of Community law it may, and in some cases must, postpone the proceedings before it and

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<sup>65</sup> I/A Court HR Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, Advisory Opinion OC-4/84 of 19 January 1984, Series A No 4 paras 16-28.

<sup>66</sup> n 65 above, paras 29-30.

<sup>67</sup> The American Convention does not allow national judges to request advisory opinions, but calls have been made to amend the Convention to open this possibility. Pasqualucci (n 17 above), 256.

<sup>68</sup> On the future relationship between the Court and national judiciaries and, more in general, national legal orders, see K Hopkins 'The effect of the African Court on the domestic legal orders of African states' (2002) 2 *African Human Rights Law Journal* 234.

<sup>69</sup> Art 234 Treaty Establishing the European Community.

refer the matter for clarification to the ECJ in Luxembourg. Upon receipt of the ECJ's preliminary judgment, the national court then settles the dispute in question. Over time, the European preliminary ruling procedure has evolved into a particularly effective multilateral system of judicial protection in which the ECJ, by interpreting Community law, guides national courts in uniformly applying and enforcing that law. This procedure has been crucial to the success of the European Community, especially during times when member states, mainly pushing for their national interests, largely paralysed the Community's legislator. Unlike the preliminary judgments of the ECJ, advisory opinions of the African Court lack binding effect. Therefore, article 4 cannot be regarded as the basis for a fully fledged African system of judicial protection comparable to, and as effective as, that of the European Union. However, if the Court were willing to interpret this provision as to allow national courts to request advisory opinions on international human rights instruments and the compatibility of domestic law with those instruments, it could build up a working relationship with these courts. Much more than politicians, national courts and judges share common values and by involving the latter, the Court could de-politicise human rights protection and lay the foundations for a uniform interpretation and objective application of human rights law in Africa.

## 5 Conclusion

The debates during the intergovernmental meetings that have ultimately led to the adoption of the Protocol centred on the African Court's contentious jurisdiction and the accessibility of the Court for individuals and NGOs in particular. The negative outcome of this is that, at least in the short term, the doors to contentious procedures will remain closed for the vast majority of Africans. One positive effect, however, of the preoccupation with the Court's contentious jurisdiction was that it shifted the attention away from the proposed provision on advisory jurisdiction, which had been drafted by NGO experts pushing for a strong court. In the shadow of the controversies on contentious jurisdiction, the quite broadly defined advisory jurisdiction could, without extensive debate, be quite easily agreed upon. As a result, the newly created African Court possesses an advisory jurisdiction that exceeds that of any other international human rights organ.

Of course, a power broadly defined on paper is not necessarily a meaningful one in practice. Courts are always dependent on the cases submitted to them and the African Court's power to deliver advisory opinions will remain a dormant one if no or only very few requests for such opinions would be submitted to the Court. At first glance, the experiences of the European Human Rights Court and the African Commission do not stem hopeful: Neither one of these bodies has ever

rendered an advisory opinion.<sup>70</sup> However, the main reason why these bodies are not asked for advisory opinions would seem to lie in the broad accessibility of their procedures for dispute settlement or resolution. The European Convention is based on a strong preference for contentious procedures. It entitles individuals to submit cases to the Court and only provides for a narrowly defined advisory power.<sup>71</sup> The basic notion seems to be to get answers to human rights questions by forcing parties to use the hard-and-fast judicial channels, rather than the softer, less obliging, channel of advisory opinions.<sup>72</sup> The individual complaint procedure before the African Commission is open to virtually anybody. Given the fact that human rights questions usually arise in or relate to concrete cases of violation, it may come as no surprise that in practice the complaint rather than the advisory procedure is used. Where, however, contentious procedures are not or hardly open for individuals, advisory jurisdiction becomes more relevant. The experiences of the Inter-American Court are illustrative. This Court can only exercise contentious jurisdiction over states that have accepted its jurisdiction. In the first years after the Court's establishment in 1979, only a few states had accepted this jurisdiction and most of the cases referred to the Court involved requests for advisory opinions. Later, when more states were willing to subject themselves to the Court and the Inter-American Commission started to refer cases to the Court, the Court's contentious gradually overshadowed its advisory jurisdiction. Generally, the practical significance of advisory jurisdiction would, to some ill-defined degree, seem to depend on the accessibility and effectiveness of contentious procedures. As regards the new African Court, one may hope that the African Commission will give impetus to the Court's contentious jurisdiction by making frequent use of its power to submit cases, but given the limited possibilities for individuals to bring states before the Court, there are no reasons to be too optimistic. Particularly during the first years of its existence, the power to deliver advisory

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<sup>70</sup> To be sure, on 2 June 2004 the European Court delivered a decision concerning the first request for an advisory opinion under art 47 of the European Convention ever. The request was submitted by the Council of Europe's Committee of Ministers and involved the co-existence of the Convention on Human Rights of the Commonwealth of Independent States (CIS) and the European Convention. The Court ruled, however, that it had no advisory competence. See further <http://www.echr.coe.int/Eng/EDocs/DecisionAdvisoryOpinionrequest.htm> (accessed 28 February 2005).

<sup>71</sup> The European Court does have advisory jurisdiction, but it is not entitled to deal with any question relating to the content or scope of the rights or freedoms laid down in the European Convention or with any other question which the Court or the Committee of Ministers might have to consider in consequence of proceedings that could be instituted in accordance with the European Convention. Art 47(2) European Convention, as amended by Protocol No 11. Indeed, it is hard to think of a question that the Court could answer. So far the European Court has not received a single request for an advisory opinion.

<sup>72</sup> Österdahl (n 47 above) 141.

opinions could therefore be a means for the Court to make itself known and its influence felt. The Court could strengthen its own position by interpreting article 4(1) broadly so as to allow, in particular, NGOs and national courts to submit requests for an opinion and by indicating its willingness to interpret any human rights instruments relevant for human rights protection in Africa and to express its view on the compatibility of (proposed) domestic legislation with those instruments. The Court does not have to wait for the first request for an opinion to be submitted to it. It could on its own motion issue a communication or a comparable document indicating how it intends to make use of its advisory competence and invite the various parties to initiate advisory proceedings. Indeed, acting together, the Court and various actors entitled to submit requests could make a success of the advisory jurisdiction.

## Interpreting rights globally: Courts and constitutional rights in emerging democracies

*Nsongurua J Udombana\**

Senior Lecturer, Department of Jurisprudence and International Law, University of Lagos; Associate Professor of Law and Director of Human Rights Centre, Central European University, Budapest; Visiting Lecturer, School of Law, University of South Africa

### Summary

*Democracy has spread over Africa and with it new constitutions with justiciable bills of rights have been accepted. The main focus of the article is on constitutional interpretation and how a constitution should be interpreted in view of the fact that a constitution, and especially the bill of rights, is not only made up of clear-cut rules, but also of ideals and principles. Purposive and creative interpretations are particularly needed in Africa's emerging democracies. Creative constitutional interpretations are further enhanced when courts engage in comparative constitutional analysis. The article gives examples of how courts around the world have used comparative case law. The author further defends the approach of comparative constitutionalism in the light of the objections that have been raised against it.*

While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from . . . distinguished jurists [in other places] who have given thought to the same difficult issues that we face.<sup>1</sup>

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\* LLB (Hons), LLM (Lagos); udombana@hotmail.com or udombanan@ceu.hu. This is an expanded version of a paper delivered at a '*S v Makwanyane*' retrospective conference, on 14 February 2005 at the University of South Africa. The views expressed in this paper are those of the author and do not represent any other authority.

<sup>1</sup> SD O'Connor 'Keynote address before the ninety-sixth annual meeting of the American Society of International Law' (2002) 96 *American Society of International Law Proceedings* 348 350.

## 1 Introduction: A brave new continent

Africa is currently experiencing momentous political and economic transformation for the better and, sometimes, for the worse. What was unthinkable yesterday, today has become reality. Until relatively recently, Africa was a continent consisting of barricades and subjected to various forms of evils, including the evils of colonialism, apartheid, military *coups d'état*, and one-party dictatorships. In the last few decades, however, a cleft has opened in the pitiless walls of the continent, allowing citizens to breathe the fresh air of freedom and to experience constitutional and democratic governance. These positive changes are due partly to the euphoria and hysteria of globalisation and liberalisation and partly to the 'explosion of anger against the abuse of power, violations of human rights, economic failure, and hardship, and a deep longing for peace and order'.<sup>2</sup>

Regimes still totter and fall in a few African countries, notably Côte d'Ivoire, the Democratic Republic of Congo, Liberia, Sierra Leone and Somalia. Togo might join these failed states — unless reason prevails over passion — as some criminal elements in that country are trying to suppress due constitutional process and popular sovereignty and foist a dynasty on a country that has endured the late Gnassingbe Eyadema's despotism for four decades, largely through guile, force and French support. These setbacks notwithstanding, it may be said that the wind of change is blowing where it wishes in Africa, with 'the ballot . . . increasingly replacing the bullet as a means of attaining political power and maintaining legitimacy'.<sup>3</sup> Democracy may not be a system of government that embodies all the democratic ideals, but it is one that approximates these ideals to a reasonable degree.<sup>4</sup>

Following the demise of apartheid, South Africa exemplifies this brave new continent.<sup>5</sup> Apartheid was consigned to the ignominy of history through the common identity and unity of purpose by segments of civil society and international organisations.<sup>6</sup> This paved the way for the

<sup>2</sup> C Legum *Africa since independence* (1999) 56.

<sup>3</sup> DM Ayine 'Ballots as bullets? Compliance with rules and norms providing for the right to democratic governance: An African perspective' (1998) 10 *African Journal of International and Comparative Law* 709-10. See generally NJ Udombana 'Articulating the right to democratic governance in Africa' (2003) 24 *Michigan Journal of International Law* 1209.

<sup>4</sup> See A Lijphart *Democracy in plural societies: A comparative exploration* (1977) 4.

<sup>5</sup> See *The Prosecutor v Tadić* para 622 Trial Chamber Judgment Case No IT-94-1-T (7 May 1997).

<sup>6</sup> Welcoming the vanquishing of apartheid in South Africa, the country's first elected black President, Nelson Mandela, elatedly said: 'That historic change has come about not least because of the great efforts in which the United Nations [and the Organization of African Unity] engaged to ensure the suppression of the apartheid of crime against humanity.' Cited in United Nations *Basic facts about the United Nations* (2000) 232.

institution of majority rule and a multi-party democracy in South Africa in 1994, after 'voters queued around the country for hours, and in some cases, days to mark their "X" on the ballot papers', in an 'election [that] was a moment of national pride'.<sup>7</sup>

One of the remarkable developments in these new democracies is their constitution-making process, which has been inclusive and participatory, allowing various groups to express their perceptions and concerns before being channelled into a constitution. The 1993 Constitution of Ghana, for example, was brought into existence pursuant to a referendum in April 1992, which was a recognition that sovereignty belongs to the people and that they must agree on the content of the instrument meant to govern their lives.

The South African experience presents a sterling case study of a democratic constitution-making process. As described by an 'outside' commentator,<sup>8</sup> the Constitutional Assembly that was charged with drafting the South African Constitution embarked upon a programme of public participation, adopting a three-pronged approach — community liaison, media liaison and advertising. It established a media department that utilised print, radio, television, billboards and other advertising strategies to attract public interest in the constitution-making process. The media strategy also included the establishment of a newsletter — *Constitutional Talk* — a telephone talk-line, and the creation of an internet home page. In the end, the Constitutional Court, itself a creation of the Constitution, was given the 'unusual' power to decide whether the new constitutional text adopted by the Constitutional Assembly complied with the constitutional principles contained in the interim Constitution.<sup>9</sup> The final Constitution came into force on 4 February 1997 after the Constitutional Court held, in December 1996, that the amended text complied with all the principles established at Kempton Park.<sup>10</sup> The constitution-making process in South Africa has been 'hailed not only as unique but as one of the most democratic and inclusive constitution-making exercises in history'.<sup>11</sup>

This inclusiveness has not been uniform in Africa. In some countries, the constitution-making processes lacked inclusivity, diversity, participation, transparency, autonomy and accountability. Nigeria's 1999 Con-

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<sup>7</sup> K O'Regan 'Human rights and democracy — A new global debate: Reflections on the first ten years of South Africa's Constitutional Court' (2004) 32 *International Journal of Legal Information* 200.

<sup>8</sup> See JO Ihonvbere *Towards a new constitutionalism in Africa* (2000) 60.

<sup>9</sup> See sec 71 of the interim Constitution of South Africa.

<sup>10</sup> See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa* 1996, 1997 2 SA 97 (CC); 1997 1 BCLR 1 (CC).

<sup>11</sup> J Sarkin 'Innovations in the interim and 1996 South African Constitution' (1998) 60 *The Review* 57.



stitution, for example, was prepared and promulgated in great secrecy by the military, led by the then caretaker head of state, General Abdulsalami Abubakar. The drafting process — if, indeed, it was a process — was largely non-consultative and non-transparent, thus making the ‘we the people’ clause in the Preamble a fraud. The legitimacy crisis that the Constitution suffers from has led to repeated calls for a Sovereign National Conference to address the concerns of the diverse nations that make up Nigeria and to draw up a people’s constitution. President Obasanjo is unlikely to convene such a conference; instead, he is proposing a National Political Reform Conference, the contents whereof are yet to be grasped by Nigerians.

Another charade was the constitution-making process in Zimbabwe where President Robert Mugabe, in response to campaigns by civil society groups for a fully representative constitutional assembly tasked with drawing up a new constitution, established a Constitutional Commission (CC) pursuant to his powers under the Commission of Inquiry Act. This executive action had two intended effects: First, it allowed Mugabe to determine the size and make-up of the CC; and, second, the CC was merely tasked with submitting a report with recommendations for a new constitution to a President who was under no obligation to accept any or all of the recommendations.<sup>12</sup> Yet, as Van der Vyer warned, ‘a superimposed constitutional formulae or constitutional arrangements that . . . do not address the real causes of discontent, are sure to generate their own legitimacy crisis’.<sup>13</sup> Experience has also shown that ethnic conflicts in Africa are often the products of regimes that promote feelings of exclusion within certain groups.

Meanwhile, the establishment of a Constitutional Court in South Africa as the highest court of appeal in all constitutional matters has produced dynamic constitutional litigation in the last decade, which is parallel to none on the continent. The organisers of this conference have chosen *S v Makwanyane*<sup>14</sup> as a point of reference for reflection on this development. However, since they have also graciously allowed me to choose my own topic, I have chosen to address a larger but related question of how a creative and global interpretation of constitutional rights in Africa could assist in mainstreaming respect for the values associated with those rights. This paper is also concerned with redefining the role of the judiciary in Africa, particularly in emerging democracies.

As this paper will later show, *Makwanyane’s* case was remarkable for

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<sup>12</sup> See J Hatchard ‘Some lessons on constitution making from Zimbabwe’ (2001) 45 *Journal of African Law* 210.

<sup>13</sup> J van der Vyver ‘Constitutional options for post-apartheid South Africa’ (1991) 40 *Emory Law Journal* 745 822.

<sup>14</sup> *S v Makwanyane* 1995 3 SA 391 (CC).

its invocation of international and comparative law. The question, of course, is whether comparative constitutionalism is lawful and/or legitimate, since constitutions 'are often the outcome of constituent processes which can be defined in various ways and which are, undoubtedly, influenced, on the one hand, by the historical, cultural, philosophical and ideological background of the countries in question, and, on the other, by contingent political, economic and diplomatic factors'.<sup>15</sup> I start by briefly noting the nature of rights guaranteed in emerging democratic constitutions in Africa. Thereafter, I examine how courts may translate these rights from the realm of rhetoric into practice — through a creative interpretation that is also global or comparative. Finally I present a conclusion.

## 2 The constitutionalisation of rights

Any approach to the protection of human rights in Africa must take the constitution as its point of departure because a constitution is the foundation of the legal system and a protocol of survival and continuity for any social group, ensuring that no one attains salvation or offers a programme of salvation to the populace by another route. It is a blueprint of intra-governmental relations, setting forth the general parameters of executive, legislative and judicial powers and embodying fundamental rights granted to individuals under the law. It provides both a framework of government for a society in a continual process of transition and a framework of fundamental principles of humanity and respect for human rights to control and guide the exercise of all governmental power. It provides a measure of rationality or consistency in decision-making, both in relation to the individual and society.<sup>16</sup>

The constitutions of most emerging democracies in Africa begin by affirming faith in the universal values of justice, democracy, freedom, equality and the dignity of the human person. Of course, this does not mean that all constitutions share the same values, but each system shares most of them. Section 1 of the South African Constitution, for example, provides that the Republic of South Africa shall be founded, *inter alia*, on the values of human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism, the supremacy of the Constitution and the rule of law. Similarly, the Preamble to the Constitution of Burundi affirms the country's

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<sup>15</sup> V Piergigli 'The reception of liberal constitutionalism and 'universal' values in the African bills of rights: Ambiguities and perspectives in the turn of the millennium' <http://www.eur.nl/frg/iacl/papers/piergigli.html> (accessed 28 February 2005).

<sup>16</sup> See BO Nwabueze *Ideas and facts in constitution making* (1993) 98.

... commitment to construct a political order and a system of government inspired by ... and founded on the values of justice, democracy, good governance, pluralism, respect of the freedoms and basic rights of the individual, unity, solidarity, mutual understanding, tolerance and co-operation between the different ethnic groups ...

Almost all of these constitutions contain lofty human rights provisions.<sup>17</sup> While some constitutions guarantee primarily only civil and political rights, others guarantee economic, social and cultural rights as well. Civil and political rights underscore the fact that the nature and dignity of the human person have to be absolutely protected and indicate the inviolable, imprescriptible and inalienable rights to be promoted and protected by the state. Socio-economic rights have the aim of giving people the possibility of receiving help from the state, thus guaranteeing equality and social justice. Provisions guaranteeing civil and political rights typically begin with a solemn declaration concerning the principle of non-discrimination, that is, equality before the law and equal protection under the law. Some writers believe that both principles are strong candidates for inclusion among *jus cogens*.<sup>18</sup>

The Constitution of South Africa, for example, expresses, in its Preamble, the need for a 'new order ... in which there is equality between people of all races ...' Equality and non-discrimination are also the first substantive rights protected in the country's Bill of Rights. Section 9 of the Constitution provides:

- 1 Everyone is equal before the law and has the right to equal protection and benefit of the law.  
Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- 3 The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- 4 No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- 5 Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Equality is a positive expression of non-discrimination. In *Harksen v Lane*,<sup>19</sup> the South African Constitutional Court held that section 9(1) would be violated if a measure differentiates between categories of

<sup>17</sup> For human rights provisions in constitutions of African states, see generally C Heyns (ed) *Human rights law in Africa* (2004) 247 (discussing human rights protection enshrined in laws of African countries).

<sup>18</sup> See W Mckean *Equality and discrimination under international law* (1983) 279 282.

<sup>19</sup> *Harksen v Lane* NO 1998 1 SA 300.

people and the differentiation does not bear a rational connection to a legitimate government purpose.<sup>20</sup>

Beyond equality and non-discrimination, most constitutions guarantee the right to life and personal integrity, the right to develop one's personality (physically, morally, socially and culturally), freedom from cruel and inhuman treatment and freedom from slavery or forced labour. These provisions usually precede a detailed or concise list of rights, such as the right to liberty and security of the person, freedom of domicile, the right to respect for a person's correspondence, freedom of movement and residence, freedom of expression and religion (except for Islamic countries where Islam is the state religion), freedom of assembly, demonstration and association, including the right to form or join a political party or a trade-union as well as political and citizens' rights.

However, certain rights that are often emphatically declared on the basis of universal principles only exist on paper, due to the legal constraints that they are dependent on, constraints which are either vague and indeterminate or, in contrast, extremely precise. Consequently, rights previously declared in such a solemn manner are deprived of any real meaning, a ready example being the fundamental right to life — often implicit in Western constitutions. Various constitutions in Africa — Equatorial Guinea, Ghana, Libya, Malawi, Nigeria, Seychelles and Uganda — contain provisions on the death penalty which directly or indirectly deny the right to life. The death penalty is permitted for numerous reasons: as a sanction or if the life of a person constitutes a danger to society or according to a law reasonably justified in a democratic society or to fulfil a death sentence imposed by a competent court of justice or confirmed by the highest court of appeal.

The second class of rights usually protected in national constitutions is social, economic and cultural rights. This is sometimes positioned under a special title in the part of the constitution concerning freedoms in general, as is the case in the Constitutions of Cape Verde, Madagascar, Mozambique and São Tomé and Príncipe. In others, they are arbitrarily placed with civil and political rights and sometimes they are positioned after them. Yet, in some African constitutions, such as that of Nigeria, these 'second generation' rights match the principles concerning policy or the fundamental directives of the state. Those social and economic rights that are protected in most constitutions include family and labour rights, the right to health and to a healthy environment, the right of ownership (individual or collective), economic freedom and cultural rights. Some systems provide for claims so as to eliminate sex discrimination deriving from historical customs and traditions and to guarantee equal political, social, economic and cultural

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<sup>20</sup> n 19 above, para 53.

rights, including labour rights and rights concerning personal matters. Such is the case with the Constitutions of Chad, Egypt, Ethiopia, The Gambia, Malawi, Namibia, South Africa and Uganda.

In the past, Africa's judiciary lacked institutional independence and financial autonomy, with judges holding their offices at the sufferance of the executive. Emerging constitutions contain formal commitments to the independence of courts. Almost all constitutions are cast in nearly the same mould, so that these guarantees are generally similar. But the difference in structure between federal and unitary states results in variations in procedures of judicial review and the organisation of the judiciary. These constitutions are characterised by the following main principles: due process of law, legislative authority over the administrative structure of the judiciary, the obligation of the judiciary to uphold the constitution and the law and its immunity from dismissal and independence from the legislative and executive branches.

Some constitutions, such as those of Cape Verde and Ghana, contain specific clauses on the independence of the judiciary. Others, such as those of Benin, Central African Republic, Equatorial Guinea, Gabon, Mali and Togo, refer to judges and constitutional courts as 'the guardians of fundamental freedoms' and mandate them to enforce fundamental rights. Seventeen constitutions designate the judicial power as the 'guardian of human rights', including, randomly, Algeria, Burkina Faso, Burundi, Congo, Mali, Rwanda, Senegal and Togo. Other constitutions, such as those of South Africa and Uganda, confer a right of access to justice both on individuals and groups, thus mirroring the African Charter on Human and Peoples' Rights (African Charter).<sup>21</sup> In some countries, like Benin, Central African Republic, Egypt and South Africa, the Constitutional Court is independent and autonomous; but in others, as in Burkina Faso and Nigeria, it is an appendage of the Supreme Court. The guarantees under the Bill of Rights are protected in some cases by enabling individuals to appeal to the Constitutional Court or the Supreme Court against laws or public acts or omissions believed to be detrimental to those rights. This is the case in Benin, Burundi, Cape Verde, Central African Republic, Congo, Djibouti, Liberia and Seychelles.

A number of countries, including Benin, Ghana, Mali, Namibia, Nigeria, South Africa and Uganda, have established other institutions to complement the judiciary, with the mandate to protect the public from abuses by government and quasi-government bureaucracies. These institutions, which are variously called Public Defender, Public Complaint Commission or simply Ombudsperson, are also given inves-

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<sup>21</sup> African Charter on Human and Peoples' Rights, adopted on 27 June 1981 and entered into force on 21 October 1986; Doc OAU/CAB/LEG/67/3/Rev 5, reproduced in (1982) 21 *International Legal Materials* 59.

tigatory and prosecutorial powers and are expected to liaise with the judiciary and other appropriate national institutions. Other countries — like Ethiopia, Ghana, Nigeria, South Africa and Uganda — have established national human rights institutions with the mandate to promote and protect human rights and further the cause of social justice. Still others, such as South Africa, have gender commissions to promote, protect and uphold the fundamental tenets of gender equality.

It is not certain if the constitutionalisation of rights guarantees their respect in practice, but it provides, at least, an important mechanism for mainstreaming respect for the values that are associated with those rights, both in law and in policy making. It provides the basis for holding governments accountable and provides an instrument for political action and mass mobilisation. Meanwhile, the manner in which courts interpret these rights goes a long way to mainstreaming the values inherent in them.

### **3 Interpreting constitutional rights: Thinking global, acting local**

#### **3.1 The Constitution as a living instrument**

Much of the burden of realising constitutional rights in emergent democracies in Africa rests on the shoulders of constitutional courts — whatever their name tags — since these courts are the primary guardians of the bill of rights. Whatever else may be their tasks in interpreting and adjudicating constitutional rights, they certainly include striking ‘a balance between the individual’s freedom and the right of the state to self preservation’.<sup>22</sup> The state is far more powerful than any individual and is endowed with ‘state authority’ that gives it a monopoly on the legitimate use of force within its territory. Being a predator, the state must be contained if the individual is not to be placed in an extremely vulnerable position. Plato saw the dangers of unchecked power many centuries ago, when he wrote: ‘No human being . . . is capable of having irresponsible control of all human affairs without becoming filled with pride and injustice.’<sup>23</sup>

Constitutionalism, then, is about limitations on the powers of a government. If democracy is a government of the people and if, as in Africa, ‘the people’ is the sovereign or whatever name that is fashionable to ascribe majority rule, then there has to be some limitations on that sovereign power lest it ends in despotic majority absolutism. Many democracies in the past believed that the ‘self-restraint of the majority’ would preserve the delicate balance between majority rule and respect

<sup>22</sup> BO Nwabueze *Judicialism in commonwealth Africa* (1977) 139.

<sup>23</sup> Plato *The laws* bk IV 713. C (RG Bury transl Leob Classical Library ed 1926).

for human rights, but the 20th century shattered this dream. The post-World War II era has seen the emergence of written constitutions with written bills of rights and an independent judiciary empowered to enforce those rights; and the essence of judicial independence is the power of judges to say 'no' — 'no' to legislators, presidents, governors, municipal or local authorities, in short, 'no' whenever 'the needs of the political moment clash with constitutional guarantees'.<sup>24</sup>

A constitutional court must be policy-oriented, formulating and articulating the values of general validity and acceptance within a given society and infusing these values with meaning and vitality. It must be guided at all times by national ideology — what the Germans call the *Volkgeist* or national spirit. Unless the goals and the fundamental attitudes and values that should inform the behaviour of its members and institutions are clearly stated and accepted, Ben Nwabueze warns, 'a new nation is likely to find itself rudderless, with no sense of purpose and direction'.<sup>25</sup> While the decision of a constitutional court in a democracy should serve the purpose of settling disputes between the parties before it or correcting individual mistakes in lower court judgments, its primary concern should be to elucidate, safeguard and develop the values inherent in a constitution. According to Barak:<sup>26</sup>

The supreme court's primary concern is broader, system wide corrective action. This corrective action should focus on two main issues: bridging the gap between law and society, and protecting democracy.

Interpreting constitutional rights involves, first, determining the meaning and scope of a guaranteed right and, second, determining whether a challenged law or conduct conflicts with the fundamental rights. In determining the meaning and scope of guaranteed rights, a constitutional court should constantly remind itself that a constitution is not a document frozen in time but is a living instrument to be applied to the changing needs of a society still in the process of maturation. A constitution, like law, is not merely composed of a closed set of clear-cut rules, but deals with lofty ideals and principles. They lay down, in the words of Ronald Dworkin, 'general, comprehensive moral standards that government must respect but . . . leaves it to statesmen and judges to decide what these standards mean in concrete circumstances'.<sup>27</sup> Similarly, constitutional rights are not formulated as detailed set of rules designed to deal with specific, envisaged situations.

<sup>24</sup> The Hon MH Marshall 'Speech: "Wise parents do not hesitate to learn from their children": Interpreting state constitutions in an age of global jurisprudence' (2004) 79(5) *New York University Law Review* 1633 1639.

<sup>25</sup> Nwabueze (n 22 above) 140.

<sup>26</sup> A Barak 'The Supreme Court, 2001 term-forward, a judge on judging: Role of a Supreme Court in a democracy' (2002) 116 *Harvard Law Review* 16 27-28.

<sup>27</sup> R Dworkin *Life's dominion: An argument about abortion, euthanasia and individual freedom* (1993) 119.

Constitutional rights must be interpreted in such a way that they trump governmental interest,<sup>28</sup> for the simple reason that human rights protect not only the individual in a democracy but democracy itself. A constitutional court must not be very positivistic or legalistic in its attitude, but must go to the spirit of the law in the defence of human rights and human beings. Although a court should seek logical consistency and the symmetry of the legal structure and should not lightly sacrifice certainty, uniformity, order and coherence on the altar of judicial dexterity, it is incorrect to assert that judges can extract the meaning of constitutional provisions from legal materials alone.<sup>29</sup> Human rights are not merely legal rights; they are also moral rights, and moral decisions do not admit of mathematical certainty. A constitutional court may be, in the words of Hans Kelsen, 'a negative legislator';<sup>30</sup> but it is a legislator nonetheless and it must look for openings and create jurisprudence — through a creative interpretation of constitutional rights.

The South African Constitutional Court contributed remarkably to the elaboration of general principles on constitutional interpretation that is worth noting. The *Makwanyane* case provides a point of departure. In that case, the Constitutional Court adopted a liberal and creative approach to the interpretation of the Bill of Rights, when it stated:<sup>31</sup>

Whilst paying due regard to the language that has been used, [an interpretation of the Bill of Rights should be] 'generous' and 'purposive' and 'give . . . expression to the underlying values of the Constitution'.

This principle was put to a decisive but controversial use in *S v Mhlungu*,<sup>32</sup> when the majority of the Constitutional Court allowed persons involved in cases pending at the commencement of the Constitution to rely on rights in the interim Bill of Rights, despite the apparent provision in the Constitution to the contrary.<sup>33</sup> According to the Court:<sup>34</sup>

<sup>28</sup> See R Dworkin *Taking rights seriously* (1977) ch 7 (arguing that rights are 'trumps' held by individuals that outweigh collective goals).

<sup>29</sup> Traditional constitutional courts assert that the constitutions themselves and domestic commentaries are the sole bases for the analysis and interpretation of their constitutions. See PJ Smith 'States as nations: Dignity in cross-doctrinal perspectives' (2003) 89 *Vanderbilt Law Review* 1 21.

<sup>30</sup> Cited in AS Sweet *Governing with judges: Constitutional politics in Europe* (2000) 35. Kelsen defines a 'negative legislator' as one who cannot make law freely because the decision making is 'absolutely determined by the constitution'.

<sup>31</sup> *Makwanyane* (n 14 above) para 9.

<sup>32</sup> *S v Mhlungu* 1995 3 SA 867 (CC).

<sup>33</sup> See sec 241(8) of the Constitution of South Africa 1996: 'All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed.'

<sup>34</sup> *Mhlungu* (n 32 above) para 9.



An interpretation which withholds the rights guaranteed by chapter 3 of the [interim] Constitution from those involved in proceedings which fortuitously commenced before the operation of the Constitution would not give to that chapter a construction which is 'most beneficial to the widest amplitude' and should therefore be avoided if the language and context of the relevant sections reasonably permits such a course.

Nigeria's Supreme Court also has laid down a principle for constitutional interpretation in a number of cases, notably *Nafiu Rabiu v The State*,<sup>35</sup> where Justice Udo-Udoma stated:<sup>36</sup>

My Lords, it is my view that the approach of this Court to the construction of the Constitution should be, and so it has been, one of liberalism, probably a variation on the theme of the general maxim *ut res magis valeat quam pereat*. I do not conceive it to be the duty of this Court so to construe any of the provisions of the constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.

These are encouraging signals. Purposive and creative interpretations of constitutional rights are particularly needed in Africa's emergent democracies to help governments understand their legal obligations, the positive consequences for implementing those obligations, and negative ones for non-compliance. All genuine interpretation is necessarily creative, that is, it is 'a matter of interaction between purpose and object'.<sup>37</sup> Creative interpretation is also constructive, in that it imposes 'purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong'.<sup>38</sup>

### 3.2 Interpreting rights globally

Creative constitutional interpretations are enhanced when courts think global and act local, that is, when judges engage in comparative constitutional analysis. Comparative constitutionalism is 'emphatically . . . relevant to the task of interpreting constitutions and enforcing human rights'<sup>39</sup> and can be 'helpful in the quest for a theory of the public good and right political order'.<sup>40</sup> It could help one to understand what the law is and to understand one's constitutional traditions better. It could provide guidance, perspective, inspiration or reassurance for judges and may help in elucidating different functional concerns to similar

<sup>35</sup> *Nafiu Rabiu v The State* (1980) FRN 509.

<sup>36</sup> n 35 above, 519.

<sup>37</sup> R Dworkin *Law's empire* (1986) 52.

<sup>38</sup> As above.

<sup>39</sup> RB Ginsburg & DH Merritt 'Fifty-first Cardozo Memorial Lecture: Affirmative action: An international human rights dialogue' (1999) 21 *Cardozo Law Review* 253 282.

<sup>40</sup> DP Kommers 'The value of comparative constitutional law' (1976) 9 *John Marshall Journal of Practice and Procedure* 685 692.

questions and in strengthening the quality of judicial decisions, by providing a benchmark against which such decisions can be judged.<sup>41</sup>

There is an emerging trend in many jurisdictions towards an extra-territorial interpretation of constitutional rights that is both dynamic and edifying. Some countries' constitutions, such as those of Angola, Cape Verde, Malawi and South Africa, expressly enjoin their courts to invoke international and comparative law. Section 21(2) of the Constitution of Angola and section 17(3) of the Constitution of Cape Verde provide that constitutional and legal norms related to fundamental rights shall be interpreted and incorporated in the light of international instruments. Section 11(2) of the Constitution of Malawi enjoins the judiciary to 'have regard to current norms of public international law and comparative law.' Section 36 of the Constitution of South Africa 1996 requires any limitation of a fundamental right to be 'reasonable and justifiable in an open and democratic society based on freedom, equality and human dignity.' Section 39(1) further provides:

- When interpreting the Bill of Rights, a court, tribunal or forum —
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.

The jurisprudence of the South African Constitutional Court reveals a dynamic bent towards a global interpretation of rights. As the Court explained, again in *Makwanyane's* case, '[i]nternational agreements and customary international law provide a framework within which . . . [the Bill of Rights] can be evaluated and understood'<sup>42</sup> and these include both binding and non-binding public international law.<sup>43</sup> The *Makwanyane* case, itself, provides a classic example of the Court's invocation of international and comparative law; the Court assumed that an expansive comparative constitutional analysis was necessary in determining the constitutionality of the death penalty. The Court went on to discuss decisions from courts in the United States, Canada, Hungary, India, the European Court of Human Rights as well as the UN Committee on Human Rights, and concluded that the death penalty was unconstitutional for being cruel and inhumane.

In *S v Williams*<sup>44</sup> — the corporal punishment case — the Constitutional Court noted a 'growing consensus in the international community' that judicially imposed whipping 'offends society's notions of decency and is a direct invasion of the right which every person has to human dignity'.<sup>45</sup>

<sup>41</sup> See VC Jackson 'Narratives of federalism' (2001) 51 *Duke Law Journal* 223 254-63.

<sup>42</sup> *Makwanyane* (n 14 above) paras 36-7.

<sup>43</sup> O'Regan (n 7 above) 207 writing: 'Like many South African courts before us, we find international law and comparative law most helpful in our jurisprudence. There is an emerging dialogue across continents and nations concerning democracy and human rights and we engage this dialogue in the development of our own Constitution in our own specific context.'

<sup>44</sup> *S v Williams* 1995 7 BCLR 861 (CC).

<sup>45</sup> n 44 above, para 39.

The Court even drew upon decisions of sister institutions in Africa, to wit the Supreme Courts of Namibia and of Zimbabwe, wherein these courts held that corporal punishment constitutes inhuman or degrading punishment.<sup>46</sup> In *S v Ephraim*,<sup>47</sup> the Court ruled that 'abduction [violates] the applicable rules of international law'.<sup>48</sup>

The ruling in *S v Ephraim* was particularly important when contrasted with the practice in the United States in which an officer may, in the absence of an express ban treaty, abduct a foreigner and forcibly transport him to the US to stand trial. The US Supreme Court approved such a practice in *United States v Alvarez-Machain*,<sup>49</sup> largely because of its traditional reluctance to apply comparative constitutional analysis in interpreting the US Constitution.<sup>50</sup> Even as late as 1997, Justice Scalia wrote: 'Comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.'<sup>51</sup> Ackerman agreed, arguing that the 'spirit of the American Constitution requires limiting the scope of inquiry to American sources'.<sup>52</sup> Ackerman continued:<sup>53</sup>

To discover the Constitution, we must approach it without the assistance of guides imported from another time and place. Neither Aristotle nor Cicero, Montesquieu nor Locke, Harrington nor Hume, Kant nor Weber will provide the key. Americans have borrowed much from such thinkers, but they have also built a genuinely distinctive pattern . . . As we lose sight of these ideals, the organising patterns of our political life unravel.

In recent years, however, the US Supreme Court has tried to redeem itself from this 'frozen-in-time' approach to interpretation, and American scholars and justices now freely discuss the merits of a comparative approach to a constitutional question.<sup>54</sup> *Thomson v Oklahoma*<sup>55</sup> was

<sup>46</sup> n 44 above, paras 31-32 34.

<sup>47</sup> *S v Ephraim* 1991 2 SA 553 (A).

<sup>48</sup> n 47 above, 568.

<sup>49</sup> See *United States v Alvarez-Machain* (1992) 504 US 655 670.

<sup>50</sup> See Barak (n 26 above) 114 (stressing the reluctance of the US Supreme Court in invoking comparative law); C Moon 'Comparative constitutional analysis: Should the United States Supreme Court join the dialogue?' (2003) 12 *Journal of Law and Policy* 229 240.

<sup>51</sup> *Printz v United States* (1997) 521 US 898 921 n 11; A Scalia 'Commentary' (1996) 40 *St Louis University Law Journal* 1119 (arguing that 'international norms' should not control adjudication of domestic issues in the US courts).

<sup>52</sup> B Ackerman *We the people: Foundations* (1991) 3.

<sup>53</sup> n 52 above, 3-4 6.

<sup>54</sup> See eg SD O'Connor 'Remarks at the ninety-sixth annual meeting of the American Society of International Law' (2002) 96 *American Society International Law Proceedings* 350 ('Conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts'); WH Rehnquist 'Constitutional courts — Comparative remarks' in P Kirchhof & DP Kommers (eds) *Germany and its basic law: Past, present and future — A German-American symposium* (1993) 411 412 ('Now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.').

<sup>55</sup> *Thomson v Oklahoma* (1988) 487 US 815.

one of the pioneer cases in this regard. In that case, a majority of the Supreme Court found that the execution of a 15 year-old would violate the Eight Amendment's prohibition against cruel and unusual punishment, arguing that:

The conclusion that it would offend civilised standards of decency to execute a person who was less than 16 years old at the time of his or her offence is consistent with the views that have been expressed by respected professional organisations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.

Since then, the Supreme Court has warmly embraced the influence of globalisation in American constitutional jurisprudence, for example, in *Grutter v Bollinger*,<sup>56</sup> in which Justice Ginsburg referenced 'the international understanding' concerning the duration of affirmative action programme; *Washington v Glucksburg*,<sup>57</sup> in which Justice Rehnquist, writing for the majority, provided as relevant background a lengthy footnote concerning foreign court decisions on the constitutionality of bans on assisted suicide; and *Thompson v Oklahoma*,<sup>58</sup> in which the Court stressed the relevance of international views on the death penalty. Others are *Lawrence v Texas*,<sup>59</sup> in which its Supreme Court struck down a law criminalising homosexuality as a violation of the Fourteenth Amendment, citing *Dudgeon v United Kingdom*,<sup>60</sup> a 1981 European Court of Human Rights decision that struck down the United Kingdom's criminal sodomy laws; and *Atkins v Virginia*,<sup>61</sup> in which Justice Stevens, writing for the majority, noted that executing the mentally retarded is a practice that has been 'overwhelmingly disapproved' by the 'world community',<sup>62</sup> a fact which, according to him, supports the conclusion that such executions are prohibited by the Eighth Amendment, being 'cruel and unusual punishments'.<sup>63</sup>

There is, indeed, a global cross-pollination of human rights, as many courts in other jurisdictions frequently cite decisions of international human rights tribunals that do not even have jurisdiction over them. Examples include the Australian case of *Leask v Commonwealth*,<sup>64</sup> in which Justice Toohey cited the European Court of Human Rights' decision in *Soering v United Kingdom*,<sup>65</sup> concerning extradition to a country permitting the use of the death penalty; the Canadian case of *United*

<sup>56</sup> *Grutter v Bollinger* (2003) 539 US 306.

<sup>57</sup> *Washington v Glucksburg* (1997) 521 US 702 718 n 16.

<sup>58</sup> *Thompson v Oklahoma* 487 US 815 830-31.

<sup>59</sup> *Lawrence v Texas* (2003) 539 US 558.

<sup>60</sup> *Dudgeon v United Kingdom* (1981) 45 Eur Ct HR Ser A.

<sup>61</sup> *Atkins v Virginia* (2002) 536 US 304.

<sup>62</sup> n 61 above, 316 n 21.

<sup>63</sup> As above, 307 321.

<sup>64</sup> *Leask v Commonwealth* (1996) 187 CLR 579 615-16.

<sup>65</sup> *Soering v United Kingdom* (1989) 161 Eur Ct HR Ser A.

States v Burns,<sup>66</sup> which also cited *Soering v United Kingdom*; and the Hong Kong case of *Shum Kkwok Sher v HKSAR*,<sup>67</sup> in which that country's Court of Final Appeal cited *Hashman & Harrup v United Kingdom*,<sup>68</sup> concerning the specificity requirement of laws constraining freedom of speech. These courts also consult the jurisprudence of other municipal courts in constitutional interpretations. In *The Queen v Keegstra*,<sup>69</sup> for example, the Canadian Supreme Court considered whether the Canadian criminal code could prohibit hate speech. In interpreting the Charter of Rights and Freedoms, the Court turned to American jurisprudence as well as international human rights law for assistance. Chief Justice Dickson justified such an approach by asserting that 'international human rights law and Canada's commitments in that area are of particular significance in assessing the importance of parliament's objective'.<sup>70</sup>

In the Australian case of *Mabo v Queensland [No.2]*,<sup>71</sup> the High Court — the country's highest court — rejected, by a six to one majority, the doctrine of *terra nullius*, supporting its holding not only with the decision of the International Court of Justice but also with decisions from Nigeria, Canada, India, New Zealand and the United States.<sup>72</sup> In another case, *Australia Capital Television Pty v Commonwealth*,<sup>73</sup> the Court held as unconstitutional an Act allowing the government to pass legislation limiting or restricting the freedom of communication and broadcasting rights. In arriving at its decision, the Court looked to decisions from Canada, England, the US and the European Court of Human Rights.<sup>74</sup>

Refreshingly, a few other constitutional courts in Africa also participate in this international dialogue. In *Mwellie v Ministry of Works*,<sup>75</sup> for example, the Constitutional Court of Namibia considered decisions from India, US, Canada, England, Malaysia, South Africa and the European Court of Human Rights. Indeed, Africa's transitional judiciaries have managed to produce a corpus of constitutional case law, though not many of them are active participants in the comparative constitu-

<sup>66</sup> *United States v Burns* [2001] 1 SCR 283 para 53.

<sup>67</sup> *Shum Kkwok Sher v HKSAR* [2002] 2 HKLRD 793.

<sup>68</sup> *Hashman & Harrup v United Kingdom* (1999) Eur Ct HR Ser A.

<sup>69</sup> *The Queen v Keegstra* [1990] 3 SCR 697.

<sup>70</sup> n 69 above, 749-50. See generally L LeBel & G Chao 'The rise of international law in Canadian constitutional litigation: Fugue or fashion? Recent developments and challenges in internalising international law' (2002) 16 *Supplement Constitutional Law Review* 23 45; GV la Forest 'The expanding role of the Supreme Court of Canada in international law issues' (1996) 34 *Canadian Yearbook of International Law* 89 90-91.

<sup>71</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

<sup>72</sup> n 71 above, 40 48 83-83 123-24 137 164-65.

<sup>73</sup> *Australia Capital Television Pty v Commonwealth* (1992) 177 CLR 106.

<sup>74</sup> n 73 above, 107 168-69.

<sup>75</sup> *Mwellie v Ministry of Works* [1995] 4 LRC 184.

tional dialogue. Some are not even aware of the existence of many international human rights tribunals, let alone draw inspiration from their dynamic and rich jurisprudence.

The celebrated Nigerian case of *Abacha v Fawehinmi*<sup>76</sup> reveals a gratuitous ignorance of international human rights jurisprudence on the part of some of the Supreme Court justices. Among the issues for determination was included the question whether a treaty incorporated into the laws of Nigeria has a status higher than, and superior to, other municipal laws and what, in particular, was the relationship between the African Charter and the Nigerian Constitution and between the Charter and other municipal laws. The Supreme Court agreed with the Court of Appeal that the African Charter (Domestication Act) is a statute with international flavour and that if there is a conflict between it and another statute, the provisions of the Charter prevail over that other statute, based on the presumption that the legislature does not intend to breach an international obligation.<sup>77</sup> The Court, however, held that the African Charter is not superior to the Constitution and that the National Assembly has the power to remove a treaty from the body of its municipal laws.<sup>78</sup>

In a passage that remains highly embarrassing, Justice Belgore — the most senior member of the Nigerian Supreme Court justices — said, in his concurring judgment: ‘There is provision in the [African] Charter for a Commission to be set up, but since 19th January 1981 when the Charter was made in Banjul, The Gambia, no Commission has been set up.’<sup>79</sup> This statement was made on 28 April 2000. One wonders if the learned justices might have reasoned differently if they knew that an African Commission on Human and Peoples’ Rights had been in existence for more than 12 years<sup>80</sup> prior to the *Fawehinmi* case and that the Commission had developed a pool of jurisprudence on human rights.

The African Commission itself is involved in international dialogue aimed at giving life and force to the African Charter. In interpreting the Charter, the Commission is enjoined to:<sup>81</sup>

draw inspiration from international law on human and peoples’ rights, the Charter of the United Nations, the . . . [Constitutive Act of the African Union], the Universal Declaration of Human Rights, other instruments adopted by the United Nations and African countries in the field of human and peoples’ rights, as well as from the provisions of various instruments adopted within the specialised agencies of the United Nations of which the parties to the present Charter are members.

<sup>76</sup> See *Abacha v Fawehinmi* [2000] FWLR (Pt 4) 533.

<sup>77</sup> n 76 above, 586.

<sup>78</sup> As above.

<sup>79</sup> n 76 above, 595.

<sup>80</sup> The Commission was established and inaugurated in 1987 ‘to promote human and peoples’ rights and ensure their protection in Africa’; art 30 African Charter.

<sup>81</sup> Art 60 African Charter.

By placing reliance on international human rights jurisprudence, the Commission has succeeded in extending the paradigm of human rights in Africa to the basic needs of peoples, thereby departing from the original paradigm. In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*,<sup>82</sup> for example, the Commission created a right to housing in the African Charter even in the absence of an express guarantee. According to the Commission:<sup>83</sup>

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing . . .

### 3.3 Points of discord

The question that begs for an answer is whether comparative constitutionalism can be justified in the absence of an express authorisation. What is more, is it lawful and legitimate for transitional judiciaries to invoke international and comparative law in interpreting constitutions that are products of different cultural and historical developments? Comparative constitutionalism is met with the objection that it opens the floodgate to the application of laws that were born to different countries in different ages and in very different circumstances. Opponents of comparative constitutionalism insist that it upsets the acculturation of a society through the legislative process; that it is wrong to disaggregate legislation from its cultural instantiation, since laws are imbedded in the culture of a people.<sup>84</sup> They appeal to Montesquieu, who argued that laws 'should be adapted in such a manner to the people for whom they are made, as to render it very unlikely for those of one nation to be proper for another'.<sup>85</sup>

Comparative constitutionalism, according to its opponents, also raises serious questions of democratic legitimacy. Modern liberal democracies tend to justify judicial authority in terms of the rule of law; and the rule of law produces an argument for 'legislative sover-

<sup>82</sup> See eg Communication 155/96 *Social and Economic Rights Action Centre v Nigeria* Fifteenth Annual Activity Report Annex V (*SERAC* case).

<sup>83</sup> n 82 above, para 60.

<sup>84</sup> See D Childress III 'Using comparative constitutional law to resolve domestic federal questions' (2003) 53 *Duke Law Journal* 193 217 219 (arguing, incorrectly, that '[e]ach legal system is autonomous and is perhaps incapable of legal transplant. Any transplant would be a rejection of the organic law that is part of that society and culture').

<sup>85</sup> C de Secondat 'Baron de Montesquieu' in DW Carrithers (ed) *The spirit of the laws* bk 1 ch 3 104-05 (1977) (1748).

eignty in its narrowest and least reflective sense'.<sup>86</sup> Others fear the danger that judicial comity may one day require that a country's constitutional court or Supreme Court reach a decision that is not in that country's best interest.<sup>87</sup>

These objections are true; but they do not represent the whole truth. Of course, a judge should necessarily take the history and changing conditions of his community as his point of departure in interpreting a constitution. He should, however, not stop there; he should pay attention to legal developments in the rest of the world and to their role in keeping their countries in step with these developments, realising, as the United States (US) Supreme Court did — in *Lawrence v Texas*<sup>88</sup> — that:<sup>89</sup>

[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

There are several reasons why comparative constitutionalism is legitimate and imperative. The first is that the language of human rights is global, spoken by political leaders and ordinary citizens alike. This is because of the rediscovery that humanity is confronted with basically common issues. Dr Samuel Johnson wrote many years back that people everywhere are prompted by the same motives, deceived by the same fallacies, all animated by hope, obstructed by danger, entangled by desire, and seduced by pleasure.<sup>90</sup> It is naïve, in the light of this rediscovery, for judges to expect the breeze of globalisation to pass them by. No institution of government can afford to ignore the rest of the world; and that includes the courts.

A second but related justification is that, despite the differences in the historical development or the conceptual structure and style of operation that exist in different legal systems, these systems give the same or similar solutions to the problems of life. The bills of rights in Africa are generally composed in a very similar manner to those of the Western world and bear, in particular, the imprimatur of the Universal Declaration of Human Rights of 1948 (Universal Declaration).<sup>91</sup> These constitutions rest, to borrow Weinrib's words, 'on a shared constitutional conception that, by design, transcends the history, cultural heritage,

<sup>86</sup> C Harlow 'Voices of difference in a plural community' (2002) 50 *American Journal of Comparative Law* 339 341.

<sup>87</sup> See Moon (n 50 above) 245.

<sup>88</sup> *Lawrence v Texas* (2003) 123 S Ct 2472.

<sup>89</sup> n 88 above, 2482.

<sup>90</sup> See BH Bronson (ed) *Samuel Johnson: Rasselas, poems, and selected prose* (1971) 95.

<sup>91</sup> Universal Declaration of Human Rights, adopted on 10 December 1948; GA Res 217 A (III) GAOR 3d Sess.



and social mores of any particular nation-state'.<sup>92</sup> Thus, nearly all countries in Africa assume a model that basically draws from those of liberal democracies, at least from a formal point of view.<sup>93</sup>

The values that underpin modern constitutions — justice, democracy, freedom, equality and the dignity of the human person — share a multinational history and universal acceptance; they are standards for sound constitutional structuring, making it imperative for constitutional courts and lawyers to be comparatists. Dignity, for example, is the common denominator of our very humanity and is 'above all price and so admits of no equivalent'.<sup>94</sup> The Universal Declaration also provides that '[a]ll human beings are born free and equal in dignity and rights'<sup>95</sup> and almost all other international human rights instruments contain similar provisions. A state cannot use its particular national or religious tradition as justification for its failure to respect human dignity; neither could such failure be justified 'in the name of majoritarian political processes'.<sup>96</sup>

Dignity is a central value that animates the South African Constitutional Court's interpretation of the Bill of Rights. Section 39(a) of the South Africa Constitution provides that interpretation of the Bill of Rights 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.<sup>97</sup> Justice O'Regan stressed as much, in *Makwanyane's* case, when she held:<sup>98</sup>

Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.

It is self-defeating for African judges to stick to an unchanging line in a radically changed world. Convergence, not divergence, has been the mega-trend since the early 1980s and beyond. Our judges should pro-

<sup>92</sup> LE Weinrib 'Constitutional conceptions and constitutional comparativism' in V Jackson & M Tushnet (eds) *Defining the field of comparative constitutional law* (2002) 3 15.

<sup>93</sup> See Piergigli (n 15 above) (noting exceptions in constitutional provisions concerning torture or slavery and forced labour, that is, practices that are either autochthonous or related to the colonial period).

<sup>94</sup> HE Jones *Kant's principle of personality* (1971) 127.

<sup>95</sup> Art 1 Universal Declaration.

<sup>96</sup> H Botha 'Comparative law and constitutional adjudication' (unpublished but on file with author).

<sup>97</sup> See also *Makwanyane* (n 14 above) para 144 (where the Constitutional Court described the rights to life and dignity as 'the most important of all human rights, and the source of all other personal rights' in the Bill of Rights); and generally A Chaskalson 'Human dignity as a foundational value of our constitutional order' (2000) 16 *South African Journal on Human Rights* 193.

<sup>98</sup> *Makwanyane* (n 14 above) para 329.

mote judicial comity, by opening their minds to new approaches, mindful that 'other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit'.<sup>99</sup> They should use their best skills and judgment to fit human rights law to the new challenges that an evolving democratic society leaves at the doors of their courthouses.<sup>100</sup> Human rights law can only develop if its jurisprudence is a dialogue rather than a monologue; and, if applied more frequently, African courts could use international and comparative norms to make justiciable many of the socio-economic rights that some African constitutions regard as mere fundamental objectives and directive principles of state policies.

Of course, constitutional interpretation must be system-specific, as unscientific juridical comparison will yield very limited results. The South African Constitutional Court, for example, is keenly aware of this danger and has repeatedly stressed that, in the final analysis, it is the South African Constitution that must be interpreted and that its provisions must be placed within the context of South African society.<sup>101</sup> In the *Makwanyane* case, for example, the Court held in balance its references to foreign jurisprudence with its reliance on the indigenous African concept of *ubuntu*, which was taken to signal values of respect, dignity, compassion and solidarity.<sup>102</sup> Constitutional courts must also maintain uniformity and predictability, so that litigants and advocates alike can rely on the continued application of the same rules. As Cody Moon pointedly asks, 'When one constitutional court decides an issue one way and another reaches a different conclusion, who determines which court is correct?'<sup>103</sup>

A final point to stress is that advances in information and communication technologies (ICTs) have, undoubtedly, aided the global cross-pollination of human rights, making decisions of international and constitutional courts only a mouse click away. The internet affords access to foreign judicial decisions and law journals contain all manners of commentaries. African judges should acquaint themselves with, and avail themselves of, the opportunities that the ICTs have opened up to the international community. These, of course, have their limitations; but therein lie the challenges. Every court must determine for itself the

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<sup>99</sup> SD O'Conner 'Broadening our horizon: Why American judges and lawyers must learn about foreign law' *International Judicial Observer* June 1997 2, cited in RB Ginsburg 'Looking beyond our borders: The value of a comparative perspective in constitutional adjudication' (2004) 22(2) *Yale Law and Policy Review* 329 337.

<sup>100</sup> See JS Kaye 'Delivering justice today: A problem-solving approach' (2004) 22(1) *Yale Law and Policy Review* 125.

<sup>101</sup> See eg *Williams* (n 44 above) paras 50 51.

<sup>102</sup> *Makwanyane* (n 14 above) paras 130-31 223-27.

<sup>103</sup> Moon (n 50 above) 245.

acceptable uses of ICTs and must test and retest new ideas, retain and refine what is good and reject what is bad, recognising, as Benjamin Cardozo did, that 'in the endless process of time, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine'.<sup>104</sup>

## 4 Conclusion

O'Regan writes:<sup>105</sup>

The challenge of building one nation and one economy in which all South Africans may participate and from which all may benefit remains a major challenge for the short, medium and perhaps even long-term.

This is also the challenge facing almost all emerging democracies in Africa, including Ghana, Kenya, Nigeria, Uganda, Zambia and Zimbabwe. In these countries, the wealth of nations has become the poverty of peoples due, largely, to corruption and mismanagement of national resources. Politics is still a freak-show in Africa, rather than deliberative democracy. Recycled politicians are busy fattening their bank accounts, with voices of pleasure pouring out their notes on every side. On such systems as these the electorates matter little — they are foam on waves.

In the meantime — and probably in the long run as well — transitional judiciaries in Africa should expound African constitutions with Africa's ugly past and present challenges in mind.<sup>106</sup> They should draw upon international and comparative law to assert their institutional authority and should 'abandon their longstanding insularity and inertia in matters of jurisprudential innovation and borrowing'.<sup>107</sup> Since the final cause of law is the welfare of society,<sup>108</sup> African judges should devote themselves towards this end rather than being defenders of the *status quo*. Most courts in the past, including those of South Africa, were passive instruments of legitimating authoritarian regimes. The dying dynasty of dictators on the continent presents present courts with golden opportunities to develop constitutionalism, by enforcing limitations on the exercise of governmental power, exercising their powers of judicial review to advance and deepen the transition to constitutional democracy, and, above all, protecting human rights through comparative constitutionalism.

<sup>104</sup> B Cardozo *The nature of the judicial process* (1921) 179.

<sup>105</sup> O'Regan (n 7 above) 201.

<sup>106</sup> OW Holmes Jr *The common law* (1881) 1 ('The life of the law has not been logic; it has been experience').

<sup>107</sup> HK Prempeh 'A new jurisprudence for Africa' (1999) 10(3) *Journal of Democracy* 135 146.

<sup>108</sup> See Cardozo (n 104 above) 62.

The Constitutional Court, the Bar and similar institutions in South Africa have helped, and continue to help, the nation and the people in surviving an unprecedented wicked and oppressive era in their history. Such a remarkable achievement within such a limited time frame is worth celebrating; but as we celebrate, let us remind ourselves that, in the general condition of human life in Africa, there is much more to be endured than enjoyed. There is still a wide gap between promise and performance, that is, between rights guaranteed in bills of rights and their actual enjoyments by the intended beneficiaries. The following lines from Abigail Adams are as relevant for us today as they were when she first wrote them to her son during the era in which he was coming of age:<sup>109</sup>

These are the times in which a genius would wish to live. It is not in the still calm of life, or the repose of a pacific station, that great characters are formed. The habits of a vigorous mind are formed in contending with difficulties.

Our consolation should be that we are not alone in sharing our past pains, our present concerns and our future challenges. Let us look to the next decade with optimism, which is the motor that drives hope but without which there would only be the despair that fulfils its own prophecy of doom.

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<sup>109</sup> 'Letter from Abigail Adams to John Quincy Adams' quoted in D McCullough *John Adams* (2001) 226.

# The right to pre-trial silence as part of the right to a free and fair trial: An overview

*Tharien van der Walt\**

Senior Lecturer, Faculty of Law, North West University

*Stephen de la Harpe\*\**

Senior Lecturer, Faculty of Law, North West University

## Summary

*The right to pre-trial silence as part of the right to a free and fair trial is included in many international human rights treaties, albeit not expressly. The exact content of this right is, however, not clearly defined and the scope thereof differs in various jurisdictions. In this contribution, the provisions of the African Charter, decisions of the European Court of Human Rights and the position in South Africa are discussed. As a general rule, it can be stated that it is accepted that during the pre-trial stage the right to remain silent serves as a safeguard against the abuse of powers. There is, however, a difference of opinion as to what extent negative inferences can be drawn from pre-trial silence. We conclude that it ought to be impermissible to draw an adverse inference as to the guilt or the credibility of the accused from his pre-trial silence alone.*

## 1 Introduction

Since the end of World War II, human rights have played an increasingly important role in international law.<sup>1</sup> The right to a free and fair trial has formed one of the basic human rights since its inclusion in the 1948

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\* BProc, LLB, LLM (UNISA); drttvdw@puknet.ac.za

\*\* BA et Comm, LLB, LLM (Pretoria); pvrspdlh@puknet.ac.za

<sup>1</sup> J Dugard *International law — A South African perspective* (2000) 234.

Universal Declaration of Human Rights (Universal Declaration).<sup>2</sup> It was subsequently included in most international human rights treaties such as the International Covenant on Civil and Political Rights (CCPR),<sup>3</sup> the European Convention on Human Rights and Fundamental Freedoms (European Convention),<sup>4</sup> the American Convention on Human Rights (American Convention)<sup>5</sup> and the African Charter on Human and Peoples' Rights (African Charter).<sup>6</sup> Respected authors such as Dugard even regard it to form part of customary international law.<sup>7</sup>

Some international instruments, such as the European Convention, include a detailed description of the right to a free and fair trial, while others, like the African Charter,<sup>8</sup> indirectly provide for the right to a fair trial. The right to a free and fair trial is also protected in the domestic laws<sup>9</sup> of most democratic orders.

Most international instruments do not specifically refer to the right to silence. The right to silence, and specifically pre-trial silence, is usually protected as part of the right to a free and fair trial. Express reference to the right to silence, is, however, made in CCPR. CCPR provides that everyone has the right not to be compelled to testify against themselves or to confess to guilt.<sup>10</sup> This right is generally known as the common law privilege against self-incrimination and is the corollary of the right to silence.<sup>11</sup>

The right to silence was referred to in the European Court of Human Rights' decision of *Murray v United Kingdom*<sup>12</sup> as a 'generally recognised international standard'.<sup>13</sup> The Court stated further that, while the right to silence is not an absolute right, it nevertheless lies at the heart of the notion of a fair trial.<sup>14</sup> Historically, the right to silence developed as a procedural protection against state coercion and as a fundamental element of the notion of a fair trial.<sup>15</sup>

In this paper the right to pre-trial silence is discussed with reference to:

<sup>2</sup> Art 10 Universal Declaration.

<sup>3</sup> Art 14 CCPR.

<sup>4</sup> Art 6 European Convention.

<sup>5</sup> Art 8 American Convention.

<sup>6</sup> Arts 7 & 26 African Charter.

<sup>7</sup> Dugard (n 1 above) 241.

<sup>8</sup> Arts 5, 6, 7 & 26 African Charter.

<sup>9</sup> See *inter alia* sec 35 of the Constitution of the Republic of South Africa Act 108 of 1996 and secs 7-14 & 24(2) of the Canadian Charter of Rights and Freedoms.

<sup>10</sup> Art 14(3)(g) CCPR.

<sup>11</sup> C Theophilopoulos 'The European Convention on Human Rights and the right to silence: The lesson for South Africa' (2003) 36 *De Jure* 372 373.

<sup>12</sup> *Murray v United Kingdom* (1996) 22 EHRR 29.

<sup>13</sup> n 12 above, para 45.

<sup>14</sup> n 12 above, paras 29 & 56.

<sup>15</sup> *Saunders v United Kingdom* (1997) 23 EHRR 313.

- the provision for this right in the African Charter and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Principles and Guidelines), drafted by the African Commission on Human and Peoples' Rights;<sup>16</sup>
- the application of this right by the European Court of Human Rights; and
- the development and application of this right in South Africa.

In conclusion, we set out our views as to what the right to pre-trial silence should entail.

## 2 The African Charter on Human and Peoples' Rights

As mentioned above, the African Charter only indirectly provides for the right to a free and fair trial. The protection of this right in the African Charter can be inferred from the following: Article 5 provides for the protection of the right to human dignity of every individual and recognition of his legal status.<sup>17</sup> Article 6 protects the right to liberty and security of person and prohibits the deprivation of freedom except for reasons and conditions previously laid down by law. In particular no one may be arbitrarily arrested or detained.<sup>18</sup> Article 7 provides that everyone shall have the right to have his cause heard, which comprises of the right to appeal, the right to be presumed innocent, the right to defence, and the right to be tried within a reasonable time by an impartial court or tribunal. It also refers, in subsection 2, to the principle of legality.<sup>19</sup> Article 26 places a duty on state parties to guarantee the independence of the courts.<sup>20</sup>

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<sup>16</sup> Adopted at its 33rd ordinary session in Niamey, Niger in May 2003.

<sup>17</sup> Art 5 of the African Charter provides: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

<sup>18</sup> Art 6 of the African Charter provides: 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.'

<sup>19</sup> Art 7 of the African Charter provides: '1 Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. 2 No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.'

<sup>20</sup> Art 26 of the African Charter provides: 'States parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.'

None of these articles specifically contains provisions relating to the right to silence. However, the African Commission on Human and Peoples' Rights (African Commission) is mandated by article 45(1)(b) of the African Charter to formulate and lay down principles and rules aimed at solving legal problems relating to human rights and freedoms. As a result, the African Commission drafted Principles and Guidelines. These Principles and Guidelines are not binding on state parties to the African Charter, but are indicative of how the right to a free and fair trial is interpreted by the African Commission. It is submitted that these Principles and Guidelines will have persuasive value in the African Court on Human and Peoples' Rights. In these Principles and Guidelines, the right to silence, including pre-trial silence, is expressly provided for.<sup>21</sup>

The Preamble of the Principles and Guidelines recognises that it is necessary to formulate and lay down principles and rules to strengthen and supplement the provisions relating to a fair trial contained in the African Charter and to reflect international standards.

The Principles and Guidelines are divided into various sections. Section A deals with the general principles applicable to all legal proceedings in Africa and lays down principles and guidelines regarding fair and public hearings and independent and impartial tribunals. Section B deals with judicial training; section C with the right to an effective remedy; section D with court records and public access; section E with *locus standi*; section F with the role of prosecutors; section G with access to lawyers and legal services; section H with legal aid and assistance; section I with independence of lawyers; section J with cross-border collaboration; section K with access to judicial services; section L with the prohibition of civilians to be tried by military courts; section M with provisions regarding arrest and detention; section N with provisions relating to criminal charges; section O with children and the right to a fair trial; section P with victims of crime and abuse of power; section Q with traditional courts; section R contains a non-derogability clause; and section S contains the definitions.

Section M of the Principles and Guidelines deals extensively with provisions applicable to arrest and detention. It lays down various guidelines regarding the rights of arrested persons which state parties should observe. The pre-trial right to silence is specifically protected in Part 2, which deals with rights upon arrest.<sup>22</sup> Subsection (f) deals with the right

<sup>21</sup> See secs M, N & O of the Principles and Guidelines.

<sup>22</sup> Sec M Part 2 of the Principles and Guidelines provides for rights upon arrest: '(a) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed, in a language he or she understands, of any charges against him or her; (b) Anyone who is arrested or detained shall be informed upon arrest, in a language he or she understands, of the right to legal representation and to be examined by a doctor of his or her choice and the facilities available to exercise this right; (c) Anyone who is arrested or detained has the right to inform, or have the authorities notify, their family or friends. The information must



upon arrest not to be obligated to answer any questions or participate in any interrogation without his or her lawyer being present.<sup>23</sup>

Section N deals with provisions applicable to proceedings relating to criminal charges. Part 6 thereof (in subsection (d)) deals with the accused person's right not to be compelled to testify against himself or to confess to guilt.<sup>24</sup> Subsection (d)(1) provides for the exclusion of any confession or other evidence obtained through coercion or force. An admission or confession obtained during *incommunicado* detention shall be considered to have been obtained by coercion and thus be excluded. Subsection (d)(2) provides that silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent.

From the above, it is clear that the right to silence, including pre-trial silence, is protected by the African Charter, as expanded on by the Principles and Guidelines, as an integral part of the right to a fair trial.<sup>25</sup> The exposition in the Principles and Guidelines is, generally

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include the fact of their arrest or detention and the place the person is kept in custody; (d) If the arrested or detained person is a foreign national, he or she must be promptly informed of the right to communicate with his or her embassy or consular post. In addition, if the person is a refugee or stateless person or under the protection of an inter-governmental organization, he or she must be notified without delay of the right to communicate with the appropriate international organization; (e) States must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her lawyer, doctor, family and friends, and in the case of a foreign national, his or her embassy or consular post or an international organization; (f) Any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present; (g) Anyone who is arrested or detained shall be given reasonable facilities to receive visits from family and friends, subject to restriction and supervision only as are necessary in the interests of the administration of justice and of security of the institution; (h) Any form of detention and all measures affecting the human rights of a person arrested or detained shall be subject to the effective control of a judicial or other authority. In order to prevent arbitrary arrest and detention or disappearances, states should establish procedures that require police or other officials with the authority to arrest and detain to inform the appropriate judicial official or other authority of the arrest and detention. The judicial official or other authority shall exercise control over the official detaining the person.'

<sup>23</sup> Sec M Part 2(f): 'Any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present.'

<sup>24</sup> Section N Part 6(d): 'The accused has the right not to be compelled to testify against him or herself or to confess to guilt. 1 Any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing. Any confession or admission obtained during *incommunicado* detention shall be considered to have been obtained by coercion. 2 Silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent.'

<sup>25</sup> The African Commission's Principles and Guidelines includes a non-derogatory clause which provides that not even times of war or other similar conditions may be invoked to justify a derogation from the right to a fair trial.

speaking, in accordance with other international instruments<sup>26</sup> and with some common law jurisdictions. It is therefore worthwhile to compare the position as stated by the European Court of Human Rights and some common law jurisdictions.

### 3 The European Court of Human Rights

Article 6(1) of the European Convention does not expressly provide for the right to silence.<sup>27</sup> Prior to the 1993 decision in *Funke v France*,<sup>28</sup> the European Court of Human Rights did not interpret the European Convention as providing protection for an individual's right to silence and privilege against self-incrimination.

In this case, the Court read an implied privilege against self-incrimination in the wording of article 6(1) of the European Convention.<sup>29</sup> The Court held that the European silence principle is a fundamental part of the European *communis opinio*, which places the burden of proof on the prosecution. According to the Court, it consists of two essential elements, namely a right to silence by the suspect during the pre-trial stage and the right to silence of an accused at trial, and, secondly, the privilege against self-incrimination which may be claimed by both the suspect and the accused.<sup>30</sup>

The European silence principle is an extension of the principle that, where the state fails to prove its case against the accused, the accused is entitled to a discharge. It entails the following:<sup>31</sup>

- (a) The right is protected by article 6(1) of the European Convention but is not absolute and is subject to reasonable limitation.
- (b) It may be invoked by a suspect during pre-trial stage and by the accused at trial.
- (c) It applies to all legal and quasi-legal proceedings which lead to a criminal sanction, penalty or fine, including insolvency, competition, anti-trust and tax investigations.
- (d) The privilege against self-incrimination may be claimed by the witness personally to avoid self incrimination but also to avoid incrimination of a third party.

<sup>26</sup> See *inter alia* Amnesty International's Principles and Guidelines on the Right to a Free and Fair Trial as well as art 8 of the American Convention which provides for the right to a fair trial.

<sup>27</sup> This article provides that 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent tribunal established by law. . .'.

<sup>28</sup> (1993) 16 EHRR 297 326.

<sup>29</sup> Theophilopoulos (n 11 above) 373.

<sup>30</sup> As above.

<sup>31</sup> Theophilopoulos (n 11 above) 374-375.

- (e) The right to silence applies to oral testimony and the discovery of documents, but not to non-testimonial evidence or physical (real) evidence.
- (f) The suspect must be informed of this right at the earliest possible stage.

It is proposed that article 6(1) of the European Convention should now be read with article 14(3)(g) of CCPR,<sup>32</sup> which expressly recognises the right not to give incriminatory evidence against oneself.<sup>33</sup>

In *Murray v United Kingdom*,<sup>34</sup> the European Court of Human Rights held that, in certain circumstances, the drawing of an adverse inference from silence during pre-trial investigations would not violate the right to remain silent. The Court, in this case, had to consider the question whether the provisions in the Criminal Evidence Order 1988 (Northern Ireland), permitting an adverse inference to be drawn from an accused's silence during interrogation, infringe articles 6(1) and (2) of the European Convention which protect the right to a fair trial.

The majority reasoned that no right is absolute and that the right to silence may be limited in appropriate circumstances. Caution is, however, required when drawing adverse inferences. Five members of the court disagreed with the majority finding. Judge Bussitil,<sup>35</sup> on behalf of the minority, held:

In my view, the attachment of adverse inferences to the right to silence in the pre-trial stage is a means of compulsion, in that it can constitute a form of direct pressure exercised by the police to obtain evidence from a suspect. The co-operation of the detainee can be obtained during interrogation with the threat of adverse inferences being drawn against him for remaining silent. Thus the suspect is faced with Hobson's choice — he either testifies or, if he chooses to remain silent, he has to risk the consequences, thereby automatically losing his protection against self-incrimination.

In *Averill v United Kingdom*,<sup>36</sup> the European Court of Human Rights confirmed the decision by the majority in *Murray*,<sup>37</sup> and held that adverse inferences may be drawn in a situation where the suspect refuses to co-operate if there was a clear calling for an innocent explanation. It was held that an adverse inference may not be drawn when the accused's reason for silence is based on a good cause. Where the accused's silence is based on a policy of non-co-operation<sup>38</sup> with the police, a reasonable inference may be drawn.

<sup>32</sup> '[E]veryone shall be entitled . . . [n]ot to be compelled to testify against himself or to confess to guilt.'

<sup>33</sup> Theophilopoulos (n 11 above) 373.

<sup>34</sup> n 12 above.

<sup>35</sup> n 12 above, 51.

<sup>36</sup> (2001) 31 EHRR 372 para 47.

<sup>37</sup> n 12 above.

<sup>38</sup> This would be where the accused refuses to answer questions put to him or by the police solely because he refuses to co-operate and for no other legitimate reason.

The European Court of Human Rights thus allows adverse inferences to be drawn from the pre-trial silence of accused persons under appropriate circumstances. The failure of the European Convention to give a clear definition of, and justification for, the right to silence is, however, a major criticism of the Convention.<sup>39</sup> Hopefully the African Commission's Principles and Guidelines, which deals extensively with the right to silence, will enable the African Court on Human and Peoples' Rights to bring about legal certainty in this regard.

## 4 South Africa

South African courts have traditionally made a distinction between pre-trial silence and silence at trial. The South African Constitution also clearly distinguishes between the right to pre-trial silence<sup>40</sup> and the right to remain silent at trial.<sup>41</sup> An accused person may rely on his right to remain silent in the pre-trial, trial and sentencing phase.<sup>42</sup>

### 4.1 Silence at trial

In South Africa, the right to remain silent at trial includes the right not to give evidence against oneself and not to answer incriminating questions. The South African courts diligently protected the right to remain silent at trial, even before this right was constitutionally enshrined.<sup>43</sup> Section 35(3)(h) of the Constitution now grants every accused the right to be presumed innocent, to remain silent and not to testify during proceedings. The only instance where an adverse inference may be drawn from the accused's silence at trial is after the prosecution has established a *prima facie* case and the accused then still relies on his right to remain silent.<sup>44</sup>

The position is the same in Canada. In *R v Noble*,<sup>45</sup> the Canadian Supreme Court held that an accused's silence at trial could not be used as inculpatory evidence against him. The Court held that if silence is treated as evidence, then the right to silence is violated, as it implies that the accused has no choice but to furnish evidence, whether or not

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<sup>39</sup> Theophilopoulos (n 11 above), 385.

<sup>40</sup> Sec 35(1)(a) of the Constitution provides: 'Everyone who is arrested for allegedly committing an offence has the right to remain silent.'

<sup>41</sup> Sec 35(3)(h) of the Constitution provides: 'Every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings.'

<sup>42</sup> *S v Dzukuda* 2000 2 SACR 443 (CC).

<sup>43</sup> See *inter alia Gosschalk v Rossouw* 1966 2 SA 476 (C) 490-3; *R v Weyer* 1958 3 SA 467 (G) 470-2.

<sup>44</sup> See *S v Mthetwa* 1972 3 SA 766 (A); *S v Snyman* 1968 2 582 (A).

<sup>45</sup> (1997) 1 SCR 874, 6 CR (5th) 1.

he elects to testify. The Court held that the burden on the prosecution to prove the case beyond a reasonable doubt against the accused prohibits the accused's silence from being used as evidence by the state to meet the required standard of proof. The Court consequently held that if silence may be used against the accused to establish guilt, then part of the burden of proof is shifted to the accused.

It is, however, generally accepted in South Africa that the right to remain silent at trial may be limited in appropriate circumstances. In *S v Boesak*,<sup>46</sup> it was argued that an adverse inference was drawn against the accused from the fact that the defence did not challenge the authenticity of a letter, as well as from the fact that the accused elected not to testify during trial. The Constitutional Court held that the right to remain silent does not mean that there are no consequences attached to an election to remain silent at trial. If an accused person chooses to remain silent at trial in the face of evidence calling for an answer, the court is, depending on the weight of the evidence, entitled to conclude, as happened *in casu*, that the evidence is sufficient to prove guilt beyond a reasonable doubt.

#### 4.2 South African common law position regarding pre-trial silence

At common law, suspects and accused persons have the right to remain silent during pre-trial investigations, which includes the right not to answer questions put to them by the police. No adverse inference of guilt can be drawn from the accused's pre-trial silence alone and the state has to prove its case beyond a reasonable doubt. It cannot be expected of an accused to help his adversary (the state) to prove the case against him by furnishing information to the police.

This rule originates from the common law.<sup>47</sup> Tindall JA formulated the rule as follows:<sup>48</sup>

[I]f the silence of the accused could be used as tending to prove his guilt, it is obvious that innocent persons might be in great peril; for an innocent person might well, either from excessive caution or for some other reason, decline to say anything when cautioned. And I may add that an accused person is often advised by his legal advisers to reserve his defence at the preparatory examination. It would, also, in my opinion, have been a misdirection to say that the silence of the accused was a factor which tended to show that their explanation at the trial was concocted.

Section 35(1)(a) of the Constitution<sup>49</sup> states that everyone who is arrested has the right to remain silent. The High Court held in *S v Brown*<sup>50</sup> that, although the right to remain silent was recognised at

<sup>46</sup> 2001 1 SA 912 (CC).

<sup>47</sup> See *R v Mashелеle & Another* 1944 AD 571 where the Court relied on the English decision of *R v Leckey* 1943 2 All ER 665.

<sup>48</sup> n 47 above, 583-4. See also *S v Zwayi* 1998 2 BCLR 242 (CK).

<sup>49</sup> n 9 above.

<sup>50</sup> 1996 2 SACR 49 (NC).

common law, its constitutional status required a change in emphasis in its application. The right to remain silent, including pre-trial silence, calls for even stricter enforcement and, when needed, protection due to its constitutional status.

### 4.3 South African Law Commission's proposals

The Law Commission<sup>51</sup> proposed two options regarding pre-trial silence:

- Firstly, that the right to remain silent should be developed to allow for adverse inferences to be drawn from an accused's pre-trial silence; and
- Secondly, that no change to the common law position, as confirmed by the Constitution, be made.

The first option, to allow for an adverse inference to be drawn during trial from an accused person's pre-trial silence, entails that in circumstances where the police question an accused during pre-trial investigations and the accused:

- fails to mention certain facts when questioned or charged; or
- fails or refuses to account for objects, substances or marks, which may implicate the accused in the commission of the offence, found in his or her possession at the time of arrest; or
- fails to account for his or her presence at a particular place which may implicate the accused in the commission of the offence;

an adverse inference, which may be reasonable and justifiable in the circumstances, may be drawn against the accused at the subsequent trial. The Law Commission, however, does not state whether the adverse inference sought to be drawn against the accused from his pre-trial silence should only affect the accused's credibility or whether it even may, in certain circumstances, be used to establish the accused's guilt. It is significant that the Law Commission uses the word 'may' and not 'must' with regard to the reasonableness and justifiability of the adverse inference.

The Law Commission is clear on the fact that an accused person's silence at trial may never, on its own, establish the guilt of the accused. The state must submit a *prima facie* case and if the accused then relies on his right to remain silent at trial, the accused may be found guilty. The conviction is based on his failure to answer to the *prima facie* case made out by the state — and is not based on his silence or the adverse inference drawn against him as a result of his silence. This is in agreement with the common law position regarding the accused's silence at trial.

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<sup>51</sup> The South African Law Commission, a government appointed body, which is tasked with researching and advising on law reform in South Africa.

The situation is different with regard to the pre-trial silence of the accused. Where an accused relies on his right to remain silent during interrogation, no *prima facie* case has yet been established against the accused, and it is in this instance that the Law Commission's proposals are not clear. Does evidence during trial of an accused's pre-trial silence only affect the accused's credibility or may an adverse inference be drawn, in appropriate circumstances, and used to establish the guilt of the accused? Although the Law Commission is not clear on what the adverse inference may be used for (credibility or guilt), it is submitted that it surely could not have been the intention of the Law Commission that the inference may be used, on its own, to prove the guilt of the accused.

The Law Commission's proposal regarding the drawing of an adverse inference from the pre-trial silence of the accused is based on sections 34, 36 and 37 of the Criminal Justice and Public Order Act 1994 (England). In English law, the right to remain silent has been substantially diminished. In terms of this Act, the court may draw a 'proper inference' from the accused's failure to mention relevant facts at pre-trial investigations. The court is also allowed, in terms of this act, to draw 'such inferences as appear proper' from silence at trial. Before the enactment of this Act, the English Law was similar to the South African common law position. In terms of recent developments, English law tends to move away from the complex evidentiary rules of common law jurisdictions<sup>52</sup> towards the civil law principle where a more free evaluation of evidence exists. It is argued that this free evaluation of evidence assists the court in its search for the truth. However, not unexpectedly, the transplants of legal concepts of civil jurisdictions into common law jurisdictions carries its own problems. To allow a lay jury, which is not required to give reasons for its verdict (as is the case in England) to draw adverse inferences from an accused person's pre-trial silence may be inappropriate and dangerous in those circumstances.<sup>53</sup>

In Canada, the Supreme Court of Appeal held in *R v Herbert*<sup>54</sup> that section 7 of the Charter<sup>55</sup> accords a detained person a pre-trial right to remain silent. The scope of that right extends beyond the narrow formulation of the confession rule.<sup>56</sup> The scope of the right to silence in

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<sup>52</sup> A Choo & S Nash 'Inappropriate procedural transplants: Recent developments in the law of evidence in England and Wales' paper delivered at the 2nd World Conference on Crime, Durban, South Africa 2001.

<sup>53</sup> As above.

<sup>54</sup> (1990) 2 SCR 151.

<sup>55</sup> The Canadian Charter in secs 7-14 & 24(2) protects the right to a fair trial. Sec 11(c) protects the right to silence indirectly by providing that any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence.

<sup>56</sup> n 53 above, 152 (the confessions rule entails that an accused may not be forced to make a confession).

the pre-trial detention period must be based on the fundamental concept of the suspect's right to freely choose whether to speak to the authorities or to remain silent. The Court re-iterated that this right may be limited, but such limitation must be prescribed by law as required by section 1 of the Charter.

In the Canadian case of *R v Crawford*,<sup>57</sup> the Court on appeal confirmed that the right to pre-trial silence is not absolute. The Court said that the application of Charter values must take into account other interests and in particular other Charter values, which may conflict with their unrestricted and literal enforcement. The Court held that the right to remain silent means that a suspect has the right to refuse to talk to the police and not to be penalised for it. Further, since the police have informed the accused of the right not to speak, his exercise of this right cannot logically found an inference of credibility when he later testifies. Since the law of evidence precludes the admission of prior consistent statements to bolster the credibility of an accused, admission of evidence of an accused's silence would lead to further difficulties. If pre-trial silence can lead to a negative inference as to credibility, then the accused is placed in the anomalous situation of being obliged to make a prior consistent statement to the police, in order to avoid cross-examination on his silence. He is at the same time unable to tender that very evidence in support of his own credibility.

#### 4.4 The South African Constitutional Court<sup>58</sup>

The Constitutional Court in South Africa has had the opportunity to deal with the right to pre-trial silence. The right to remain silent and the constitutionality of a limitation of this right was considered in *S v Manamela & Another (Director of Justice Intervening)*.<sup>59</sup> The Constitutional Court confirmed that the right to silence, like the presumption of innocence, was firmly rooted in our law. These rights are inextricably linked to the right against self-incrimination and the principle of non-compellability of an accused person as a witness at trial. The Court found that there is nothing unreasonable, oppressive or unduly intrusive in asking an accused, who has already been shown to be in possession of stolen goods, acquired otherwise than at a public sale, to produce evidence that he had reasonable cause to believe that the goods were acquired from the owner or some other person who had the authority to dispose thereof. The Court held that the limitation of the right to remain silent contained in this provision was justified.

In *S v Thebus and Another*,<sup>60</sup> the Constitutional Court had the

<sup>57</sup> (1995) 1 SCR 858.

<sup>58</sup> The Constitutional Court is the highest court in constitutional matters in South Africa.

<sup>59</sup> 2000 3 SA 1 (CC).

<sup>60</sup> 2003 2 SACR 319 (CC).



opportunity to decide on the permissibility to draw adverse inferences from an accused person's pre-trial silence. The justices of the Constitutional Court were not *ad idem* on this issue.<sup>61</sup> Four separate judgments were delivered. The first appellant contended, with regard to the right to pre-trial silence, that both the trial court and the Supreme Court of Appeal drew an adverse inference from his failure to disclose his alibi before the trial. It was argued that such an inference constitutes an infringement on his constitutional right to remain silent as afforded by section 35(1)(a) of the Constitution.

It is convenient to summarise the judgment on the basis of the three questions discussed in the main judgment:

- Is it permissible to draw an adverse inference of guilt from the pre-trial silence of the accused?
- Is it permissible to draw an adverse inference regarding the credibility of the accused from his pre-trial silence?
- Is it permissible to cross-examine the accused on the failure to disclose an alibi timeously, thus taking into account his or her response?

#### 4.4.1 Is it permissible to draw an adverse inference of guilt from the pre-trial silence of the accused?

In the main judgment (Moseneke J, Chaskalson CJ and Madala J), it was held that it is not permissible to draw an adverse inference of guilt from the pre-trial silence of the accused. Goldstone J, O'Reagan J, Ackermann J and Mokgoro J also held that no inference as to the guilt of the accused may be drawn from the pre-trial silence of the accused in not disclosing his alibi defence. Yacoob J held that the right to silence, properly interpreted, has an impact on the way a criminal trial should be conducted. The need to ensure a fair criminal trial is the key to determine whether a right has been infringed. Such right will only be infringed if it is implicated in a way that renders the trial unfair. Drawing an inference to guilt solely on the silence of the accused would render the trial unfair. Ngcobo J and Langa DCJ held that on the facts of the matter, the first appellant's right to pre-trial silence was not implicated. The first appellant was warned of his right to remain silent and of the consequences of making a statement. The first appellant did not assert his right to remain silent. Guilt can, however, not be inferred from silence only.

#### 4.4.2 Is it permissible to draw an adverse inference on the credibility of the accused from his pre-trial silence?

Moseneke J, Chaskalson CJ and Madala J held that a distinction may properly be drawn between an inference on silence and a credibility

<sup>61</sup> See T van der Walt & SP de la Harpe 'The right to pre-trial silence: *S v Thebus* 2003 (2) SACR 319 (CC)' (2004) 17 *South African Journal of Criminal Justice* 379 for a detailed discussion of this case.

finding connected with the election of an accused person to remain silent. The rule of evidence that the late disclosure of an alibi affects the weight to be placed on the evidence supporting the alibi is well recognised in our common law. This is a law of general application. The late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi. Standing alone, it does not justify an inference of guilt. The absence of a prior warning that the non-disclosure of an alibi will be used against the accused is a factor which is taken into consideration when determining the weight to be placed on the evidence of the alibi. A failure to disclose an alibi timeously is not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by him or her for failing to disclose the alibi timeously within the factual context of the evidence as a whole. The limited adverse inference regarding the credibility of the accused is a justifiable limitation in terms of section 36(1).

Goldstone J, O'Reagan J, Ackermann J and Mokgoro J held that no valid distinction can be drawn between adverse inferences going to guilt and adverse inferences going to credibility. In the context of an alibi, the practical effect of the adverse inference to be drawn for the purpose of credit, namely that the alibi evidence is not to be believed, will often be no different from the inference to be drawn with respect to guilt, namely that the late tender of the alibi suggests that it is manufactured and that the accused is guilty.

Yacoob J held that the appropriate protection of the right to silence does not require the cross-examination of the accused person about the reasons for the failure to disclose an alibi to be absolutely protected. It does not prohibit a judicial officer from drawing any legitimate inference from the evidence revealed by the cross-examination, the silence of the accused and all the relevant surrounding evidence. The overarching and abiding obligation of a judicial officer is to ensure a fair trial. Drawing an inference as to credibility solely on the silence of the accused would, however, render a trial unfair.

Ngcobo J and Langa DCJ held that the first appellant did not assert his right to silence.

#### 4.4.3 Is it permissible to cross-examine an accused on the failure to disclose an alibi defence timeously, thus taking into account his or her responses?

Moseneke J, Chaskalson CJ and Madala J held that it is permissible to cross-examine an accused on why he or she opted to remain silent on an alibi or on any other defence. It is quite proper, and often necessary, to probe in cross-examination the reasons why the accused chose to

remain silent. This goes to the credibility of the accused and would not unjustifiably limit the content of the right to remain silent. There are, however, limits to such cross-examination. Such cross-examination must always be exercised with due regard to fairness towards both the accused and the prosecution and without unduly encroaching upon the right to remain silent or limiting a proper enquiry for the late disclosure of a defence.

Goldstone J, O'Reagan J, Ackermann J and Mokgoro J held that it is not permissible for an accused person to be cross-examined on why he or she opted to remain silent on an alibi or any other defence. No accused person should have to account for the exercise of a right entrenched in the Constitution. It would secondly be unfair to allow such cross-examination in the light of the accused person having been informed of the right to remain silent without at the same time being informed that he or she might be requested to account for the positive exercise of the right at the trial. This only relates to cross-examination on the pre-trial silence of the accused. It does not preclude other lines of cross-examination designed to test the veracity of the alibi.

Yacoob J held that cross-examination concerning why an alibi was not disclosed infringes the right to silence only if it renders the trial unfair. The responses obtained through cross-examination may be taken into account by judicial officers in conjunction with the failure to disclose an alibi in the process of making an inference, provided that the way in which the inference is made and the drawing of the inference does not render the trial unfair. All courts must be sensitive to the need of a fair trial in the process of determining whether or not to allow cross-examination or to use silence as a factor in drawing an inference.

Ngcobo J and Langa DCJ held that the first appellant's right to silence was not implicated as he chose to make an exculpatory statement which was inconsistent with his alibi. Where the accused person, having been warned of the right to remain silent and of the consequences of not remaining silent, chooses to make an exculpatory statement which differs from his or her alibi, it is a legitimate topic for cross-examination.

#### 4.5 Opposing views of South African authors

Van Dijkhorst<sup>62</sup> states that some aspects of the right to silence have become a procedural impediment, which is illogical, unnecessary, unwarranted, unworkable and costly beyond imagination. He argues that the right to be presumed innocent and the right to remain silent should not be confused. Although both are enshrined in our Constitution and fall within the concept of a fair trial, the principle underlying the presumption of innocence is basically to eliminate the risk of con-

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<sup>62</sup> K van Dijkhorst 'The right to silence: Is the game worth the candle?' (2001) 113 *South African Law Journal* 26-58.

viction based on factual error.<sup>63</sup> That is not the case with the right to remain silent. He does not pertinently distinguish between the right to remain silent at trial and pre-trial silence. What is clear is that he is not opposed to allowing adverse inferences to be drawn from an accused's pre-trial silence in appropriate circumstances.

Van Dijkhorst alleges that the defendants of the right to remain silent are unaware of the realities of practice. Emotionally, they rely on fairness, but fairness only to the accused. He argues that it is unfair to society to allow a dangerous criminal to walk free, as happens in cases where the accused relies on his right to remain silent and no adverse inference may be drawn against him, thus resulting in the acquittal of the accused. He emphasises the cost implications<sup>64</sup> in cases where the accused relies on his right to remain silent. He urges that a criminal justice system, which is fair and just, fast and effective, as well as user-friendly to witnesses and victims, should be created. In short — the rights of victims should also be protected.

According to Joubert,<sup>65</sup> no adverse inference should be drawn against a person who exercises his right to silence for two reasons:

- Firstly, no such inference *could* be drawn, for there may be a number of reasons why the accused relies on his right to remain silent (the accused may be scared, he may not trust the police or the criminal justice system, he may (erroneously) believe that there is no evidence against him, or he may simply want to exercise the right of which he has been informed, or a number of other reasons).
- Secondly, no such inference could logically be drawn to fill the gaps in the state's case. Where an element of crime has not been proven by the state (at least *prima facie*), then the fact that the accused refuses to give evidence at trial or answer questions before trial cannot logically fill that gap.

It is therefore not fair to assume that the accused cannot give a reasonable explanation for his silence. Joubert also states<sup>66</sup> that people should not be penalised for exercising their rights or else the rights afforded to individuals in reality amount to nothing, at best, and to liabilities or traps, at worst.

The right to silence is also inextricably linked with the right to be presumed innocent. If the state is expected to prove an accused person's guilt beyond a reasonable doubt as a result of the presumption of innocence, then it follows that the state is also expected to do so on its own without the help of the accused.

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<sup>63</sup> n 62 above, 26.

<sup>64</sup> n 62 above, 43-46.

<sup>65</sup> J Joubert (ed) *Criminal procedure handbook* (2003) 10-11.

<sup>66</sup> n 65 above, 11.

Schwikkard<sup>67</sup> states that to draw an adverse inference against the accused on the basis of him relying on his right to remain silent at trial cannot be used as inculpatory evidence against the accused. To allow the drawing of a negative inference from a constitutionally inferred right negates the existence of that right.<sup>68</sup> Where an accused relies on his right to remain silent during his trial and the state presents a *prima facie* case resulting in the conviction of the accused, the conviction should be based on the undisputed evidence (proof beyond a reasonable doubt) and not on the accused's failure to testify. This is the position where the accused relied on his right to remain silent at trial and where an accused relied on his pre-trial right to remain silent and refused to, for example, answer questions put to him by the police. Evidence of the accused's failure to answer police questions may of course be tendered during trial, but no adverse inference may be drawn against the accused on grounds thereof. The accused must be afforded the opportunity, at trial, to give evidence. Failure to answer to the *prima facie* case put forward by the state might lead to conviction, but as explained above, not because of the failure to testify (relying on the right to remain silent) but because the *prima facie* case of the state now becomes proof beyond a reasonable doubt.

## 5 Conclusion

The law on the right to silence as part of the right to a free and fair trial is not altogether clear. On the one hand, we have the argument that a criminal trial is a truth-seeking process and if any adverse inferences from the accused's pre-trial silence may help the trier of fact discovering the truth, then such inferences should be allowed. Coupled with this is the fact that it is costly and time-consuming to allow accused persons to rely on their right to remain silent before the trial, without attaching any adverse consequences to their decision.<sup>69</sup>

On the other hand, we have the argument that in an accusatorial criminal procedure system, such as in many countries in Africa, it is not advisable to limit the accused's right to pre-trial silence. An accused is a full legal subject with rights in an accusatorial system and as such entitled to participate in his trial in any way he deems fit — including the right to be allowed to rely on his right to remain silent as a way to conduct his defence — the so-called passive defence.<sup>70</sup>

We are of the view that the protection of the right to remain silent during pre-trial investigations serves as a safeguard against abuse of

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<sup>67</sup> P.J. Schwikkard *Presumption of innocence* (1999) 118-125.

<sup>68</sup> As above.

<sup>69</sup> Van Dijkhorst (n 62 above).

<sup>70</sup> Joubert (n 65 above).

powers, by *inter alia* the police. If negative inferences can be drawn from pre-trial silence, police may use unacceptable methods to gather evidence. An arrested person should not be coerced to make a statement or to answer questions put to him or her by the police. If an arrestee is informed that should he or she rely on his or her right to remain silent during pre-trial investigations, an adverse inference can be drawn against him or her at his or her trial, it amounts to a form of coercion. If he or she is not thus informed and an adverse inference is drawn against him or her at trial, it can be argued that he or she was not properly informed about the consequences of the exercising of his or her rights.

We are of the view that it ought to be impermissible to draw an adverse inference as to the guilt or the credibility of the accused from his or her pre-trial silence alone. Silence should also never be used to establish the guilt of an accused. To do so, would shift part of the burden of proof to the accused, and would render the trial unfair.

It would also be unfair to warn a person that he or she has a right to remain silent and thereafter to use that very silence to discredit the person at trial by drawing an adverse inference on credibility from the silence alone. However, this ought not to exclude cross-examination on an accused's choice to exercise his or her right to pre-trial silence. If an accused at trial leads evidence as to a defence, and he or she is given a fair opportunity to explain his or her choice to remain silent, the right to silence is limited, but justifiably so if the explanation is only taken into account to determine credibility. The weight attached to the accused's evidence ought to depend *inter alia* on the explanation given. At the end, taking into consideration all the relevant factors, the cumulative effect of all the evidence may justify the drawing of an adverse inference regarding the credibility of the accused.

No negative inference ought to be drawn if the accused's explanation is that he or she remained silent because he or she was merely exercising his or her right to pre-trial silence in accordance with the warning given that he or she has the right to silence. Any cross-examination on the accused's election to exercise his or her right to pre-trial silence must be reasonable. Such cross-examination must allow for the possibility that the accused can exercise his or her right to pre-trial silence with no other motive than the exercise of a fundamental human right.

It seems logical that the right to remain silent is not infringed where an accused person is warned that he or she has a right to remain silent and he or she then willingly chooses to give information. In such circumstances, the accused willingly waives his or her right to pre-trial silence and should carry the consequences of his or her choice. Similarly, if cross-examination is fair and done to determine the veracity of the accused's defence, cross-examination as to an accused's failure to disclose a defence timeously is in our view not an unjustifiable infringement of an accused's right to remain silent.

If one has regard to the different views with regard to the application of the right to pre-trial silence as part of the right to a free and fair trial, the last word has not yet been spoken. In due course, the African Court will have to give guidance in this regard to African countries.

# Breaking new ground: The need for a protocol to the African Charter on the abolition of the death penalty in Africa

Lilian Chenwi\*

LLD candidate and tutor, Centre for Human Rights, Faculty of Law, University of Pretoria

## Summary

*The 1980s saw the drafting and adoption of international treaties on the abolition of the death penalty. In the European and Inter-American human rights systems, steps have been taken to abolish the death penalty by means of the adoption of protocols to their respective human rights treaties. Therefore, the African continent is the only region with a human rights treaty that does not have a protocol on the abolition of the death penalty. Human rights systems need to be constantly adapted to match changing conditions. Accordingly, in view of the international human rights developments and trends towards the abolition of the death penalty, this article addresses the need for a protocol to the African Charter on Human and Peoples' Rights on the question of the abolition of the death penalty in Africa.*

[W]e urge the OAU [now African Union] to strongly consider adopting an additional protocol to the African Charter aiming at the abolition of the death penalty.<sup>1</sup>

## 1 Introduction

The question addressed in this article is whether there is need for a

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\* LLB (Buea), Maîtrise (Yaoundé), LLM (Pretoria); lilian.chenwi@up.ac.za. I would like to thank Prof Frans Viljoen for his useful comments on this article.

<sup>1</sup> K Acheampong 'Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and political rights and socio-economic rights' (2001) 1 *African Human Rights Law Journal* 185 201.



protocol on the abolition of the death penalty in Africa. The African Charter on Human and Peoples' Rights (African Charter)<sup>2</sup> makes no mention of the death penalty or the need to abolish it.<sup>3</sup> Further, only six African states have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights (CCPR), aiming at the abolition of the death penalty.<sup>4</sup> These states are Mozambique, that became a state party on 21 July 1993, Namibia, on 28 November 1994, Seychelles, on 15 December 1994, Cape Verde, on 19 May 2000, South Africa, on 28 August 2002, and Djibouti, on 5 February 2003.<sup>5</sup> Considering the few number of ratifications of the Second Optional Protocol, one might pose the question: Should one not encourage African states to ratify the existing Protocol instead of seeking the adoption of a new protocol addressing the same issue? The answer is simple. African states have realised that international human rights instruments do not always address the unique problems of the continent.<sup>6</sup> Therefore, a protocol to the African Charter would gain more legitimacy, as it will be African-specific. That is, it will take into consideration the unique problems of the continent. The above probably explains, in part, why not all the abolitionist and *de facto* abolitionist African states have ratified the Second Optional Protocol.

The legal basis for the adoption of a protocol on the abolition of the death penalty in Africa is found in article 66 of the African Charter. This article provides that 'special protocols or agreements may, if necessary, supplement the provisions of the present Charter'. Since the protocol would, most likely, take into consideration the unique problems of the continent, it stands a better chance of effectively supplementing the provisions of the African Charter than the Second Optional Protocol. The principles enshrined in the protocol would be relevant in interpreting other human rights instruments on the continent in general, and article 4 of the African Charter in particular.

This article begins by answering the question why there is a need for a protocol on the abolition of the death penalty in Africa. The experi-

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<sup>2</sup> Adopted on 27 June 1981 and entered into force on 21 October 1986 (OAU Doc CAB/LEG/67/3 rev 5 (1982) 21 *International Legal Materials* 58).

<sup>3</sup> Art 4 prohibits the 'arbitrary' deprivation of life, which some could interpret as permitting the death penalty.

<sup>4</sup> Adopted by the UN General Assembly on 15 December 1989, entered into force on 11 July 1991. The Protocol has been ratified by 54 states and signed by eight. For the ratification status of international instruments on the abolition of the death penalty, see <http://web.amnesty.org/pages/deathpenalty-treaties-eng> (accessed 25 February 2005).

<sup>5</sup> It should be noted that São Tomé and Príncipe (6 September 2000) and Guinea-Bissau (12 September 2000) are signatories to the Protocol.

<sup>6</sup> M Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40.

ences of the United Nations (UN), European and Inter-American human rights systems on the subject are then considered. Subsequently, drawing from the experiences of the above systems, the article makes suggestions with regard to the drafting process and the content of such a protocol.

## 2 Why the need for a protocol?

The ultimate test for any legal system that purports to deal with human rights is the difference it makes to the lives of people.<sup>7</sup> The adoption of a protocol on the death penalty would definitely make a difference to the lives of people, especially those accused of capital offences. A protocol on the abolition of the death penalty in Africa has an important place in the framework of human rights protection in Africa. It would be essential in enhancing human rights protection in Africa. As article 4 of the African Charter makes no mention of the death penalty and has not been interpreted in the context of the death penalty, a protocol to the African Charter on the abolition of the death penalty is necessary to afford full protection of the right to life and, generally, to clarify the situation of the death penalty in Africa.

Why adopt a protocol? Why not push for the interpretation or amendment of article 4 of the African Charter? These are questions that would certainly cross the minds of many. At present, the African Commission on Human and Peoples' Rights (African Commission) is the supervisory body of the African Charter. According to article 45(3) of the African Charter, the African Commission would only be in the position to interpret article 4 in the context of the death penalty, if it is requested to do so by a state party, an institution of the African Union (AU), or an organisation recognised by the AU. Alternatively, if the African Commission were presented with a direct challenge to the death penalty based on article 4, then it would be in a position to interpret article 4.

This could be a problematic route with regard to addressing the question of the abolition of the death penalty in Africa, as inspired boldness has not been the hallmark of the African Commission and several scholars have commented generally on the relative inefficacy, thus far, of the Commission.<sup>8</sup> Nevertheless, abolitionist state parties (including *de facto* abolitionists), institutions of the AU and African organisations are encouraged to request an interpretation of article 4 of the African Charter in the light of the abolition of the death penalty in

<sup>7</sup> C Heyns 'The African regional human rights system: In need of reform?' (2001) 2 *African Human Rights Law Journal* 155 156.

<sup>8</sup> D van Zyl Smit 'The death penalty in Africa' (2004) 4 *African Human Rights Law Journal* 1 7.

Africa. The adoption of a protocol on the abolition of the death penalty would facilitate an interpretation of article 4.

Regarding the question of an amendment of article 4 of the African Charter,<sup>9</sup> it might not be feasible at the moment considering the status of abolition in Africa. Only 12 African countries have abolished the death penalty in law and practice.<sup>10</sup> Therefore, most African states still retain the death penalty in their statutes, despite the growing international human rights standards in general,<sup>11</sup> and standards on the abolition or limitation of the death penalty in particular.

Furthermore, a protocol on the abolition of the death penalty in Africa is desired, considering the international human rights developments and trends towards the abolition of the death penalty.<sup>12</sup> In particular, the developments and trend towards the abolition of the death penalty in Africa necessitates such a protocol. This is even more so, considering that for human rights systems to be efficient, they need to be constantly adapted to match changing conditions. One of the means of such adaptation could be through the adoption of protocols to supplement the existing human rights instruments.

The changing conditions in Africa indicate a trend towards the abolition of the death penalty. First, when the African Charter was adopted in 1981, it was not made clear whether the drafters intentionally omitted reference to the death penalty. However, in 1990, a trend towards abolition of the death penalty was evidenced with the adoption of the African Charter on the Rights and Welfare of the Child;<sup>13</sup> and

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<sup>9</sup> Art 68 of the African Charter states as follows: 'The present Charter may be amended if a State party makes a written request to that effect to the Secretary-General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the State parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary-General has received notice of acceptance.'

<sup>10</sup> These countries are Cape Verde (1981), Mozambique (1990), Namibia (1990), São Tomé and Príncipe (1990), Angola (1992), Guinea Bissau (1993), Seychelles (1993 (abolished the death penalty for ordinary crimes in 1979)), Mauritius (1995), Djibouti (1995 (only one person had received a death sentence since independence in 1977 and the sentence was commuted)), South Africa (1997 (abolished the death penalty for ordinary crimes in 1995)), Côte d'Ivoire (2000) and Senegal (2004).

<sup>11</sup> Generally, the above standards are relevant as most African states are parties to major international human rights instruments, some, which aim at limiting the imposition of the death penalty. For the status of ratification of international and regional (African) human rights instruments by African states, see C Heyns (ed) *Human rights law in Africa* (2004) 48 106.

<sup>12</sup> For a discussion of the international human rights developments and trends towards abolition, see, generally, W Schabas *The abolition of the death penalty in international law* (2002).

<sup>13</sup> Adopted in July 1990 and entered into force on 19 November 1999 (OAU Doc CAB/LEG/24.9/49 (1990)).

in 2003, with the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>14</sup> Both instruments place restrictions on the imposition of the death penalty on certain categories of persons — persons below 18 years of age and expectant mothers or mothers of infants and young children.<sup>15</sup> Their adoption is a commendable step towards the abolition of the death penalty in Africa.

In 1999, for the first time, the African Commission came close to addressing the question of the abolition of the death penalty. The Commission passed a resolution urging states to envisage a moratorium on the death penalty, to limit its imposition to the most serious offences and to reflect on the possibility of abolishing the death penalty.<sup>16</sup> In *Interights et al (on behalf of Bosch) v Botswana*,<sup>17</sup> the African Commission, again, came close to addressing the question of the abolition of the death penalty in Africa. The Commission, in its decision, tactfully concedes that the abolition of the death penalty in Africa is desirable, when it encourages African states to take all measures to refrain from using the death penalty.<sup>18</sup>

The adoption of a protocol on the abolition of the death penalty would fortify the above recommendations of the African Commission. In view of the emerging debate on the question of the death penalty in Africa,<sup>19</sup> the African system would be more responsive to the needs of a protocol on the subject. This is because the debate in itself is already an important contribution towards the improvement of the system in affording better protection of human rights in general.

Other developments on the African continent indicate changing conditions with regard to the death penalty. There has been progress towards the commutation of death sentences on the African continent. For example, in 2003 in Kenya, the death sentences of 195 persons were commuted and 28 others, who were under the sentence of death and had

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<sup>14</sup> Adopted by the 2nd ordinary session of the Assembly of the African Union (AU) in Maputo, 11 July 2003.

<sup>15</sup> See arts 5(3) & 30(e) of the African Children's Charter and art 4(2)(j) of the African Women's Protocol.

<sup>16</sup> Thirteenth Annual Activity Report (1999-2000) Annex IV.

<sup>17</sup> Communication 240/2001, *Interights et al (on behalf of Bosch) v Botswana* Seventeenth Annual Activity Report: 2003-2004 (African Commission). The Seventeenth Annual Activity Report was adopted by the Assembly of the AU during its 4th ordinary session, held in Abuja, Nigeria from 30 to 31 January 2005 (Assembly/AU/Dec 56(IV)).

<sup>18</sup> n 17 above, para 52.

<sup>19</sup> During the Commission's 36th ordinary session (2004), for the first time in the Commission's agenda, the death penalty was one of the issues discussed. Commissioner Chirwa initiated debate on the death penalty in Africa, urging the Commission to take a clear position on the subject. She recommended that in view of the international and human rights developments and trends, it is necessary for the continent to initiate constructive debate on the question of the death penalty in Africa.

served 15 to 20 years in prison, were released.<sup>20</sup> In 2004 in Cameroon, a new decree was passed, which provides for the commutation of the death sentences of persons originally sentenced to death before the date of signature of the decree.<sup>21</sup> A *de facto* moratorium has been in place in Zambia since 1997, and the President has promised never to sign execution warrants.<sup>22</sup> On 19 April 2003, Mwanawasa appointed a commission to review the Constitution, with one of the specific terms of reference being to advise on the future of the death penalty in Zambia.<sup>23</sup>

Also, in Nigeria, on 13 November 2003, the government set up the national study group on the death penalty, which was tasked with preparing an advisory opinion to guide the government on whether or not to abolish the death penalty.<sup>24</sup> The study group recommended that an official moratorium on executions be put in place until the Nigerian criminal justice system can ensure fundamental fairness and due process in capital cases and minimise the risk of innocent people being executed.<sup>25</sup>

The Truth and Reconciliation Commission (TRC) of Sierra Leone just concluded its report, in which it recommended, *inter alia*, the abolition of the death penalty and the immediate repeal by parliament of all laws authorising the use of capital punishment.<sup>26</sup> The TRC further recommended the introduction of a moratorium on all judicially sanctioned executions and the immediate commutation of existing death sentences.<sup>27</sup> Also, in April 2004, the Ugandan Minister of Justice and Constitutional Affairs, Mukwaya, said the government was considering substituting the death penalty with long jail terms.<sup>28</sup>

What is more, there has been significant progress towards ending the death penalty in Southern Africa,<sup>29</sup> following intense lobbying from human rights activists in the region. There is also an apparent abolition trend in the countries of the Economic Community of West African States (ECOWAS).<sup>30</sup>

<sup>20</sup> Hands Off Cain *The death penalty worldwide: 2004 report* (2004) 50.

<sup>21</sup> Art 1 of Decree No 2004/344 of 29 December 2004 on the commutation and remission of sentences. The Decree was published in *Cameroon Tribune* No 8258/4457 of 31 December 2004 13. It should be noted that art 3 of the Decree precludes the application of art 1 on repeat offenders and persons sentenced for, *inter alia*, assault causing the death of a minor, and theft with violence entailing the death of a person.

<sup>22</sup> Hands Off Cain (n 20 above) 51.

<sup>23</sup> As above.

<sup>24</sup> E Anaba 'Law and human rights: Death penalty: Options for the government — Study group' *Vanguard* (Lagos) 5 November 2004.

<sup>25</sup> As above.

<sup>26</sup> The TRC Report is available at <http://www.iss.co.za> (accessed 25 February 2005).

<sup>27</sup> As above.

<sup>28</sup> Hands Off Cain (n 20 above) 56.

<sup>29</sup> See D Mavunduse 'A new millennium free from death penalty in Southern Africa' <http://www.sardc.net/editorial/sanf/1999/09/30-09-199-nf2.htm> (accessed 25 February 2005).

<sup>30</sup> Amnesty International *West Africa: Time to abolish the death penalty* (2003) AI Index: AFR 05/003/2003.

Moreover, some African states, especially *de facto* abolitionist states, for example Malawi and Kenya, hang on to capital punishment with clearly little commitment to use it as a means of crime control. This lack of commitment and the above developments could be understood to mean that some African states have recognised the undesirability of the death penalty, thus rendering the continent more susceptible to the idea of the adoption of a protocol on the abolition of the death penalty.

The flaws in the application of the death penalty in Africa should convince the AU and African states that a protocol on the abolition of the death penalty in Africa is much needed. For example, in relation to innocent defendants, the finality of the death penalty in itself is problematic. If an innocent person is unjustly imprisoned, he can be released and compensated if it is discovered. But unlike all other criminal punishments, the death penalty is uniquely irrevocable. If an innocent person is killed, the person cannot be brought back to life if it is discovered that the person was unjustly executed.

Convictions for capital crimes have to be free of error so as to ensure that an innocent person is not sentenced to death.<sup>31</sup> However, the possibility of error cannot be excluded from any system of justice because of certain factors, which affect any case that comes before the court, that are almost certainly present to some degree in all court systems. These factors include the difference that exists between the rich and the poor, between good and bad prosecutors, between good and bad defence, between severe and lenient judges, between judges who favour capital punishment and those who do not, and the subjective attitudes that might be brought into play by factors such as race and class.<sup>32</sup> Therefore, despite the procedural safeguards that have to be followed before the death penalty is imposed, there is still the chance of judicial error, leading to the conviction of innocent persons.<sup>33</sup>

There have been reports of persons from countries in Africa, for example Malawi, being released from prison, sometimes after many years in custody, on the grounds of their innocence.<sup>34</sup> Also, persons have been sentenced to death in Uganda and released after many years

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<sup>31</sup> Despite the evolving standards of proof, such as DNA testing, the risk of executing the innocent still exists. Notwithstanding the use of DNA testing in the USA, eg, the most influential and troubling aspect of the death penalty is the demonstrable failure of the system to convict and sentence only the guilty; see H Bedau 'The present situation of the death penalty in the United States' in Council of Europe *Death penalty: Beyond abolition* (2004) 209.

<sup>32</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 54 (*Makwanyane*).

<sup>33</sup> Eg, notwithstanding the sophisticated legal system of the United Kingdom, the inbuilt checks and balances in the system of criminal procedure, persons have been convicted and executed as a result of judicial error; see G Devenish 'The historical and jurisprudential background to the application of the death penalty in South Africa and its relationship with constitutional and political reform' (1992) 5 *South African Journal of Criminal Justice* 1 17.

<sup>34</sup> R Hood *The death penalty: A worldwide perspective* (2002) 132.

on grounds of their innocence. For example, Mpagi was on death row for 19 years in Luzira Maximum Security Prison for murder. It later turned out that the man he was accused of having murdered was alive. His conviction was therefore the result of an irresponsible justice system and indifferent investigators.<sup>35</sup>

In addition, capital punishment is a source of agonising controversy among judges who have moral reservations about the death penalty and who are legally obliged in certain circumstances to impose it.<sup>36</sup> Arbitrariness in the use of the death penalty cannot be eliminated because of the imperfections inherent in criminal trials. At every stage of the process, there is an element of chance, as the outcome is dependent upon factors such as the way the police investigate the case, the way the prosecutor presents the case, how effectively the accused is defended, the personality and particular attitude to capital punishment of the trial judge and, if it goes on appeal, the judges who are selected to hear the appeal.<sup>37</sup> Overall, the outcome is dependent on respect for fair trial rights, and the degree of chance can be reduced if fair trial rights are respected.<sup>38</sup> Nonetheless, inadequate legal aid and prosecutorial discretion, for example, result in some defendants being sentenced to death and executed while others convicted of similar crimes are not.<sup>39</sup>

Lastly, a protocol on the abolition of the death penalty in Africa is needed because, in the presence or absence of an extradition treaty, a state party to the protocol can invoke it to refuse extradition from its state to a country in which capital punishment still exists. This has been the case in the European system in which Protocol No 6 (discussed below) has been invoked to refuse requests for extradition from a Council of Europe member state to third countries in which capital punishment still exists.<sup>40</sup>

The foregoing paragraphs have illustrated that there is a need for the adoption of a protocol to the African Charter on the question of the abolition of the death penalty in Africa. The adoption of a protocol

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<sup>35</sup> See 'Foes of death penalty making gradual gains in Africa' *The New York Times* 20 October 2004.

<sup>36</sup> Devenish (n 33 above) 19.

<sup>37</sup> *Makwanyane* (n 32 above) para 48.

<sup>38</sup> Regrettably, to a great extent, increased concern about the use of the death penalty in Africa is as a result of the death penalty being imposed after trials that do not conform to international and national fair trial standards. Eg, trials are conducted after excessive delay, and in some cases defendants have no access to legal assistance and lack proper defence.

<sup>39</sup> E Prokosch 'The death penalty versus human rights' in Council of Europe (n 31 above) 29.

<sup>40</sup> H Krüger 'Protocol No 6 to the European Convention on Human Rights' in Council of Europe (n 31 above). Also see, generally, *Soering v United Kingdom* Judgment of 7 July 1989, Ser A Vol 161 (European Court of Human Rights) (1989) 11 EHRR 439.

would be the ideal option in enhancing human rights protection in general, and the right to life in particular, on the continent.

### 3 Comparative international experiences

Protocols on the abolition of the death penalty have been adopted under the UN, European and Inter-American human rights systems. The adoption of protocols on the death penalty in the European and Inter-American systems explains why encouraging African states to ratify the Second Optional Protocol to CCPR should not be the only option, as it is also necessary to adopt a regional protocol on the death penalty. Thus, Africa is the only system that is yet to adopt a protocol on the abolition of the death penalty. The experiences of the UN, European and Inter-American systems in this regard could therefore provide some guide with regard to the process of adoption (drafting and otherwise) and content of a protocol on the abolition of the death penalty in Africa.

#### 3.1 The United Nations experience

The first draft of the Second Optional Protocol to CCPR was submitted to the UN General Assembly at its 1980 session, which stated in its article 1 as follows:<sup>41</sup>

- 1 Each State party shall abolish the death penalty in its territory and shall no longer foresee the use of it against any individual subject to its jurisdiction nor impose nor execute it.
- 2 The death penalty shall not be re-established in States that have abolished it.

The resolution, to which the draft was annexed, was adopted with consensus.<sup>42</sup> After several drafts, in respect of which various governments made comments, the final Protocol (Second Optional Protocol to CCPR) was adopted in 1989, with 59 votes in favour, 26 against and 48 abstentions.<sup>43</sup> Those who deal with human rights on a daily basis, such as governments, were involved in the process. The Preamble of the Protocol states that measures towards abolition should be seen as progress in the enjoyment of the right to life. The Protocol abolished the death penalty, but gave states the option to use it in wartime. Article 1 of the Protocol provides:

- 1 No one within the jurisdiction of a State Party to the present Protocol shall be executed.
- 2 Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

<sup>41</sup> Schabas (n 12 above) 174. According to the draft art 2, art 1 would be regarded as an additional article to CCPR, and no derogation could be permitted from art 1.

<sup>42</sup> See UN Doc A/C 3/35/SR.84 paras 9-10.

<sup>43</sup> For a discussion of the drafting process, see Schabas (n 12 above) 171-182.



Article 2(1) provides:

No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

A more nuanced position was preferred — abolition of the death penalty in peacetime — as most states retained the death penalty for crimes committed under military law or in exceptional circumstances. It was therefore thought that, allowing for the option of using the death penalty in wartime would make it possible for more states to accede to, or ratify the protocol. It should be noted that a notice to the UN Secretary-General of the relevant provisions in the national legislation applicable during wartime must accompany reservations to the Protocol, which are only permissible at the time of ratification.<sup>44</sup>

Furthermore, article 3 of the Second Optional Protocol to CCPR requires state parties to the Protocol to include in their periodic reports to the UN Human Rights Committee, information on the measures adopted to give effect to the Protocol. The provisions of the Protocol apply as additional provisions to CCPR and article 1 is not subject to any derogation under CCPR.<sup>45</sup>

### 3.2 The European experience

The drafting of a protocol on the abolition of the death penalty in the European human rights system was preceded by studies on capital punishment in Europe.<sup>46</sup> Likewise, in the UN system, the campaign that ended up with the adoption of the Second Optional Protocol began slowly, with a study of the death penalty and of its effectiveness as a deterrent.<sup>47</sup> Following proposals from the Parliamentary Assembly and conferences of ministers of justice of the Council of Europe in 1982, the Committee of Ministers mandated its Steering Committee for Human Rights to 'prepare a draft additional protocol to the European Convention on Human Rights abolishing the death penalty in peacetime'.<sup>48</sup> It took one year to prepare the text and it was adopted in 1983.

The Protocol (Protocol No 6) abolished the death penalty in peacetime only.<sup>49</sup> Article 1 state: 'The death penalty shall be abolished. No

<sup>44</sup> Art 2(2) Second Optional Protocol to CCPR.

<sup>45</sup> Art 6 Second Optional Protocol to CCPR.

<sup>46</sup> See eg M Ancel *The death penalty in European countries* (1962).

<sup>47</sup> Schabas (n 12 above) 155.

<sup>48</sup> Krüger (n 40 above) 88.

<sup>49</sup> Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, adopted on 28 April 1983, entered into force on 1 March 1985 (ETS 114). The Protocol has been ratified by 44 states and signed by six.

one shall be condemned to such a penalty or executed.’ Article 2 provides as follows:

A state may make provision in its law for the death penalty in respect of acts committed in time of war or imminent threat of war; such penalty shall apply only in instances laid down in the law and in accordance with its provisions. The state shall communicate to the Secretary General of the Council of Europe the relevant provisions of law.

The word ‘peacetime’ was not included in the Protocol so as to avoid drawing attention to the wartime exception.<sup>50</sup> The difference between Protocol No 6 and the protocols in the other systems is that Protocol No 6 applies in peacetime only, whereas the other protocols abolish the death penalty in wartime as well, although they permit state parties to make a reservation on this point. Nevertheless, the adoption of Protocol No 13 corrected the situation.<sup>51</sup>

The adoption of Protocol No 13 followed a recommendation of the Parliamentary Assembly of the Council of Europe that the Committee of Ministers draw up an additional protocol abolishing the death penalty in both peace- and wartime.<sup>52</sup> The reasons advanced in support of the need for an additional protocol were: First, the death penalty is inhuman and degrading punishment. Second, its imposition has proved ineffective as a deterrent, and, owing to the fallibility of human justice, also tragic through the execution of the innocent. Third, there was no reason why capital punishment should be inflicted in wartime, when it is not inflicted in peacetime. The Parliamentary Assembly stated that there is lack of legal safeguards and high risk of executing the innocent when applying wartime death sentences.<sup>53</sup> The points put forward by the Parliamentary Assembly are also flaws in the application of the death penalty in Africa, thus necessitating the need for a protocol on the abolition of the death penalty in Africa.

As a result of the Parliamentary Assembly’s recommendation, Protocol No 13 abolishes the death penalty in all circumstances — both peacetime and wartime. The Protocol provides in its preamble that ‘abolition of the death penalty is essential for the protection of [the right to life] and for the full recognition of the inherent dignity of all human beings’. Articles 1, 2, 3 and 5 of the Protocol read:

<sup>50</sup> Schabas (n 12 above) 287.

<sup>51</sup> Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, adopted by the Committee of Ministers in February 2002, entered into force on 1 July 2003. Thirty countries have ratified the Protocol and 13 have signed but are yet to ratify the Protocol. For a discussion of the drafting process, see C Ravaud ‘The case law of the institutions of the European Convention on Human Rights’ in Council of Europe (n 31 above) 112-113.

<sup>52</sup> See Parliamentary Assembly of the Council of Europe Recommendation 1246 (1994) on the abolition of the death penalty.

<sup>53</sup> As above.

**Article 1 — Abolition of the death penalty**

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

**Article 2 — Prohibition of derogations**

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

**Article 3 — Prohibition of reservations**

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

**Article 5 — Relationship to the Convention**

As between the States Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

As seen from the provisions above, the legal effect of Protocol No 13 is that it neutralises article 2 of Protocol No 6. Protocol No 13 therefore provides an excellent example for other human rights systems to follow.

### 3.3 The Inter-American experience

The extension of the application of the death penalty in some states and proposals from Uruguay and other states on the abolition of the death penalty prompted the Inter-American Commission on Human Rights to raise the idea of an additional protocol to the American Convention on Human Rights<sup>54</sup> on the abolition of the death penalty.<sup>55</sup> The Inter-American Commission justified the need for a protocol on the basis that, when the American Convention was adopted, prevailing conditions would not have permitted abolition, but that there had been an evolution since then.<sup>56</sup> Drawing from this explanation, a protocol on the abolition of the death penalty in Africa is needed, bearing in mind the growing international trend on the abolition of the death penalty, which is also evidenced in Africa.

The above led to the adoption of the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.<sup>57</sup> The Preamble outlines explanations for the adoption of the Protocol. These include: First, everyone has an inalienable right to life, which cannot be suspended for any reason. Second, the abolition of the death penalty helps to ensure more effective protection of the right to life. Third, the death penalty has irrevocable consequences, forecloses the correction of judicial error and

<sup>54</sup> Adopted in 1969, entered into force in 1978 (reprinted in *Basic documents pertaining to human rights in the Inter-American system* OEA/Ser L/V/II 4 Rev 9, 31 January 2003 27).

<sup>55</sup> Schabas (n 12 above) 350-351.

<sup>56</sup> As above.

<sup>57</sup> Adopted on 8 June 1990, entered into force on 28 August 1991 (OAS Treaty Series No 73 (1990), reprinted in *Basic documents pertaining to human rights in the Inter-American system* OEA/Ser L V/II 82 doc 6 Rev 1 80 (1992)). The Protocol has been ratified by eight states and signed by one. Despite the poor ratification status, the Protocol could still serve as a source of reference for Africa.

precludes the possibility of changing or rehabilitating those convicted. The above are not unique to the Inter-American system, as they are also associated with the application of the death penalty in Africa and elsewhere. The above therefore provides the basis for the adoption of a protocol on the abolition of the death penalty in Africa.

The Protocol to the American Convention, same as the Second Optional Protocol, abolishes the death penalty, but allows states to reserve the right to use the death penalty in wartime. Article 1 provides:

The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.

Article 2(1) provides:

No reservations may be made to this Protocol. However, at the time of ratification or accession, the States Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.

The Inter-American and UN approaches have been seen by Schabas as more fully abolitionist than the European approach in Protocol No 6.<sup>58</sup> This is because the latter applies only in time of peace, whereas the former applies at all times, except where a state entered a reservation under article 2. A point worth noting is the fact that article 2 of the Protocol to the American Convention makes reference to international law, which the Second Optional Protocol does not. The reference to international law implies that, when applying the death penalty in wartime, the restrictions on the application of the death penalty contained in other international law instruments applicable in wartime have to be respected.<sup>59</sup>

#### **4 Suggestions on the drafting process and contents of the protocol**

The experiences of other human rights systems provide guidance with regard to the drafting process and content of a protocol on the abolition of the death penalty in Africa. The following suggestions are therefore made, based on the lessons learned from the experiences of the UN, European and Inter-American human rights systems.

With regard to the drafting process, it is suggested that experts

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<sup>58</sup> Schabas (n 12 above) 352.

<sup>59</sup> These include the Geneva Conventions (Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention), 75 UNTS 13 and Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention) 75 UNTS 287); and the additional protocols (Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)).

should be appointed to draft the Protocol. The process has to be participatory, through the involvement of various interested parties who use human rights daily, such as lawyers, non-governmental organisations (NGOs), government officials, academics and civil society.

On the content of the protocol, the following recommendations are made. First, since the Protocol would aim at the abolition of the death penalty, the approach of the UN and Inter-American system on the issue of the application of the Protocol is recommended. The Protocol should abolish the death penalty in peace- and wartime, allowing for a reservation at time of accession or ratification to use the death penalty in wartime. As was the case with the Second Optional Protocol to CCPR and Protocol No 6, the word 'peacetime' should not be included in the Protocol, so as to avoid drawing attention to the wartime exception.

Allowing for the possibility of using the death penalty in wartime will encourage ratification of the Protocol by states that are not prepared to renounce the use of the death penalty during wartime. Besides, the political priority at the moment is first of all to obtain and ensure observance of a continent-wide moratorium on executions, which could subsequently be consolidated by the complete abolition of the death penalty in Africa.<sup>60</sup> The first step to achieving this would be the adoption of a protocol that allows for the possibility of the death penalty in wartime.

Furthermore, the approach in Protocol No 13 — abolishing the death penalty in all circumstances — cannot be taken in Africa due to the absence of a continent-wide moratorium on executions. It was possible in Europe, as there existed a moratorium on executions throughout Europe.

Second, the Protocol should set a time frame within which, after ratification, the Protocol cannot be denounced until the expiry of that time period. For example, a state party could denounce Protocol No 6 only after the expiry of five years from the date on which it became a party to it and after six months' notice to the Secretary-General of the Council of Europe.<sup>61</sup> Since the African Charter is silent on denunciation, the Protocol would have to set its own time frame for any denunciations. Allowing for a possibility of denunciation would also encourage ratification of the Protocol.

Third, the articles abolishing the death penalty and those dealing with reservations or derogations should be regarded as additional arti-

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<sup>60</sup> The same argument was used in the European human rights system to justify the abolition of the death penalty in peace time only, under Protocol No 6; see Ravaud (n 51 above) 112.

<sup>61</sup> Art 15 of the European Convention on Human Rights (adopted in 1950, entered into force on 3 September 1953 (ETS 5 213 UNTS 222)) sets down the above conditions for denunciation. Since arts 1 to 5 of Protocol No 6 are regarded as additional articles to the Convention, art 15 of the Convention applies to the Protocol.

cles to the African Charter. A provision of this nature is important, as the Protocol would supplement the provisions of the African Charter in ensuring greater protection for human rights in Africa.

Fourth, generally, since some of the provisions of the Protocol would be regarded as additional articles to the African Charter, reservations or derogations under the African Charter in respect of the Protocol should be prohibited. This will give more force to the provisions of the Protocol.

Fifth, the Protocol should make reference to international law in the article dealing with reservation to use the death penalty in wartime, thus following the approach of the Inter-American human rights system on this aspect. This would afford greater protection of the rights of those facing the death penalty during wartime because, as noted above, international law treaties applicable in wartime would have to be respected.

Sixth, the Protocol on the abolition of the death penalty in Africa should provide that states include in their periodic reports to the African Commission the measures taken to give effect to the Protocol. A provision to this effect would provide a mechanism by which the implementation of the Protocol can be monitored.

Lastly, in drafting other provisions of the Protocol, guidance should be sought from the Protocols in the UN, European and Inter-American human rights systems. The experiences of these systems exist as a reference, as they have been successful in adopting protocols on the abolition of the death penalty, and the European system has gone further to adopt a protocol abolishing the death penalty in all circumstances. Since some countries in the Inter-American human rights system share almost similar social, economic and political problems like the African states,<sup>62</sup> the experience of this system is instructive to Africa.

## 5 Conclusion

A good human rights system is one that is able to accommodate the realities and imperatives of human rights. In view of this, I have merely presented in this article an opinion as to how the African human rights system could deal with the question of the abolition of the death penalty, by adopting a protocol on its abolition. The need for a protocol on the abolition of the death penalty in Africa is justified, *inter alia*, on the basis that it would enhance the protection of human rights in general and the right to life in particular. Drawing from the experiences of the UN, European and Inter-American human rights systems, I have also

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<sup>62</sup> K Quashigah 'African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' Occasional Paper 13, Centre for Human Rights (2002), <http://www.chr.up.ac.za> (accessed 25 February 2005).

made a few suggestions regarding the drafting process and the content of such a protocol. It is hoped that the AU, including government officials and civil society in general, would take note of the need for a protocol on the abolition of the death penalty in Africa and initiate a more thorough discussion on the subject.

# A comparative study of the implementation in Zimbabwe and South Africa of the international law rules that allow compulsory licensing and parallel importation for HIV/AIDS drugs

Solomon Frank Sacco\*

Lecturer in Human Rights Law, University of Zimbabwe

## Summary

*The HIV/AIDS pandemic poses a great threat to the livelihood of people living in sub-Saharan Africa. Within Southern Africa, Zimbabwe and South Africa are some of the countries worst hit by the pandemic. While the HIV/AIDS pandemic ravages these two countries, there are in existence drugs that can treat the symptoms of HIV/AIDS and also lower the communicability of the virus. The availability of these drugs in the two countries, however, is problematic particularly because of the international patents law regime. The result is that the drugs are very expensive when imported into the countries and therefore unavailable to the people that need them the most. The present article discusses how Zimbabwe and South Africa can effectively guarantee the availability of cheap anti-retroviral drugs to their populations by utilising the flexibilities in the TRIPS agreement to allow compulsory licensing and parallel importation of cheap anti-retroviral drugs. The article also examines the legal framework in the two countries to determine how they may best be utilised to secure the right to health in the present dispensation. The paper posits that the governments in these*

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\* LLB (Hons) (Zimbabwe), LLM (Pretoria); solsacco@yahoo.co.uk. The author is a research associate at the Centre for Human Rights, Faculty of Law, University of Pretoria. This article is adapted from a dissertation submitted for the requirements of the LLM in Human Rights and Democratisation in Africa, completed at the Centre for Human Rights, University of Pretoria, 2004.



*two countries can further the citizenry's right to health in the by fully utilising the flexibilities of the TRIPS agreements to facilitate the availability of cheap anti-retroviral drugs.*

## 1 Introduction

The Agreement on the Trade Related Aspects of Intellectual Property (TRIPS) is part of the World Trade Organisation (WTO) agreement. Although the substantive provisions of TRIPS are restatements of earlier international agreements, TRIPS changed two important things. It strengthened the dispute resolution procedure for intellectual property,<sup>1</sup> and it removed the state's discretion under the Paris Convention to determine the extent of patent protection.<sup>2</sup> For the protection of pharmaceuticals, this change means that states that had traditionally not allowed patent protection for pharmaceuticals, or had limited this protection, had to amend their legislation to become 'TRIPS compliant'. Developing and least developed nations were allowed a limited period to ensure that their legislation was TRIPS compliant. Developing countries, such as India (the supplier of much of the generic drugs sold in Africa), had to amend their legislation by the end of 2004, while least developed countries (which generally have no manufacturing capacity) have until 2016.

The WTO agreement included 'flexibilities' to allow member states to disregard or 'bend' the rules in certain circumstances, such as national emergencies. These flexibilities are set out as regards patents in articles 30 (which allows exceptions to the rights of patent holders) and 31 (which allows 'other unauthorised' use of the patent).

In the second half of the 1990s, the HIV/AIDS pandemic put increasing pressure on developing countries to provide cheap or free anti-retroviral drugs to their citizens in accordance with their duties to protect and fulfil the right to health. Patents on pharmaceutical products and processes kept the prices of medicines unreasonably high, making the medicines unaffordable in public hospitals in developing countries. As a result, the WTO, meeting in Doha in 2001, declared that members of the WTO should interpret article 31 of TRIPS to allow the manufacture of generic drugs in countries facing national health crises. Article 6 of the Doha Declaration called on the Ministerial Conference to speedily achieve consensus on how countries without manufacturing capacity could benefit from the Doha declaration. Thus, on 30 August 2003, the

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<sup>1</sup> I Elangi Botoy 'From the Paris Convention to the TRIPS Agreement: A one-hundred-and-twelve-year transitional period for the industrialised countries' (2004) 7 *Journal of World Intellectual Property* 115-130.

<sup>2</sup> T Kongolo 'Towards a more balanced co-existence of traditional knowledge and pharmaceuticals protection in Africa' (April 2001) 35 *Journal of World Trade* 349.

WTO Council of Ministers agreed on a statement establishing procedures for the parallel importation of generics (grey importation), setting out a stringent procedure that has to be followed both by the exporting and importing country.

Accordingly, a country facing a public health emergency (such as the HIV/AIDS crisis) may issue compulsory licences to local manufacturers to produce patent-protected medicines. The country may alternatively choose to issue licences to companies to import medicines from countries that produce generic medicines. However, because the latter provisions mandated stringent procedures for grey importation, this procedure has been the subject of much criticism.

Zimbabwe and South Africa are facing an HIV/AIDS pandemic of such proportions that the populations of these countries will markedly decline in the next ten years. This is despite the existence of effective drugs that treat the symptoms of HIV/AIDS and dramatically lower the communicability of the virus. These drugs are under patent protection by companies in the developed world and the patents raise the prices above the level of affordability for HIV-infected persons in South Africa and Zimbabwe. Zimbabwe has declared a national emergency on HIV/AIDS and has issued compulsory licences to a local company that has started to manufacture and sell cheap anti-retroviral drugs. South Africa has not declared a national emergency and has not invoked the TRIPS flexibilities or utilised flexibilities inherent in its own legislation.

This paper attempts to measure the effectiveness of the legal norms created by articles 30 and 31 of TRIPS, the Doha Declaration and subsequent Council of Ministers' decisions. Together, these ostensibly provide a framework to allow provision of generic drugs. It further discusses how the state of emergency in Zimbabwe has been utilised to provide cheap generic drugs to Zimbabweans and whether this would be an option for South Africa. A comparison of the legal provisions governing the provision of drugs in the two countries is undertaken to examine the extent to which international and national constitutional and legal provisions may be utilised to give effect to the right to health.

The paper attempts to answer the question, 'In what ways have Zimbabwe and South Africa utilised, or failed to utilise, the flexibilities in TRIPS to effectively protect the right to health?' The paper argues that the governments of South Africa and Zimbabwe could increase provision of HIV/AIDS drugs by fully utilising the flexibilities in the TRIPS agreement. It is argued that South Africa could improve its performance in the implementation of the right to access to health care by issuing compulsory licences to local companies to manufacture cheap anti-retroviral drugs.

Governments have the duty to protect and fulfil the right to health as guaranteed under international agreements and this duty needs to be monitored. This paper seeks to provide a kind of evaluation to show how the governments have utilised the flexibilities in TRIPS to comply

with their duty. By comparing different attitudes towards compulsory licensing, the study will provide insight as to how different governments facing the same crisis should proceed to protect the right to health.

A number of studies have illustrated the international law establishing the duties of states to protect and fulfil the right to health, and on the flexibilities in TRIPS and the subsequent agreements.<sup>3</sup> However, there has been no research on how this has affected Zimbabwe and South Africa, two countries that have been especially hard hit by the HIV/AIDS pandemic. The paper attempts to place the duties of Zimbabwe and South Africa in perspective against the backdrop of the international law on patent protection and to assess their implementation of the flexibilities and the usefulness of these flexibilities in achieving their duties.

## 2 The duties arising for South Africa and Zimbabwe from the right to health and the effect of TRIPS on these duties

### 2.1 The right to health in international law

In the 1948 Universal Declaration of Human Rights (Universal Declaration), the United Nations (UN) declared that '[e]veryone has the right to a standard of living adequate to the health of himself and of his family, including . . . medical care'. While the Universal Declaration is important because of its general acceptance by all states, the right to health is more definitively provided for in the International Covenant on Economic, Social and Cultural Rights (CESCR).<sup>4</sup> Article 12(1) of CESCR protects 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.

The Committee on Economic, Social and Cultural Rights (the Committee on ESCR) has confirmed that state parties to CESCR have obligations to take steps towards implementation of the rights as well as to

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<sup>3</sup> SF Musungu 'The right to health in the global economy: Reading human rights obligations into the patent regime of the WTO-TRIPS agreement' in Centre for Human Rights *International yearbook of regional human rights Master's programmes* (2001) 194; R Mahelkar 'Intellectual property rights and the third world' 81 *Current Science* (25 October 2001) 955; <http://www.ias.ac.in/curresci/oct252001/955.pdf> (accessed 28 February 2005); P Hunt 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on his mission to the World Trade Organisation' E/CN.4/2004/49/Add 1; P McCalman 'The Doha agenda and intellectual property rights' paper prepared as part of the Asian Development Bank's Regional Technical Assistance 5994: A Study on Regional Integration and Trade: emerging policy issues for selected developing member countries, <http://www.adb.org/Economics/pdf/doha/McCalman.pdf> (accessed 28 February 2005); R Mayne & M Bailey 'TRIPS and public health' *Oxfam international briefing paper* (2002) [http://www.oxfam.org/eng/pdfs/pp020325\\_trips\\_health.pdf](http://www.oxfam.org/eng/pdfs/pp020325_trips_health.pdf) (accessed 28 February 2005).

<sup>4</sup> See Musungu (n 3 above) 203.

fulfil a minimum core content of these rights immediately.<sup>5</sup> In the *Social and Economic Rights Action Centre v Nigeria*<sup>6</sup> case, the African Commission on Human and Peoples' Rights (African Commission) confirmed that economic, social and cultural rights, which include the right to health, are justiciable under the African Charter on Human and Peoples' Rights (African Charter).

Although national constitutional orders have generally overlooked economic, social and cultural rights, including the right to health, this has been changing. The South African Constitution and constitutional cases, such as the *Minister of Health and others v Treatment Action Campaign and Others (TAC case)*,<sup>7</sup> have demonstrated that governments may be held accountable in domestic courts for failure to provide health care in certain circumstances. In Ecuador, the Constitutional Court has held that the right to health in the Ecuadorian Constitution extends as far as obliging the government to provide public entities to ensure that the general public has access to health care, demonstrating that the right to health has begun to receive acceptance at the national level.<sup>8</sup>

General Comment No 14, on the substantive issues arising from the application of the right to health, issued by the Committee on ESCR, provides the most detailed explanation of the scope of states' responsibility under the UN system with regards to the right to health.<sup>9</sup> The Committee noted that states could not guarantee good health for the individual and noted that the right would therefore have to be measured by the criteria of whether the state had provided certain goods and services.<sup>10</sup> The Committee outlined the elements of the right to health and defined the requirement of economic accessibility as follows:<sup>11</sup>

... health facilities, goods and services must be affordable for all. Payment ... has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups.

<sup>5</sup> The Committee is a body of independent experts in charge of interpreting and monitoring the application of CESCR. See United Nations Committee on Economic Social and Cultural Rights 'The nature of states parties obligations (art 2 para 1)' General comment No 3 contained in document E/1991/23 (14/12/90).

<sup>6</sup> Communication 155/96, ACHPR/COMM/AO44/1.

<sup>7</sup> 2002 5 SA 703 (CC).

<sup>8</sup> C Fairstein 'The right to health — An Ecuadorian perspective' in *Housing and ESC Quarterly* 1 [1]. The case referred to is *Edgar Carpio Castro Jofre Mendoza & Others v Ministry of Public Health and the Director of the HIV-AIDS National Programme (amparo writ)* Resolution No 0749-2003-RA, 28 January 2004.

<sup>9</sup> United Nations Committee on Economic Social and Cultural Rights 'The right to the highest attainable standard of health: Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights' E/C.12/2000/4 General Comment No 14 (11/08/2000).

<sup>10</sup> n 9 above, para 7.

<sup>11</sup> n 9 above, para 9.

The Committee said that state parties had an obligation to create a 'system of urgent medical care in cases of accidents, epidemics and similar health hazards', and that the right to health facilities, goods and services 'includes ... the provision of essential drugs'.<sup>12</sup>

State obligations relating to economic, social and cultural rights are limited by the concept of progressive realisation within a state's available resources. Thus, generally, a state's duties in relation to health can only be judged in terms of whether the state has a policy to progressively realise its obligations, taking into consideration its available resources. In South Africa, the Constitutional Court, interpreting the South African Constitution which refers to 'progressive realisation', has held that the government was required to have a 'reasonable policy'.<sup>13</sup> Although this was a test developed within the constitutional framework of South Africa, it sheds light on the nature of international obligations arising from economic, social and cultural rights.

The state has an obligation under CESCRC to take measures to prevent third parties from interfering with the elements of the right to health. The obligation includes controlling the production, supply and sale of medicines by third parties.<sup>14</sup> This duty includes ensuring that medicines of acceptable quality are sold at prices affordable to the poor and other vulnerable sectors of society. This protection can take several forms, including enacting legislation regulating the prices of drugs.<sup>15</sup>

The duty to fulfil is traditionally seen as implying expenditure by the state. However, the duty to fulfil may include more facilitative roles, such as ensuring provision of cheaper medicines by third parties through legislative and policy regimes, such as public or private health insurance.

In the context of the right to health under CESCRC, states have an obligation to ensure the availability and accessibility of essential medicines. These obligations may be satisfied by the provision of free or cheap medicines by the government or by way of the adoption of a legislative/normative framework to ensure provision of cheap medicines by third parties.

The Committee has interpreted CESCRC as including the requirement of immediately fulfilling a minimum core obligation for each protected right. With respect to health, the Committee held that the minimum core obligations with regard to the right to health include the obligation:<sup>16</sup>

<sup>12</sup> n 9 above, para 16.

<sup>13</sup> See *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 1 SA 46 (CC). See also *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) and the *TAC* case (n 7 above).

<sup>14</sup> General Comment No 14 (n 9 above) para 35. See also para 51.

<sup>15</sup> This approach has, eg, been utilised in Egypt.

<sup>16</sup> General Comment No 14 (n 9 above) para 43.

- (d) to provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- (e) to ensure equitable distribution of all health facilities, goods and services.

General Comment No 14 is, therefore, authority for the contention that all state parties have an immediate obligation to provide either free or affordable essential medicines to the population and that if a significant proportion of the population does not have access to such medicines, the state has violated its obligations.

The African Charter enshrines and protects economic, social and cultural rights on the same basis as civil-political rights. Article 16 protects the right of the individual to the highest attainable standard of health, and article 16(2) sets out the duties of the state to ensure health care. There is no general clause in the African Charter limiting the enforcement of economic, social and cultural rights to progressive realisation within available resources. Thus it has been argued that the obligations arising from the African Charter are immediate, regardless of the nature of the rights concerned.<sup>17</sup> However, in the *Purohit and Moore v Gambia* case, the African Commission apparently implied the limitation of available resources into the right to health under the African Charter.<sup>18</sup>

In General Comment No 14, the Committee on ESCR states that ensuring access to essential medicines for the large majority of the population is one of the minimum core obligations of the state. The 2002 World Health Organisation list of essential medicines contained 325 individual drugs, including 12 anti-retroviral medicines for the symptomatic treatment of HIV/AIDS.<sup>19</sup> Applying General Comment No 14, states parties owe a duty to develop a policy that will incrementally ensure the provision of essential medicines to all individuals within the state. In addition, the state has an immediate responsibility, as a core minimum, to ensure that no significant proportion of the population is denied access to essential medicines.

## 2.2 The effect of intellectual property rights on the right to health

Because of the industrialised nature of modern society, the implementation of many rights protected at international and national law implies

<sup>17</sup> O Odinkalu 'Implementing economic, social and cultural rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights. The system in practice, 1986-2000* (2002) 178 196. Although Odinkalu posits that this interpretation does not apply to the right to health, it is argued that the Charter does not limit the enforcement of the right, but rather the content where it refers to 'best attainable state of health'. This should be interpreted as meaning that individuals cannot claim breaches of their rights where they do not have perfect health, where the condition is not medically curable or treatable.

<sup>18</sup> Communication 241/200, decided at the 33rd ordinary session of the African Commission (15-29 May 2003).

<sup>19</sup> The current list can be found at [http://mednet3.who.int/eml/diseases\\_disease\\_group\\_order.asp](http://mednet3.who.int/eml/diseases_disease_group_order.asp) (accessed 4 September 2004).

the provision of patented products and products manufactured by a patented process.<sup>20</sup> The health of the individual may depend on access to certain medicines that are protected by a patent and the manufacture of which is legally monopolised by the patent holder.

Prior to the deadline given under TRIPS to most developing countries of January 2005, many developing countries did not provide patent protection, or provided only limited protection, for pharmaceutical products. Under TRIPS rules, from this date these countries will be legally bound to give full patent protection to pharmaceutical products. Many of the medicines in the developing world are generic medicines manufactured by a process of reverse engineering in countries such as India and Brazil.<sup>21</sup> For countries that have relied on this supply of essential drugs, the implementation of the TRIPS agreement will have a retrogressive effect on the delivery of essential drugs.

The conflicting duties of the state — to protect the rights of the patent holder and the rights of the patient — define the obligations of states under international law. These conflicting duties gave rise to the 'flexibilities' within the original TRIPS agreement, as it was seen that individual states would have to determine for themselves in what ways the conflict between the different rights were determined.

TRIPS was one of the agreements reached after the Uruguay Round of the General Agreement on Trade and Tariffs and was signed by 125 governments.<sup>22</sup> Provisions of TRIPS reflect the strong influence of the United States of America in the negotiations and are a reflection of American patent laws, in particular article 27, which applies to new technologies that had not previously been included, such as pharmaceuticals.<sup>23</sup>

There are a number of flexibilities in the TRIPS agreement relating to the working of patent-protected products. Under article 30, member states are allowed to provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably prejudice the interests of the patent owner. While a literal interpretation of article 30 would allow it to be applied to compulsory licensing and parallel importation, developed countries have resisted this interpretation because of the lack of controls in article 30. Much

<sup>20</sup> Musungu (n 3 above) 211.

<sup>21</sup> P Drahos 'Access to medicines: After Doha' *Trade hot topics commonwealth* No 20.

<sup>22</sup> n 21 above, 213.

<sup>23</sup> P Wojahn 'A conflict of rights: Intellectual property under TRIPS, the right to health, and AIDS drugs' (Fall 2001/Winter 2002) 6 *UCLA Journal of International Law and Foreign Affairs* 465 479. Musungu (n 5 above) 214 and G Velasquez & P Boulet *Globalisation and access to drugs: Perspectives on the WTO/TRIPS agreement* (1999), <http://www.eldis.org/static/DOC11519.htm> (accessed 10 September 2004) claim that Pharmaceutical Trans-National Companies (TNCs) pressurised developing countries, through the governments of developed countries, in favour of strict intellectual property protection.

of the debate around the solution to article 6 of the Doha Declaration was based on whether to apply article 30 (which would have allowed a more flexible system) or article 31 (which is more limiting on the powers of the governments).<sup>24</sup>

Article 31 of the agreement applies to compulsory licensing, parallel importation and government use.<sup>25</sup> Compulsory licensing and government use, which is a variant of compulsory licensing in which the government licences itself to produce the medicines, are permissible under TRIPS.<sup>26</sup>

However, article 31 of TRIPS sets out a number of restrictions on the exercise of the state's right to issue a compulsory licence, including the restriction that goods produced under a compulsory licence should be for 'predominantly' local use and the requirement to pay compensation.<sup>27</sup> While one of the requirements for a compulsory licence is reasonable compensation for the patent holder, this is subject to the rider adequate 'in the circumstances of the case'. Compensation under compulsory licences is often less than under voluntary licences and generic medicines made under compulsory licences are cheaper than under voluntary licence.

### 2.3 The Doha Declaration

The flexibilities in TRIPS were clarified in the Doha Ministerial Declaration.<sup>28</sup> The Doha Ministerial Declaration on TRIPS and Public Health unambiguously states that HIV/AIDS, malaria, tuberculosis and other epidemics are continuing public emergencies in developing countries allowing exceptions to patents.<sup>29</sup> The Doha Declaration reaffirmed the

<sup>24</sup> See I Elangi Botoy 'Potential and substantial benefits of the TRIPS agreement to the member countries of the African Intellectual Property Organisation in the patent field' (2001) 4 *Journal of World Trade Law* 91; D Shanker 'The Vienna Convention on the Law of Treaties, the dispute settlement system of the WTO and the Doha declaration on the TRIPS agreement' (2002) 36 *Journal of World Trade* 721; T Haag 'TRIPS since Doha: How far will the WTO go toward modifying the terms for compulsory licensing?' (2002) 84 *Journal of the Patent and Trademark Office Society* 945, Drahos (n 21 above) 3. For a view that art 30 is inapplicable to public health situations, see the EU submissions to the WTO in the *Canada — Patent protection of pharmaceutical products* (*Canada — Patent Protection*) WTO Doc WT/DS114R (6 March 2000), report of the panel.

<sup>25</sup> Government use is specifically allowed under art 44(2) of TRIPS.

<sup>26</sup> Musungu (n 3 above) and art 31 of TRIPS as read with art 5(A)(2) of the Paris Convention.

<sup>27</sup> Although in public emergencies, some of these requirements are relaxed.

<sup>28</sup> 'Declaration on the TRIPS agreement and public health, Ministerial Conference, 4th session, Doha 9-14 November 2001' WT/MIN (01)/DEC/W/2 14 November 2001 (Doha Declaration).

<sup>29</sup> n 28 above, para 5.



right of each state to grant compulsory licences and determine the conditions of these licences.<sup>30</sup>

The Doha Declaration was important because the WTO specifically said that governments could issue compulsory licences for the manufacture of generic medicines. The declaration thus assured developing countries that the granting of compulsory licences would not lead to litigation before the WTO dispute settlement bodies.<sup>31</sup>

While the Doha Declaration clarified the situation of countries with manufacturing capacity, there was no solution for countries that do not have manufacturing capacity and need to rely on parallel importation to ensure a supply of anti-retroviral drugs. Parallel importation is the process whereby a product is imported into a country where it is patent-protected from another country on the grounds that the patent holder was paid the first time it was sold.<sup>32</sup> Parallel importation is a suitable solution for countries that do not have infrastructure to manufacture generics through compulsory licensing. However, TRIPS does not allow parallel importation of generics, which shuts the door on a cheap source of medicines.<sup>33</sup> While TRIPS allows states to legislate to allow parallel importation from states where the goods are produced by the patent holder, or under a voluntary licence, the provisions of article 31(f) of TRIPS restricts compulsory licences predominantly to local use, limiting the scope of parallel importation.<sup>34</sup> This means that parallel importation of medicines manufactured under a compulsory licence would *prima facie* breach the TRIPS agreement.<sup>35</sup>

Article 6 of the Doha Declaration called on states to create a system to allow developing and least developed states to import medicines from other states manufacturing generic drugs. The decision of 30 August purports to be an answer to this instruction and sets up a procedure for the parallel importation of generic medicines, but this system has been criticised as excessively restrictive and unworkable.<sup>36</sup> The decision waives the obligations of members of the WTO under subarticles 31(f) and 31(h) (the conditions that the products be predominantly for the local market and the requirement to pay compensa-

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<sup>30</sup> As above.

<sup>31</sup> The Doha Declaration essentially confirms the opinion that '... countries are endowed by the TRIPS agreement with the right to adopt measures necessary to protect, for instance, public health and nutrition' *per* Elangi (n 24 above) 95.

<sup>32</sup> Musungu (n 3 above) 220.

<sup>33</sup> S Joseph 'Pharmaceutical corporations and access to drugs: The 'fourth wave' of corporate human rights scrutiny' (2003) 25 *Human Rights Quarterly* 423 449-450.

<sup>34</sup> Drahos (n 21 above) 2.

<sup>35</sup> n 34 above 3; K Gopakumar 'The WTO deal on cheap drugs: A critique' (2004) 7 *The Journal of World Intellectual Property* 99 100; J James 'Drug patents and developing countries: Problems remain' *AIDS Treatment News* Issue 385 November 2002. The Ministerial decision is WT/L/540 2 September 2003.

<sup>36</sup> Gopakumar (n 35 above) 99.

tion respectively), but subject to certain conditions. These conditions are onerous and include a strict notification procedure and the issuance of compulsory licences by both the exporting and importing countries.<sup>37</sup>

There are a number of flexibilities inherent in the TRIPS agreement that make the agreement appropriate for the protection of the human right to health. These flexibilities include, firstly, the power for states to issue compulsory licences for essential medicines; and, secondly, the power for states to import generic medicines through the WTO system. However, these flexibilities need to be used. It does not meet the obligations of a state under CESCO to include provisions in a country's patents legislation allowing compulsory licensing, but failing to actually issue compulsory licences and/or to import generics. The obligation under CESCO is to provide access to essential medicines and the flexibilities under TRIPS are merely one of the methods a state may use to protect and fulfil this right.

### **3 An assessment of South Africa and Zimbabwe's use of TRIPS flexibilities**

#### **3.1 Legal provisions**

##### **3.1.1 Constitutional provisions**

The Constitution of Zimbabwe has no protection of the right to health. The right to life was drafted restrictively in Zimbabwe to guarantee only a prohibition against arbitrary deprivation of life. However, Zimbabwe has ratified CESCO and the African Charter and is thus bound by international law to respect and implement this right.

The South African Constitution, on the other hand, has been much celebrated for its protection of socio-economic rights, including the right of access to health care, which is set out in article 27 of the Constitution. However, the South African Constitutional Court has held that an individual may not claim that the state has breached a minimum core obligation towards him by failing to provide the essentials of the enjoyment of an economic, social or cultural right, preferring to set out a 'reasonable policy' test.<sup>38</sup> Thus it cannot be argued that, under the South African Constitution, the state has an obligation to provide an individual with anti-retrovirals, but it can be argued that the government must have a reasonable policy, taking into consideration available resources, to adequately deal with the HIV/AIDS crisis.

<sup>37</sup> Gopakumar (n 35 above) 105.

<sup>38</sup> See the *TAC* case (n 7 above).

### 3.1.2 International treaties

South Africa is not a party to CESC, <sup>39</sup> but it is a party to the African Charter and is thus bound by article 16 of the Charter, which may be interpreted to give rise to immediate obligations by the South African government. Alternatively, article 16 may be interpreted with reference to articles 61 and 62, to include the concept of minimum core obligations.

Both South Africa and Zimbabwe are obliged to take progressive steps towards the realisation of the right to health and are obliged to immediately realise minimum core obligations. These minimum core obligations include ensuring that there is no significant proportion of the population that does not have access to essential medicines, which include anti-retrovirals.

Since compulsory licensing and grey importation of generic HIV/AIDS drugs are permitted under international trade law and South African patent legislation (see below), the provision of cheap anti-retroviral drugs on the market and free to the most vulnerable in society should be interpreted as an obligation arising from article 26(2) of the South African Constitution.

### 3.1.3 Legislation

Sections 31 to 35 of the Zimbabwean Patents Act govern compulsory licensing and government use of patents. Section 31 deals with the situation where a compulsory licence is sought for on the grounds that patent holder has not manufactured the products protected by the patents in Zimbabwe after the expiration of three years from the grant of the patent, and the applicant had previously unsuccessfully applied for a voluntary licence.

Section 32 allows the grant of compulsory licences for foods or medicines. Sections 34 and 35, read together, regulate government use of any invention, and allow the government to use an invention for any purpose. Whereas section 34 deals predominantly with a situation where the government makes the drugs or procures the drugs from a third party who is specifically allowed to produce the product for state use, section 35 allows a third party, properly licensed by the Minister, to produce drugs for sale in a national emergency. Thus, during a national emergency, the Minister may issue a licence to a third party to manufacture and sell the product (the declaration of a national emergency being necessary to allow the third party to sell the product). The Patents Tribunal may also issue a compulsory licence allowing the importation of generic drugs under sections 31 and 32 of the Act.

The Zimbabwean legislation therefore clearly makes the manufacture

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<sup>39</sup> As above.

and importation of generic drugs legal under certain circumstances. The procedure to be adopted by the government is relatively straightforward and empowers the government to meet national health emergencies in accordance with its international obligations. The government may choose to manufacture drugs itself, issue licences under sections 31 or 32 or declare a national emergency and utilise section 35 to authorise a third party to manufacture and sell the product.

The government chose the third option, and on 27 May 2002 the Zimbabwean government declared a state of emergency on HIV/AIDS in accordance with the Zimbabwean Patents Act and this status has been renewed regularly since then. The government of Zimbabwe has therefore taken the necessary legislative steps to ensure compliance with its international obligations.

In South Africa, section 56(2) of the Patents Act allows compulsory licences where the patented product is not manufactured in South Africa and the South African market is being serviced by expensive imports. The Patents Act allows the government to issue compulsory licences when the use of patents is abused. Abuse of patents includes failure to manufacture in South Africa and serving the market with imported goods whose prices are excessive.<sup>40</sup> It would therefore be legal for the South African government to issue compulsory licences for expensive drugs where they are being imported into South Africa and sold at an excessive price. Section 56(4)(a) implicitly allows the holder of a compulsory licence to import the patented goods by stipulating that the commissioner may impose restrictions, including the restriction that the licensee be disallowed from importing.<sup>41</sup>

After a much disputed amendment to the Medicines and Related Substances Control Act (the Medicines Act),<sup>42</sup> the new section 15C apparently facilitates the parallel importation of patent protected medicines, which would be cheaper as the drugs can be imported from countries such as India where the prices are lower because of competition with generic drugs.<sup>43</sup>

<sup>40</sup> See also Dr Gertholz Patent Attorneys 'Basic guide to patents' <http://www.gpa.co.za/english/basic/patents.htm> (accessed 14 October 2004).

<sup>41</sup> To import generic drugs that are still patent-protected in South Africa, a company needs a compulsory licence. See the Treatment Action Campaign Statement 'An explanation of the Medicines Act and the implications of the court victory' <http://www.tac.org.za> (accessed 13 September 2004).

<sup>42</sup> The pharmaceutical sector stopped the South African government from gazetting the Act for four years before finally withdrawing their case just before the matter came up for trial. See 'South African court case ends in climb down by drug corporations' at the World Socialist website, <http://www.wsws.org/articles/2001/apr2001/aids-a21.shtml> (accessed 8 October 2004); J Love 'Report on court case over South African Medicines Act' <http://www.aids-bells.org/index.html> (accessed 28 February 2005).

<sup>43</sup> See A Hooper 'Prices of pharmaceuticals to the South African public — Will they drop?' on the website of Spoor and Fisher <http://www.spoor.com/article.php?no=451> (accessed 13 September 2004).

It has been argued that the amended Act does not introduce grey importation into South African law. For any person to legally import generic versions of patent-protected pharmaceutical products, that person would need to be granted a compulsory licence under the Patents Act.<sup>44</sup> Different interpretations of the Act existed during the litigation, with the pharmaceutical companies arguing that the Act could be interpreted broadly to allow grey importation of generic versions of patented medicines, and the section was thus contrary to the TRIPS agreement. The South African government argued that the section was not aimed at the granting of compulsory licences for either grey importation or domestic manufacture of generic medicines, but rather to implement the principle of international exhaustion of patent rights. Under this principle, South Africa can legally import drugs manufactured in a third country even though the products are under patent in South Africa, as long as the products were originally sold for or by the patent owner.<sup>45</sup> This interpretation of the Act has been confirmed by Love J, who states the following:<sup>46</sup>

[P]arallel imports does not involve buying from generic suppliers, but rather just shopping around for the best price a company charges internationally . . . if South Africa permits parallel imports, it will be able to import an Indian version of Glaxo's AZT, but not CIPLA's generic version of the same drug.

However, patent experts in South Africa are of the opinion that the Act amended the law to allow grey importation of generic drugs by allowing medical registration of generic drugs identical to brand name drugs already registered so that any person could import such drugs.<sup>47</sup> It could be argued that section 15C(1) allows the Minister to suspend all proprietary rights to patents over pharmaceutical products already marketed in South Africa by the holder of the patents. However, the attitude of the South African government throughout the litigation indicates that the Act was never intended to be used to allow grey importation or local manufacture of generic medicines. The regulations issued under the amended Act confirm that the government does not intend to allow grey importation, limiting the power to grant a permit to import drugs to a person buying the drugs from a foreign country where the drugs are sold with the permission of the patent owner.<sup>48</sup>

The legislation in South Africa does not clarify whether grey importation is legal, although the Patents Act does appear to make it possible

<sup>44</sup> TAC case (n 7 above).

<sup>45</sup> Love (n 42 above).

<sup>46</sup> As above.

<sup>47</sup> A Hooper 'The Medicines and Related Substance Control Amendment Bill (B30-97) and its effect on intellectual property rights' Spoor and Fisher, <http://www.spoor.com/article.php?no=451> (accessed 11 October 2004).

<sup>48</sup> Sec 7 of General Regulations made in terms of the Medicines and Related Substances Act 101 of 1965 (as amended) of May 2003.

for an importer to be granted a compulsory licence to allow it to import generic medicines. The new Medicines Act does not appear to have changed the position much, mainly because the government does not appear prepared to utilise the legislation to allow the registration of generic medicines. Generally, the South African legislation is less empowering of the government to allow parallel importation, placing the emphasis in the Patents Act on individual applications for licences, whereas the Zimbabwean legislation allows the state to take a lead in manufacturing or facilitating third parties to manufacture generic medicines.

#### 3.1.4 Summary

Zimbabwe and South Africa have duties under international law to protect the right to health, and this includes the duty to provide essential medicines. Since both countries are facing HIV/AIDS crises on a huge scale, the governments have a duty to ensure that HIV/AIDS medication is made available and accessible to the population. The TRIPS flexibilities allow both countries to engage in either local manufacture under compulsory licence or grey importation of generic drugs. Both Zimbabwe and South Africa have the domestic legislation necessary to implement the flexibilities in the TRIPS agreement. The Zimbabwean government has taken the necessary steps to implement the Patents Act by declaring a state of emergency, whereas the South African government has not implemented domestic flexibilities to suspend patent rights over HIV/AIDS drugs.

### 3.2 The cost-effectiveness of generic anti-retrovirals

#### 3.2.1 Zimbabwe

Field research in Harare, Zimbabwe in July 2004 showed that the market was mainly served by generic anti-retrovirals produced by a Zimbabwean company, Varichem (Pvt) Ltd.<sup>49</sup> Some of the drug names, such as Stanalav, which is a three drug combination, appear to be used only in Zimbabwe and cannot be cost-compared to other countries, while others, such as Combivir, are easily compared. While prices fluctuated between pharmacies, all prices of locally manufactured anti-retroviral drugs were below USD 28 a month.<sup>50</sup> Examples of the prices are as follows: Stanalav was US \$23 or US \$24, depending on the pharmacy, whereas Nevirapine fluctuated between US \$3 and US \$6. Combivir (Zidovudine/Lamivudine) was sold for US \$13 or US \$18 per month. Zerit was on sale for between US \$12 and US \$23.

<sup>49</sup> Interviews were held with pharmacists, medical wholesalers, the patent office, Varichem (Pvt) Ltd (the generic manufacturer) and the Ministry of Health.

<sup>50</sup> The US dollar values are based on an exchange rate of 7 000 Zimbabwean dollars to one US dollar, valid at 31 July 2004.

Imported drugs were rare on the market, with pharmacies saying that the market had converted to local generics and the high prices of imported brand names made them unpopular. Imported 3TC was available at US \$143 per month and imported Nevilast was available for US \$49 per month. Locally produced anti-retroviral drugs, such as Combivir and Zerit, have the same clinical use as the above imported brand name medicines. Imported brand name 3TC was up to 11 times more expensive than locally produced Combivir and 12 times more expensive than locally produced Zerit. The vast difference in prices shows the success of local manufacture of generic medicines in reducing the price of first line anti-retroviral drugs.

### 3.2.2 South Africa

International prices of anti-retroviral drugs have declined as a result of competition from generic medicines produced in India and Brazil. Thus, in South Africa, the private sector is served by brand name anti-retrovirals at a price of approximately US \$84 per month for triple therapy: '[T]he prices offered by companies for triple therapy in South Africa have fallen . . . to approximately US \$1 000 (per patient per year) . . .'<sup>51</sup>

Meanwhile, in the public sector, voluntary licences have made cheaper anti-retroviral drugs available to the government and to NGOs working on HIV/AIDS. Commentators have claimed that such voluntary licence agreements limit the scope of the licence to supplying drugs only to the South African public health sector and the cost is still higher than generic drugs imported from India:<sup>52</sup>

Under the agreement, the South African company is not allowed to profit from the sale of the drugs, AZT, 3TC and Combivir, or export them to any other African country . . . Industry sources estimate Aspen's generic Combivir would cost about \$1,80 per patient per day, with AZT priced at \$1,60 and 3TC at just over 60 US cents, which is still above the cost of generics being offered by Indian drug makers at \$1 per day.

While the drugs supplied to the South African government are cheaper than drugs supplied on the open market, they are still more expensive than generic drugs from India or Brazil (see below) or generics manufactured in Zimbabwe. Patients that rely on the private sector in South Africa and patients in neighbouring countries do not benefit at all.

### 3.2.3 Comparison of prices between South Africa and Zimbabwe

A direct comparison of prices in South Africa as quoted by the BBC<sup>53</sup>

<sup>51</sup> Oxfam GB 'South Africa vs. the drug giants' [http://www.oxfam.org.uk/what\\_we\\_do/issues/health/drugcomp\\_sa.htm](http://www.oxfam.org.uk/what_we_do/issues/health/drugcomp_sa.htm) (accessed 14 October 2004).

<sup>52</sup> BBC News 'African firm wins AIDS drug permit' 8 October 2001, <http://news.bbc.co.uk/1/hi/business/1586355.stm> (accessed 5 September 2004). The BBC noted that before the agreement, the multinational concerned, GSK, was already providing Combivir to the South African public health sector for US\$ 2 a month.

<sup>53</sup> As above.

and the cost of generics on the open market in Zimbabwe shows that Combivir in Zimbabwe is between 43 and 60 US cents per day, whereas it was provided to the South African government and South African NGOs at US \$1,80 per day. Zerit prices in Zimbabwe were between 40 and 77 US cents per day, whereas in South Africa the price under the voluntary licence was estimated to be in the region of US \$1 per day.<sup>54</sup> This comparison has shown that drugs manufactured under compulsory licensing in Zimbabwe are cheaper than drugs manufactured under voluntary licences in South Africa. (A difference of between 20 US cents and US \$1 is important when considering economics of scale, as the marginal variance is significant for annual per capita expenditure.) Further, the price analysis does not take into consideration that the Zimbabwean prices are retail prices,<sup>55</sup> while the prices quoted by the BBC for the Aspen produced generics will be wholesale prices for drugs delivered to the government or to NGOs, implying that there would be a further mark-up if these drugs were supplied on the open market. Prices in the private sector in South Africa for triple therapy were approximately US \$84 per month, whereas in Zimbabwe, Stanalav, a locally produced triple therapy drug, was sold for US \$22 per month, approximately four times cheaper than triple therapy available to the private sector in South Africa. The granting of compulsory licences in Zimbabwe has therefore made generic drugs available on the open market at much cheaper prices than comparable medicines in South Africa. The Zimbabwean legislation and policy in this regard are more successful in making generic drugs available to its population in compliance with its international obligations.

### 3.4 Parallel and grey importation of antiretrovirals compared with local manufacture

Parallel and grey importation of drugs has become an increasingly popular answer to high drug prices:<sup>56</sup>

[I]f the US actually gets around to permitting parallel imports of medicines, US consumers could buy branded and patented medicines from the Canadian and European markets, where prices are often lower.

<sup>54</sup> W Chege 'South Africa firm offers Zerit (Stavudine) as continent's first locally made generic drug' 8 September 2003, *HIV and AIDS top stories*, <http://www.hivandhepatitis.com/recent/developing/08083.html> (accessed 8 October 2004). The Zerit licence was the only one that allowed the sale of the generic to the private market; although Aspen received voluntary licences for Combivir, Zidovudine, Lamuvodine, Didanosine and Nevirapine. These licences restricted the company to selling to the government. See HIV Newsroom 'South African generic drug maker to produce country's first generic anti-retroviral drug' *The body: An AIDS and HIV information resource*, [http://www.thebody.com/kaiser/2003/aug7\\_03/south\\_africa\\_generic.html](http://www.thebody.com/kaiser/2003/aug7_03/south_africa_generic.html) (accessed 28 February 2005).

<sup>55</sup> Pharmaceutical wholesalers refused to disclose their prices, claiming confidentiality.

<sup>56</sup> Love (n 42 above).



Grey importation, available to developing countries such as Zimbabwe and South Africa under the WTO Ministerial Decision of 30 August 2003, would allow either country to import generic drugs from companies in Brazil or India, which produce the drugs without authority from the patent holders at a vastly lower price. Neither Zimbabwe nor South Africa has taken advantage of this decision to register a system of compulsory licences with the WTO and to import generic drugs. However, Médecins sans Frontières (MSF) has been treating patients in South Africa on generic anti-retrovirals purchased from Brazil under a 2001 agreement with the Brazilian Ministry of Health after receiving drug approval from the South African Medicines Control Council. This situation is in violation of the WTO Ministerial Decision, as there has been no registration of the agreement and no compulsory licence issued for the export from Brazil and the import into South Africa.<sup>57</sup>

MSF has stated that the drugs it purchases from Brazil are half the price of discounted drugs offered in South Africa from the brand name producers. MSF has given a comparison of the different costs it had to pay for grey imported and discounted brand name drugs offered in South Africa as set out in table 1, based on discounted prices offered to the South African government by GlaxoSmithKline and Boehringer Ingelheim, compared to prices offered by the Brazilian company, FarManguinhos.<sup>58</sup>

<b>Name of drug</b>	<b>Brand name price in South Africa</b>	<b>Generic price from Brazilian company</b>
AZT/3TC	USD 2 per day	USD 0,96 per day
Nevirapine	USD 1,19 per day	USD 0,59 per day
AZT	USD 1,60 per day	USD 0,09 per day
3TC	USD 0,64 per day	USD 0,41 per day

Generic drugs manufactured in India are also markedly cheaper than other drugs available to South Africa or Zimbabwe as seen by the table below, showing the prices of anti-retroviral drugs in India as compared to Africa and the developed world.<sup>59</sup>

<sup>57</sup> No country since 30 August 2003 has taken advantage of the WTO Ministerial Decision and registered a system to import generic drugs.

<sup>58</sup> MSF 'Brazilian generic ARV drugs in South Africa — The background. A historical account of the use of Brazilian drugs in MSF's anti-retroviral programme in South Africa' 29 January 2002, <http://www.msf.org/countries/page.cfm?articleid=F8557436-9860-4D00-BC5FO476D8B7A5E1> (accessed 9 October 2004).

<sup>59</sup> This table is taken from K Singh 'Patents vs patients: AIDS, TNCs and drug price wars' *Third World Network*, <http://www.twinside.org.sg/title/twr131c.htm> (accessed 11 October 2004).

<b>Drug (Company)</b>	<b>US price</b>	<b>Cipla</b>	<b>Hetero</b>	<b>Latest company offer in Africa</b>
Zerit (Bristol-Myers)	3,589	70	47	252
3TC (Glaxo)	3,271	190	98	232
Crixivan (Merck)	6,016	N.A.	2,300	600
Combivir* (Glaxo)	7,093	635	293	730
Stocrin (Merck)	4,730	N.A.	1,179	500
Viramune (Boehringer)	3,508	340	202	483

Note: Prices are per patient per year and are in USD.

These figures indicate that grey importation of anti-retroviral drugs would be the cheapest procedure for the procurement of anti-retrovirals. However, neither the Zimbabwean nor the South African government has indicated any intention of relying on grey importation of anti-retroviral drugs relying respectively on compulsory and voluntary licences to bring prices down.

### **3.5 The effect of the two countries' strategies**

Anti-retroviral medicines manufactured in Zimbabwe under compulsory licences are cheaper than anti-retroviral medicines available in the private sector in South Africa. The medicines produced in South Africa under voluntary licence and offered to the public sector health sector are more expensive than the same drugs provided on the open market in Zimbabwe (and thus available both to the government and NGOs in Zimbabwe at the lower price). Judging the two countries purely on the pricing of drugs, Zimbabwe has been more successful in its obligation to provide affordable drugs.

However, generic drugs produced in countries with a more developed generic manufacturing capacity are markedly cheaper even than drugs produced under compulsory licence in Zimbabwe, and the failure by Zimbabwe to rely on grey importation under the WTO Ministerial Decision means that the prices charged by Varichem (Pvt) Ltd are essentially monopoly prices. Prices in Zimbabwe would be reduced by the issuing of compulsory licences under the WTO Ministerial Decision to import drugs from India and Brazil.

## **4 Other factors affecting supply of anti-retroviral drugs**

Both South Africa and Zimbabwe have undertaken to provide anti-retrovirals in public hospitals. Neither country has fully realised this aim. Zimbabwe has only provided free anti-retroviral drugs in the two main

referral hospitals in Harare and Bulawayo as pilot projects to test the mechanisms of administering the drugs. In South Africa, the government announced a nationwide roll-out of anti-retroviral drugs shortly before the general elections in early 2004,<sup>60</sup> but by June 2004 only three provinces were actually administering anti-retroviral drugs to patients, while the other provinces were still registering patients. It was apparent from the statement by the Minister of Health that drug costs was an issue in the delayed 'roll-out' of anti-retrovirals, as she stated that the tender procedure for the supply of anti-retroviral drugs would be extensive.<sup>61</sup> Neither country is supplying enough drugs to its people, although for different reasons.

Zimbabwe's health system has suffered much of the pressure of the economic collapse in the country and is receiving minimal support from international donors. The Global Fund to Fight AIDS, Malaria and Tuberculosis refused Zimbabwe's application for funds to pay for the roll-out of anti-retrovirals to around 70 000 people, citing technical reasons. However, it has been suggested that concerns over human rights abuses was a factor in the decision by the Fund. Further, bilateral donors, such as Britain and the USA, have been giving much less towards the HIV/AIDS crisis in Zimbabwe than to all neighbouring countries.<sup>62</sup> Although Zimbabwe's isolation may have been a factor in its ability to issue compulsory licences (as it was not subject to the same pressure utilised against South Africa), this situation has made it very difficult for the government to deliver the medicines to the population. It is estimated that less than 10000 people are receiving anti-retroviral drugs in the public sector in Zimbabwe.<sup>63</sup>

In South Africa, the delay has mainly been caused by government's disinclination to provide anti-retrovirals, caused apparently by the South African President's stated disbelief in the link between HIV and AIDS.<sup>64</sup> NGOs had to take the government to the Constitutional Court to obtain an order that the government provide anti-retroviral drugs to prevent mother-to-child transmission of the disease.<sup>65</sup> However, early in 2004 a decision was made that anti-retroviral drugs should be provided across the country. By June 2004, three provinces had begun to provide

<sup>60</sup> Although earlier decisions to 'roll out' anti-retroviral drugs had been made by the government, see *The Economist* of 25 April 2002 'The government finally gets serious about treating people infected with HIV', <http://www.economist.com/science/displayStory.cfm?> (accessed 9 October 2004).

<sup>61</sup> V Mohapeloa 'AIDS drug rollout continues: Government', [http://www.southafrica.info/ess\\_info/sa\\_glance/health/aidsdrugs](http://www.southafrica.info/ess_info/sa_glance/health/aidsdrugs) (accessed 9 October 2004).

<sup>62</sup> S LaFraniere 'Donor mistrust worsens AIDS in Zimbabwe' *New York Times* 12 August 2004, reproduced in *The Zimbabwe situation*, [http://www.zimbabwesituation.com/aug13\\_2004.html](http://www.zimbabwesituation.com/aug13_2004.html) (accessed 11 October 2004).

<sup>63</sup> As above.

<sup>64</sup> MSF (n 58 above).

<sup>65</sup> TAC case (n 7 above).

anti-retroviral drugs, and it was estimated that in these three provinces 3 593 people were receiving anti-retroviral treatment.<sup>66</sup>

South Africa was put under intense international and domestic pressure between 1997 and 2001 to withdraw its amendments to the Medicines Act, which had been passed by parliament in 1997 and arguably allowed the government greater powers to issue compulsory licences and to allow the grey importation of generic medicines. The international pressure came mainly from the United States of America.<sup>67</sup>

The US Government has a recent history of applying pressure to South Africa . . . to apply stronger patent protection than the TRIPS minimum standards, and the clear basis for this pressure is implicit linkage to other trade provisions and measures . . .

The United States of America placed South Africa on its section 301 watch list, a list of countries threatened with trade sanctions unless they correct certain trade practices, and suspended benefits under the Generalised System of Preferences to South Africa, for its passing of the amendment.<sup>68</sup>

Meanwhile, multinational drug manufacturers sued the South African government in the South African courts, claiming that the Medicines Act violated intellectual property laws and the South African Constitution, which suit delayed the promulgation of the Act for four years. In April 2001, the case was settled with the drug companies announcing that they were withdrawing the case against the South African government without condition. In the agreement issued between the parties, the South African government reiterated its right to legislate to 'broaden access to medicines' under the Medicines Act. At the same time, the Treatment Action Campaign, a South African NGO that had been joined to the case as an *amicus curiae*, was assured that there had been no waiver by the South African government of its right to issue compulsory licences for the manufacture and import of generic drugs.<sup>69</sup>

Although regulations have been issued in accordance with section 15C of the amended Medicines Act, they have concentrated on the pricing of drugs, rather than compulsory licences or grey importation.<sup>70</sup>

<sup>66</sup> Mohapeloa (n 61 above).

<sup>67</sup> S Cleary & D Ross 'The 1998-2001 legal interaction between the South African government and the international pharmaceutical industry: A game-theoretic analysis' <http://www.uab.edu/philosophy/faculty/ross/AIDS%20paper.htm> (accessed 28 February 2005).

<sup>68</sup> Singh (n 59 above). In 2000, after intense NGO pressure, the Clinton government rescinded these actions and indicated that it would not pressure sub-Saharan governments over compulsory licensing and parallel importation of HIV/AIDS drugs.

<sup>69</sup> Treatment Action Campaign Statement 'Victory for activists, people with HIV/AIDS and poor people everywhere! Pharmaceutical companies beaten!' issued on 19 April 2001, [http://www.globaltreatmentaccess.org/content/press\\_releases/01/041701\\_TAC\\_PR\\_lwsuit\\_win.html](http://www.globaltreatmentaccess.org/content/press_releases/01/041701_TAC_PR_lwsuit_win.html) (accessed 11 October 2004).

<sup>70</sup> Sec 7 of the regulations restricts import of drugs to drugs that were made available to a foreign market with the approval of the patent holder, excluding grey importation from the procedure under the Act.

The pricing procedure affects local pharmacies and doctors but not multinational drug companies.<sup>71</sup>

The impression is given that the South African government was more prepared to tackle doctors and pharmacists in South Africa than to fight the multinational companies by relying on compulsory licensing and grey importation of generic drugs. The official government position has been that there are a number of other issues that lead to high drug prices in South Africa, and compulsory licensing and grey importation are not the answer to all these problems.<sup>72</sup> However, the analysis of the prices of drugs available from India and Brazil indicates that the prices of drugs could be slashed by about half if the government is prepared to utilise grey importation of drugs.

Despite withdrawing the court action against the South African government, pharmaceutical companies continued to charge excessive prices for medicines. The Treatment Action Campaign brought a complaint against GlaxoSmithKline and Boehringer Ingelheim to the South African Competition Commission for charging excessive prices for pharmaceutical products. In September 2003, the South African Competition Commission held that the two companies' excessive prices were abusive business practices and recommended waiver of the companies' rights to their patents.<sup>73</sup> The Commission was quoted as follows: '[E]ach of the firms has refused to license their patents to generic manufacturers in return for a reasonable royalty ...'<sup>74</sup>

This decision confirmed that multinational corporations had continued to resist voluntary licensing of patents and had continued to charge excessive prices for patent-protected medicines in South Africa. Considering that the case was brought by an NGO and that, despite the decision, the government has still not issued compulsory licences, the

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<sup>71</sup> The government has concentrated on the pricing of medicines, appointing a Medicines Pricing Committee to implement the legislation, which limits the mark-up allowed by pharmacies on medicines. See South African government 'Paving way for cheaper medicines', [http://www.southafrica.info/ess\\_info/sa\\_glance/health/medicinespricing\\_190803.htm](http://www.southafrica.info/ess_info/sa_glance/health/medicinespricing_190803.htm) (accessed 8 October 2004); C Freeman 'Medicine prices to be slashed', [http://www.southafrica.info/ess\\_info/sa\\_glance/health](http://www.southafrica.info/ess_info/sa_glance/health) (accessed 11 October 2004); A Hooper 'Update — Pricing of pharmaceuticals to the South African public' Spoor and Fisher, <http://www.spoor.com/default.htm> (accessed 25 September 2004).

<sup>72</sup> Dr Manto Tshabalala-Msimang, South African Minister of Health, statement issued on 11 March 2001.

<sup>73</sup> MSF 'MSF welcomes decision of South African Competition Commission to promote access to medicines', press statement issued on 16 October 2003, [http://www.accessmed-msf.org/prod/publications.asp?scntid=17102003935123&content\\_type=para](http://www.accessmed-msf.org/prod/publications.asp?scntid=17102003935123&content_type=para) (accessed 28 February 2005).

<sup>74</sup> Health Gap 'South African Competition Commission announces stunning victory for access to cheaper drugs, holds GlaxoSmithKline and Boehringer Ingelheim responsible for excessive pricing and other anti-competitive practices', <http://www.healthgap.org> (accessed 12 September 2004).

case reinforces the impression that the South African government is not prepared to confront pharmaceutical companies.

## 5 Conclusion and recommendations

Anti-retroviral drugs have become cheaper in the last five years. One of the most important considerations has been the manufacture of cheap generic anti-retrovirals in Brazil and India. Prices of generic drugs in these countries have forced the prices of brand name drugs to plummet and the consumer in the third world has benefited. However, with the implementation of TRIPS in both Brazil and India, it will be necessary for governments in the third world to ensure that the flexibilities in TRIPS are utilised to the maximum extent possible. This means that countries with manufacturing capacity should issue compulsory licences to ensure that anti-retroviral drugs are available on their domestic markets at the cheapest possible price. Countries without manufacturing capacity should take advantage of the grey importation procedure set out in the Ministerial Decision of 30 August 2003 to allow parallel importation from countries manufacturing generic medicines.

In sub-Saharan Africa, South Africa has the largest economy and the most modern pharmaceutical manufacturing industry. Manufacture of generic anti-retroviral drugs in South Africa would have the effect of reducing prices across Southern Africa. Economics of scale means that the price in South Africa will have a direct effect on prices in the rest of the region (imported drugs in Zimbabwe are bought from either South Africa or India). South Africa has failed to utilise and implement the flexibilities inherent in TRIPS, and this has resulted in its failure to meet its international obligations and has kept the prices of essential medicines in the region artificially high. To some extent, this has been because South Africa has had access to cheaper anti-retroviral drugs through agreements with drug companies and through donor funding. However, the prices of drugs in the private sector are still excessively high compared to markets served with generic anti-retrovirals.

Grey importation from countries with developed manufacturing capacity will be the best way of maintaining low drug prices and will have the added benefit of promoting the efficiency of local manufacturers. Where one local manufacturer with no generic competition serves the market, as in Zimbabwe, this may lead to inefficiency and excessive prices. In a situation where the government has chosen to exercise its right to utilise generics, it should ensure that the prices charged are the lowest possible. It has been shown that companies in Brazil are interested in providing generic medicines to Africa and that such practices will have the effect of dramatically lowering the prices of drugs. Zimbabwe, therefore, must promote the importation of generic medicines to ensure compliance with its international obligations. Thus,

although Zimbabwe has allowed generic manufacture of first line anti-retroviral drugs, this does not mean that the country has fully implemented the flexibilities in the TRIPS agreement. Zimbabwe must ensure that cheaper imported generic drugs are made available and that second line generic anti-retroviral drugs are either imported or manufactured in Zimbabwe.

Both Zimbabwe and South Africa face a very difficult task in dealing with the HIV/AIDS crisis and the lower drug prices can be pushed, the easier this task will be. However, anti-retroviral drugs will not be the complete solution to the crisis. Both countries need an improved public health system, and especially they need more doctors and nurses. Reducing prices has only been the first step, and while both countries have had some limited success in this aspect, the public health systems in both countries need complete overhaul. Neither country can do this alone, and both will require extensive aid from developed countries, whether as bilateral aid or through the Global Fund for HIV, Malaria and Tuberculosis. The current situation, where the Global Fund has refused to grant money to Zimbabwe, on technical or political grounds, is unacceptable.

The following recommendations are made: South Africa should implement its laws and the flexibilities in the TRIPS agreement, allowing the compulsory licensing of anti-retroviral drugs to reduce the costs of the drugs both in the private and public sectors. Both Zimbabwe and South Africa should negotiate with Brazilian and Indian companies and issue compulsory licences to allow grey importation into the two countries of cheaper antiretroviral drugs. Zimbabwe must urgently renegotiate its position with the Global Fund, and this Fund should make every effort to overcome technical and political problems. Considering the urgency of the matter, it is not acceptable to further postpone the Zimbabwean application, as the Fund has been doing.

# Cultural authoritarianism, women and human rights issues among the Esan people of Nigeria

*Christopher E Ukhun\**

Senior Lecturer, Department of Philosophy, Faculty of Social Sciences, Ambrose Alli University, Edo State, Nigeria

*Nathaniel A Inegbedion Esq\*\**

Senior Lecturer and Head of Department, Department of Public Law, University of Benin, Benin City, Edo State, Nigeria

## Summary

*This paper seeks to address discrimination against women on cultural grounds. The issues of human and women's rights in African countries have always been complex. This is so, not because of a lack of recognition of these rights, but rather because of cultural barriers and practices that have made the realisation of these rights a rather more difficult task in Africa than is the case in the western world. These cultural barriers are termed 'cultural authoritarianism' within the context of this paper. This paper deals in particular with two such cultural barriers, namely burial and inheritance culture amongst the Esan people of Nigeria. The paper advances the argument that, in spite of its feeble attempts to do so, the state has not succeeded in putting in place sufficient measures to eliminate cultural practices that discriminate against women and has rather displayed an attitude of reluctance or lack of commitment or at other times, prevarication on women's rights.*

## 1 Cultural authoritarianism

Wiredu argues that any human arrangement is authoritarian if it entails

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\* Phd (Ambrose Alli); ebeagbor@yahoo.com

\*\* LLB, LLM (Ambrose Alli); natlaw80@yahoo.com



any person being made to do or suffer something against his or her will.<sup>1</sup> Though a broad definition, Wiredu emphasises that authoritarianism is the unjustified overriding of an individual's will.<sup>2</sup> His definition is a consequence of the importance he places on the value and ultimacy of the individual's 'will' within the context of human communities. According to Wiredu, the 'will' forms the benchmark of human value. Wiredu suggests that there should be unimpeded development of the individual's 'will', and that such development is impeded by authoritarianism, involving manipulation by others.

An important element of authoritarianism is that it is agency-predicated. The agency could be an individual or a group of individuals. Authoritarianism is a conscious and deliberate phenomenon; it is teleological or purposeful. The teleological underpinning of authoritarianism most, if not all the time, has negative effects. Wiredu argues that education should enable the individual to exercise her will in competing situations or alternatives, it must aim at enabling a person to perceive the relevant alternative (in the context of evidence) with respect to a given set of issues so that she can make a rational choice on the basis of the perceived alternative.<sup>3</sup> As such, any means that omits or conceals a set of relevant alternative *ipso facto* vitiates the possibility of a rational choice in decision-making.<sup>4</sup> According to Wiredu, education trains the mind, enabling people to make deliberate rational choices.<sup>5</sup> Indoctrination, on the other hand, moulds the mind, and this leads to built-in choices.<sup>6</sup> Indoctrination is epiphenomenalistic of authoritarianism, and hinders or impedes the individual's ability to make conscious, autonomous and rational choices or to accept beliefs based on her own consideration of the evidence.<sup>7</sup>

Wiredu states that, within the African context, some cultures are authoritarian because they involve the manipulation of the individual's 'will' through the process of the individual's indoctrination.<sup>8</sup> Apart from this, the individual is left with no room to make rational choices with regard to the evidence at her disposal. African cultures act as constricting elements of the individual's rational capacity. In other words, the authority of culture holds sway against the individual's independent and rational choices. As much as Wiredu, Appiah is of the view that the African mode of thought and belief is supported on the basis of the

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<sup>1</sup> K Wiredu *Philosophy and an African culture* (1980) 3.

<sup>2</sup> n 1 above, 2.

<sup>3</sup> P Ikenobe 'A defence of epistemic authoritarianism in traditional African cultures' (1998) xxiii *Journal of Philosophical Research* 419-420.

<sup>4</sup> n 2 above.

<sup>5</sup> Ikenobe (n 3 above) 419.

<sup>6</sup> As above.

<sup>7</sup> Wiredu (n 1 above) 2-3.

<sup>8</sup> Wiredu (n 1 above).

authority of culture.<sup>9</sup> Ikuenobe<sup>10</sup> contends that to justify belief by saying it has the authority of tradition<sup>11</sup> is one of the practices demarcating traditional cultures from formal philosophy.<sup>12</sup>

Wiredu and Appiah believe that African tradition or culture stands in opposition to critical and rational inquiry, which are necessary preconditions for the attainment of 'justified beliefs'. Wiredu argues that the disinclination to entertain questions about the reason behind an established practice or institution is a sure mark of authoritarian mentality.<sup>13</sup> He further reiterates that there is, in African cultures, the principle of unquestioning obedience to superiors, which often means elders. Hardly any premium is placed on curiosity in those of tender age, or independence of thought in those of more considerable years.<sup>14</sup>

The authority of culture is not a matter of arbitrariness; it rests squarely on elders who are designated the repositories of practical knowledge. Such knowledge, it is acknowledged, stems from the age, influence, integrity and life experience of the elders. Even though there is a cultural harmonisation of the feelings and aspirations of all individuals within African culture, such are underwritten by what the elders say. As Ikuenobe rightly observes, elders in the community play an important role as repositories of moral principles and tradition, which have some rational pragmatic basis.<sup>15</sup> One cannot challenge one's culture in Africa. To do this is equivalent to challenging the elders and the risks of doing this are high. Any person who challenges the authority of elders is likely to be reprimanded, and the repercussions are either paid in cash or kind. In African cultures, no one wants to be stigmatised as disrespectful of elders. The reasoning is that it is the desire of everyone to live to be called an elder and be respected as such.

Making specific reference to the Akan of Ghana, Wiredu compares the respect the youth in Akan society accord elders with the attitudes of youth in America.<sup>16</sup> According to him, American youth would likely consider the demands of traditional Akan society nothing short of groveling docility. Wiredu attempts to show that American or Western environment encourages the individual to exercise his or her freedom and rational capacity in investigating and justifying beliefs, while African culture stifles the individual's autonomy.

<sup>9</sup> Ikuenobe (n 3 above).

<sup>10</sup> Ikuenobe (n 3 above) 419.

<sup>11</sup> 'Tradition' has a similar connotation as 'culture' or 'custom'. They are words that are generally used interchangeably.

<sup>12</sup> A Appiah *Necessary questions: An introduction to philosophy* (1989) 203.

<sup>13</sup> Wiredu (n 1 above) 4.

<sup>14</sup> As above.

<sup>15</sup> P Ikuenobe 'Moral thought in African cultures? A metaphilosophical question' (1999) 12 *African Philosophy* 111.

<sup>16</sup> Wiredu (n 1 above) 4.

Wiredu's analysis of cultural authoritarianism in Africa is summarised as follows by Ikuenobe:<sup>17</sup> It prevents questioning, inquiry, and the rigorous analysis of evidence that could bring about growth and progress in knowledge, thus perpetuating superstitious beliefs. It further prevents the exercise of freedom of the will with respect to choice and decision-making. It prevents the use of reason in deliberation and the consideration of relevant alternatives that are necessary for decision-making. It also prevents creativity, ingenuity, and curiosity that are necessary for critical inquiry.

Ibhawoh also examined cultural authoritarianism in Africa.<sup>18</sup> He compares power or relations in state (formal) and traditional (informal) settings. In making particular allusions to the power or authority of 'tradition', he argues that tradition derives its legitimacy from the sheer force of culture.<sup>19</sup> The power of chiefs or elders in the community, a household head in the family, a traditional priest or the Islamic Sheikh is as authoritarian as that of state officials.<sup>20</sup> He further claims that the sanctions wielded by these authorities are effective and authoritarian.<sup>21</sup> As is the case with fear of stigmatisation, Ibhawoh admits that for the most part, the ostracism accompanies the exercise of such non-formal authoritarianism.<sup>22</sup>

Admittedly, cultural authoritarianism is male-elder authoritarianism. In African cultures, male elders decide what should count as a cultural value, and in what direction the community should go. According to this scenario, women and children are subservient to men. At least 90% of African cultures subjugate women and give men unqualified authority over them.<sup>23</sup> In the case of contemporary Nigeria, Bony Ibhawoh argues that, apart from the attitudes towards women, specific cultural traditions have further served to undermine the status of women. Many of these traditions affect the rights and liberties of women within the communities where they live directly.<sup>24</sup>

Within the context of this paper, the expression 'cultural authoritarianism', therefore, connotes the overbearing negative influence of culture on women. It is on the basis of cultural authoritarianism in Nigeria that we shall shortly shift our discussion to negative cultural phenomena as they affect women among the Esan people of Southern Nigeria.

<sup>17</sup> Ikuenobe (n 3 above) 420.

<sup>18</sup> B Ibhawoh *Between culture and the Constitution: The cultural legitimacy of human rights in Nigeria* (1999).

<sup>19</sup> Ibhawoh (n 18 above) 15.

<sup>20</sup> Ibhawoh (n 18 above).

<sup>21</sup> As above, 15.

<sup>22</sup> As above.

<sup>23</sup> Ibhawoh (n 18 above) 45.

<sup>24</sup> n 22 above.

These cultural practices are the burial and inheritance rights of women.<sup>25</sup>

## 2 Discrimination against women in Africa

Chinweizu is critical of gender relations in Africa. His thesis, *Anatomy of female power*, analyses sexism against African women.<sup>26</sup> In opposition to Chinweizu, a plethora of perspectives exist that reject the claim that African women are unequal players in the affairs of Africa. Chinweizu argues that feminism is a movement of bored matriarchists, frustrated tomboys, and natural termagants, who, infuriated by the façade of patriarchy, revolt against male domination and female privilege.<sup>27</sup>

Chinweizu makes no distinction between Western and African societies and his understanding of the public and private sphere is limited to age-old male forms of thought that restrict women to the private realm.<sup>28</sup> Chinweizu also ingeniously reduces the male subject to an insipid, libido-crazed, womb-obsessed, mother-worshipping moron to support his argument that female power is supreme.<sup>29</sup> Many would see Chinweizu's treatise as an unfortunate demonstration of a lack of understanding of the actual situation of women in Africa. There is no doubt that African women are oppressed. Ali Mazrui acknowledges the burden of African women. He accepts that African women face insidious malignant sexism. He suggests a programme of action for the advancement of the dignity of African women. His programme of action encompasses liberating and empowering women. Furthermore, he posits that women can be at the centre without being empowered: A woman may be liberated without being either centred or empowered. There exists different degrees of even malignant sexism.<sup>30</sup>

Pamela Abuya asserts that the Lou society of Kenya accords women subordinate status in the scheme of things in society.<sup>31</sup> She blames the patriarchal nature of Lou society which relegated women to lower levels of society. The subservient status of women in Lou culture partly hinges on their inability to inherit land. She further remarks that, under Lou

<sup>25</sup> The Edo people speak Edo language but with different dialectical variations. They can be found in Edo State, in mid-western Nigeria. The state is an administrative region named after the people. It has its administrative headquarters in Benin City.

<sup>26</sup> Chinweizu *Anatomy of female power: A masculinist dissection of matriarchy* (1990) 34.

<sup>27</sup> As above.

<sup>28</sup> A Ogundipe 'Power in gender discourse' in CE Ukhun (ed) *Critical gender discourse in Africa* (2002) 35.

<sup>29</sup> As above.

<sup>30</sup> AA Mazrui 'The black woman and the problem of gender: Trials, triumphs and challenges' The Guardian Lecture Series 6.

<sup>31</sup> P Abuya 'Women in need of liberation: An African experience' in Ukhun (n 28 above) 105.

customary law, women are not allowed to own land and are never apportioned any land upon distribution and consequent inheritance. They cultivate land which they neither have any control nor rights over.<sup>32</sup> Chimaka Tarisaye identifies three instances where sexism against Zimbabwean women could be illustrated. Irrespective of classifications such as age, sex, marital status, ethnicity, etc, women are subjected to emotional or psychological and physical violence.<sup>33</sup>

The judiciary in Zimbabwe also reinforces oppression of women. Customary law — a prodigy of the judiciary — oppresses women. Women are not beneficiaries of inheritance. Tarisaye recalls the Supreme Court's verdict over land inheritance involving a daughter older than 18 years and her younger brother in a determination of who was to inherit their deceased father's estate. The court ruled in favour of the boy.<sup>34</sup>

The thrust of the previous part of this paper was to demonstrate that the oppression of African women is a widespread phenomenon. Particular attention will now be directed at the Nigerian situation in respect of the nature of discriminatory practices of inheritance and burial among the Esan people.

### 3 The Esan people

The Esan people are a minority ethnic group in Nigeria. Going by the 1991 population census figures (the latest figures), the Esan people are spread across five local government areas in Edo State with a combined population figure of 372 122. By the same census figures, Nigeria had a total population of 88 992 220, spread across 774 local government areas. The entire population is dominated mainly by Hausa/Fulani, Yoruba, Ibo and Ijaw ethnic groups, with a sprinkling of other minority ethnic groups.<sup>35</sup> However, the Esans are a major ethnic group in Edo State. They live in the north west of Benin City, the capital of Edo State. This group is sometimes called Ishan, which is a corruption of Esan. The word Esan is derived from Esafua, meaning 'those who fled'. Many of the Esan communities and immigrant elements claim to have been founded by the people who left the Benin kingdom to evade justice

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<sup>32</sup> As above.

<sup>33</sup> C Tarisaye 'African gender in Zimbabwe: Some historical and philosophical reflections' in Ukhun (n 30 above) 120-121.

<sup>34</sup> n 33 above, 121.

<sup>35</sup> See the population census figures as released by the National Population Commission, Abuja. The population figures were obtained from the Commission's office in Benin City, Nigeria.

or escape oppression from the Binis.<sup>36</sup> Okogie contends that the word Esan came from the Benin word Esan meaning 'to jump or flee'.<sup>37</sup>

The Esan people can be found in the tropical area of the northern axis of the Nigerian forest zone. Located on a plateau, the people share boundaries with Benin City on the North-East, on the North-West with the Owan people, on the South-West with Orhionmwon and Ika, while on the South and South-East with the Aniocha and Oshimili areas respectively. The River Niger terminates her Eastern borders.<sup>38</sup> The Esan people have distinguishing linguistic, cultural and social characteristics. They speak a series of closely related dialects, commonly called Edo and not far removed from the language of the Benin kingdom.<sup>39</sup> Their culture has organising principles and institutions. These cultural institutions have inherent qualities capable of sustaining an enduring bond in the people's lives. According to Olumese, the social institutions reveal that, although the Esan people appear politically autonomous, they have considerable social inter-relations, which provided peaceful co-existence and stability in the pre-colonial society.<sup>40</sup> Even though the organising principles and institutions of Esan culture brought about harmonious living among the people in the pre-colonial period, these principles and institutions could be anachronistic, bringing about negative consequences. Such anachronisms, with their negative carry-over, are still discernable in contemporary society.

Given that a comprehensive discussion of Esan culture is beyond the scope of this paper, we attempt a description of some practices that form part of Esan culture.

#### 4 Inheritance rights among the Esan people

In native Esan law and custom, men are the receivers of inheritance. In Esanland, female children have no status or position in the family. As Okogie points out, Esan idioms state that 'a woman never inherits the sword'; or, 'you do not have a daughter and name her the family keeper — she would marry and leave not only the family, but the village, a wasted asset'.<sup>41</sup>

<sup>36</sup> PI Abumere 'Atukhiuki among the Esans in Bendel State. A case study of the belief system in the customary law as a means of social control' in B Ajibola KBE (ed) *Towards a restatement of Nigeria customary laws* (1991) 197.

<sup>37</sup> CG Okojie *Esan native laws and customs* (1994) 1.

<sup>38</sup> AI Okoduwa 'A geography of Esan' in AI Okoduwa (ed) *Studies in Esan history and culture: Evolution of Esan politics* (1997) 1.

<sup>39</sup> Abumere (n 36 above) 97.

<sup>40</sup> PS Olumese 'Socio-cultural relations in pre-colonial Esan' in AI Okoduwa (ed) *Esan history and culture: Evolution of Esan politics* (1997) 45.

<sup>41</sup> *okhuo ile aghada bhe uku; ei bie omo khuo he ole iriogbe*; CG Okogie *Esan native laws and customs* (1994) 124.

Two issues — the economic and the spiritual — validate the law of disinheritance of women and girl-children. In Esanland, it is believed that when a woman marries, all her possessions go to her husband, thereby draining the family's wealth. Admittedly, it is on the basis of this economic consideration that a man, while alive, acts with restraint when sharing his property among his children. Sometimes, it does happen that because of his love for his daughter, he disproportionately gives his assets to his daughter at the expense of the eldest son. In this case, the elders of the land (*Odionweles*) will immediately reverse the action of the dead or living man. This is why it is said in Esanland that *olimin yi yi obe egbele khuale* ('bad laws made by a dead man can be reversed by the living'). A spiritual dimension is employed to validate the disinheritance of Esan women. It is believed that women are inferior to men in both the physical world and the spiritual realm. Such may be the consequences.<sup>42</sup>

A man while alive gave the family house to the first daughter; in no distant future, the house collapses under mysterious circumstances. Many other calamities could happen if the decision or law is not reversed. The woman herself may begin to experience grave misfortunes. Her misfortunes are invariably linked to spiritual forces at work. She is reminded that her spiritually induced woes could continue unless such property was handed over to the first son.

Indeed, what a woman gets is not by right, but as an act of goodwill. No matter her status, she herself is an inheritable property, especially in widowhood. In many Nigerian cultures, widow inheritance is prevalent. In Esanland, women are losers in matters of inheritance; they have no rights.

The Esan culture places a premium on the superiority of the first son.<sup>43</sup> Thus, where a man dies *intestate*, and there is evidence placed before a customary court that the deceased was subject to the customary law of his place of origin or where he lived and died, any application before the customary court for an order to administer the estate of the deceased will normally be granted in favour of the first son and other children of the deceased. An application brought by the other children of the deceased without the support of the first son will not succeed. There are two reasons for this.

First, under the customary law of the Esan speaking people, if a man dies *intestate*, the first son becomes a trustee of the estate of the deceased pending the time the final burial rites of the deceased are performed by the first son. In the interim he administers the estate for and on behalf of himself and the other children. Therefore, and

<sup>42</sup> CE Ukhun 'Sexism in philosophy: An African perspective' unpublished PhD thesis, 1998 199.

<sup>43</sup> For a detailed discussion of this custom, see IO Usi *The customary law of the 'Binis'* (2000) 36-54.

based on this custom, an application to the customary court to administer the estate of the deceased is a mere formality that will be granted as a matter of course, except where there are other extenuating circumstances that may prevent the court from making such a grant; for instance, where the legitimacy of the first son is in dispute.

Second, after the final burial rites of the deceased are performed, the elders of the extended family of the deceased distribute the properties of the deceased. Again, the first son occupies a prominent place in the affair. As a matter of right, he takes the house of the deceased.

Given the above scenario, a female child of the deceased has very little role to play. She has little or no inheritance rights, as the major assets of the deceased are shared among his sons. Here, also, lies the discrimination against women. Yet, the Nigerian Constitution prohibits discrimination on the ground of sex. The very Constitution that gives this protection also provides for the establishment of Customary Courts of Appeal<sup>44</sup> with jurisdiction to hear appeals on questions pertaining to customary law<sup>45</sup> including by extension, those discriminatory customs on inheritance and burial rights. Such appeals will normally emanate from the Area Customary Courts, specifically established for that purpose by a law of a State House of Assembly. The customary laws of inheritance and burial rights are unduly beneficial to the first son and discriminatory against the female child.

## 5 Burial rights of the Esan people

In Esan culture, the burial of one's departed parents is an important event in the lives of the living and of the dead in their spiritual abodes. He who buries his departed parents is a substantial person in the family and the public sphere. Burial rites are a way in which an Esan person may be valued; it confers respectability and responsibility on a person. The performance of burial rights and the inheritance of the deceased's properties are inter-linked. In Edo State, generally, particularly amongst the Bini and Esan people, the performance of burial rites is a prerequisite for the inheritance of the deceased's estate.

The woman's right to bury her parents is clearly defined in Esan culture. They may not bury their fathers. There is an economic motivation in disallowing a woman to bury her father. The economic motivation is aimed at disinheriting as, should she be allowed to bury her father, his wealth automatically goes to her and her husband. This is an attempt to retain the family's wealth.

But what happens in a situation where the daughter or woman feels

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<sup>44</sup> See secs 265 & 280 1999 Constitution.

<sup>45</sup> See secs 267 & 282 1999 Constitution.



the need to bury her father? In this case, she asks the Egbele (elders) to grant her permission to bury her father. However, such permission is granted on the understanding that she is helping her younger brothers or minors in the matter, that her intention is not to inherit the family's wealth. According to Okogie, it is this attempt to keep property in the family that led to the custom where a woman, however wealthy, is not allowed to bury her father, since he who performs the burial ceremony inherits the property. If she is very influential and her brothers minors, she could prevail on the Egbele to allow her to perform these ceremonies, strictly on the understanding that she is only doing so because she does not want their father to remain unburied and that she is doing everything on behalf of her brothers.<sup>46</sup>

Given some historical antecedents or instantiation, were she the only child of her father, what is her position or role in the burial ceremony? In this case, the next male in line of succession performs the burial ceremonies; the woman and her wealth (and influence) obscured so that after the ceremony she cannot lay claim to property.<sup>47</sup> If burial rights confer substantiability on a person in Esan tradition, then women in Esan culture are not substantial because they have no burial rights. Only the men do. Herein then lies the authoritarian nature of the culture.

## 6 State influence and cultural authoritarianism

What has been the role of the state in these cultural practices? The issues of legislative intervention and judicial intervention will be examined next.

### 6.1 Legislative intervention

Legislative intervention in this area of the law has vacillated between outright prohibition of discrimination against women and passive encouragement of it. The 1999 Constitution of the Federal Republic of Nigeria clearly prohibits any form of discrimination against a citizen on the grounds of ethnicity, sex, religion or political opinion, either expressly or in the practical application of any law in force in Nigeria.<sup>48</sup> Yet, cultural issues of inheritance and burial among the Esan speaking people have always imposed discriminatory practices obviously infringing on this constitutional prohibition. Similar constitutional protection can be found in section 21 of the Constitution. This section provides that 'the state shall protect, preserve and promote the Nigerian cultures

<sup>46</sup> Okogie (n 41 above) 124-125.

<sup>47</sup> As above, 125.

<sup>48</sup> See sec 42(1).

which enhance human dignity and are consistent with the fundamental objectives as provided in this chapter'. It may then be contended that any culture that is discriminatory against women within the context of section 42 does not enhance human dignity and is therefore not worthy of protection, preservation and promotion under section 21. The problem, however, with this section is that judicial intervention cannot be sought to interpret or enforce the provision, since the Constitution<sup>49</sup> has ousted the jurisdiction of the courts in respect of any issue involving this provision and others, as found in chapter 2 of the 1999 Constitution. Therefore, section 21 is of little value in advancing the cause of human rights.

In Nigeria, inheritance rights are regulated by statute and by customary law, particularly in Edo State. Two statutes call for consideration here, that is, the Wills Law<sup>50</sup> and the Administration of Estates Law.<sup>51</sup> While the former deals with testate succession, the latter deals with both testate succession and intestate succession. The Wills Law, rather than promote women's rights as an aspect of human rights, or at least guarantee the equality of both sexes on inheritance rights, inadvertently enhances cultural discrimination against women in issues relating to inheritance. For example, section 3(1) of the law provides as follows:

Subject to any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not so devised, bequeathed and disposed of would devolve upon the heir at law of him, or if he became entitled by descent, of his ancestor or upon his executor or administrator.

While this provision recognises the right of any person to dispense with his property by testamentary disposition,<sup>52</sup> it also curtails such a right by subjecting it to the applicable customary law. Thus, any disposition made which is not in accordance with the prevailing customary law is liable to be set aside, even where such custom infringes women's rights. This kind of provision defeats the spirit and philosophy behind a law on wills so long as such a law seeks to confer a right on a person to dispose of his property upon death, in the way, manner and to whom he desires. The provision does not only curtail the right under section 42 earlier referred to, but it also discriminates against women. Section 42(1) of the 1999 Constitution provides as follows:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a

<sup>49</sup> See sec 6(6)(C) of the 1999 Constitution. See also the case of *AG Bornu State v Adamu* (1996) 1 NWLR [Part 427] 681 (CA).

<sup>50</sup> Cap 72, Laws of Bendel State of Nigeria 1976 as applicable in Edo State. The old Bendel State has been split into Edo and Delta States.

<sup>51</sup> Cap 2, Laws of Bendel State of Nigeria 1976 as applicable in Edo State.

<sup>52</sup> In accordance with sec 44 of the 1999 Constitution.

person be subjected either expressly by, or in the practical application of, any law in force in Nigeria or in any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject.

The object of the above-quoted constitutional provision is to accord equal rights to every citizen irrespective of gender. This objective, however, appears to have been defeated by the customary law of inheritance and burial rights of the Esan speaking people of Edo State in mid-western Nigeria. For instance, any disposition of property which seeks to confer ownership rights on a female child, to the detriment of a male child, in respect of real property where the deceased lived and died, is liable to be set aside on the grounds that it is against the custom of the Esan speaking people.<sup>53</sup>

Within the realm of customary law, special courts have been created to enforce the judgments of local customary courts of the different tribes that make up the Esan speaking people. For example, the Bendel State Customary Courts Edict No 2 of 1984 as applicable in Edo State, established District and Area Customary Courts<sup>54</sup> with the jurisdiction to try matters pertaining to, *inter alia*, inheritance upon intestacy under customary law and to grant power to administer the estate on an intestacy under customary law. While the District Customary Courts have a monetary limit of N5 000,00 on customary matters dealing with intestacy, the Area Customary Courts have unlimited jurisdiction on the sum it may award with respect to inheritance matters. The Constitution in fact empowers the states to create customary courts and practically all the states in the southern region have created these courts with the jurisdiction to hear and determine cases involving the customary law of the location of the courts.<sup>55</sup> The significance of the establishment of customary courts is that, and as shall be seen shortly, the courts do in fact determine issues and enforce them in favour of the male gender.

The Administration of Estates Law earlier referred to suffers from the same defects as the Wills Law. For example, section 1(3) provides:

Nothing in this law affects the administration of the estates of deceased persons by or under the authority of any customary court nor unless otherwise expressly provided the distribution, inheritance or succession of any estate where such distribution, inheritance or succession is governed by customary law whether such estate is administered under this law or by or under the authority of a customary court.

The legal implication of this provision is that, just like the Wills Law, the Administration of Estates Law is subject to the prevailing customary law

<sup>53</sup> See *Lawal-Osula v Lawal-Osula* [1995] 32 LRCN 291 (SC).

<sup>54</sup> See sec 3(1) of the Edict.

<sup>55</sup> See sec 6(5)(i) & (j) of the 1999 Constitution.

of the area. Thus, where the deceased was subject to customary law during his lifetime, an application may be brought before a customary court to administer his estate under the prevailing customary law. The court will usually grant such an application even where it discriminates against a female child. Indeed, it is common in legal practice in Edo State, to apply to a customary court, on behalf of the eldest surviving male child of the deceased, to administer the estate of the deceased under customary law and to the exclusion of any female child. The court usually grants such applications.

Recently, the Edo State House of Assembly, a regional legislative body in Nigeria, enacted a law to prohibit the customary practice of female circumcision or genital mutilation.<sup>56</sup> Though not falling within the scope of the discussion, it is, however, evidence of a growing awareness of the cultural practices that are no longer in tune with international human rights law. The law prohibits the circumcision or mutilation of the genital organ of any female, whether or not the female's consent was obtained.<sup>57</sup> The problem with this legislation is that it is a state effort, applicable only in the state and therefore not binding on other states in the Nigerian Federation where some of these objectionable cultural practices are still prevalent. Even then, it remains to be seen whether these legislative efforts have been matched by sufficient judicial intervention. However, at a sub-regional level, the Ghanaian parliament has gone a step further than Nigeria in this direction. In 1994, the Ghanaian parliament passed an Act to amend the Criminal Code of Ghana. The Act, Criminal Code Amendment Act No 484 of 1994, inserted a new section 69A in the Code. The section prohibits female circumcision in whatever form and prescribes a three-year minimum sentence for any person found guilty under the section. Being national legislation, it is a marked improvement over the Nigerian situation. It is, however, hoped that the Edo State legislation will be amended to include other negative cultural practices such as the burial and inheritance.

## 6.2 Judicial intervention

Depending on the culture or custom that is at issue, the Nigerian superior courts have prevaricated women inheritance. This statement will be elucidated with reference to case law recently decided by the Courts. The first is the case of *Lawal-Osula and Others v Lawal-Osula and Others*.<sup>58</sup> The issue to be determined here was whether a testator could will his property, irrespective of the Bini<sup>59</sup> custom of Edo State

<sup>56</sup> See the Female Circumcision and Genital Mutilation (Prohibition) Law 1999.

<sup>57</sup> See sec 3 of the Law.

<sup>58</sup> n 43 above.

<sup>59</sup> Bini is another dialectical variation of the Edo language.

applicable to such matters. The testator in this case, a traditional Bini chief, wrote a will devising his real and personal properties in the manner specified in the will. The effect of the disposition was to completely shut out the first son from the provisions of the will. The first son and some other children were not mentioned in the will at all. The testator's will favoured his wife and her child, as he bequeathed his important assets, including where he lived and died, to his wife. Under Bini customary law, a man cannot will his *Igiogbe*.<sup>60</sup> Fearing that he might be caught with this custom, the deceased added a special declaration in the will that read thus:

I DECLARE that I make the above devise and bequest when I am quite sane and well. It is my will that nobody shall modify or vary this will. It is my will that the native law and custom of Benin shall not apply to alter or modify this will.

The plaintiff, who claimed to be the first son of the deceased testator, brought an action to set aside the provisions of the will on the grounds, *inter alia*, that it violated Bini customary law. The contention of the plaintiff was upheld in the Supreme Court, which is the highest court in Nigeria. The Supreme Court held that, when a hereditary chief dies, whether 'testate' or 'intestate', he will be buried according to native law and custom at his usual place of abode in the traditional way by performing certain rites. After this burial, the eldest son, in trust up to such a time when he can perform the second burial, holds all his properties. Then he takes the *Igiogbe* and other items of his estate can be shared. The Court went further to define the *Igiogbe* as the house or houses where the deceased hereditary chief lived or used as seat or seats as a Bini chief. This cannot be taken away and perhaps this includes the paraphernalia of office.

The Court then opined that the provisions of the Wills Law, referred to earlier in this article, was subject to the Bini custom. The effect of such an opinion is that, despite the provisions of the Wills Law, permitting a testator to devise his property in a way and manner he thinks fit, it cannot derogate from the Bini custom that only the first son of the deceased inherits the *Igiogbe*.<sup>61</sup> The Court then concluded that the custom satisfies the test for the validity of customary law in that the said custom is not repugnant to the principles of natural justice, equity and good conscience.<sup>62</sup> The judgment clearly excludes a woman from inheriting the *Igiogbe*, irrespective of the wish of the testator.

However, the 'pendulum' swung in favour of women's rights in the

<sup>60</sup> The 'Igiogbe' is a 'Bini' language which means the house or houses where the deceased lived and died.

<sup>61</sup> See also *Abudu v Eguakun* [2003] 36 WRN 1 (SC).

<sup>62</sup> For a full discussion of the validity tests, see AD Badaiki *Development of customary laws* (2001) 31-55; AO Obilade: *Nigerian legal system* (2000) 100-111.

case of *Ukeje v Ukeje*,<sup>63</sup> where the Court of Appeal, Lagos Division, adopted a progressive approach to the issue of whether women have inheritance rights at all under the Ibo customary law of South-Eastern Nigeria. In a study done by the Project Alert on Violence Against Women, a non-governmental organisation (NGO), the NGO found that under Ibo custom, the deceased sons and every other member of the family (including the females) presume that all landed properties are for the boys. The study also revealed that neither a daughter nor a wife could inherit.<sup>64</sup> Unlike the Esan<sup>65</sup> custom, which is only restrictive of the inheritance rights of women, the Ibo custom completely excludes women from benefiting from the estate of the deceased. The plaintiff in this case brought an action before the Lagos High Court, challenging this custom. Judgment was given in her favour by the High Court, upon which the respondent appealed to the Court of Appeal. At the Appellate Court, one of the issues that had to be determined was whether the Ibo custom was not unconstitutional in view of the provisions of sections 39(1)(a) and 39(2) of the 1979 Constitution, *in pari materia* with sections 42(1) and (2) of the 1999 Constitution. The Court held that this custom was indeed unconstitutional.<sup>66</sup>

This decision is an affirmation of the earlier decision of the Enugu Division, in the case of *Mojekwu v Mojekwu*.<sup>67</sup> This case concerns the situation when a man and his only son and brother die. According to custom, the first son of the deceased brother will inherit all the property to the exclusion of any female child. He is called *oli-ekpe*.<sup>68</sup> The *oli-ekpe* inherits the land, the wives of the deceased and if the deceased had daughters, he will give them away in marriage.<sup>69</sup> The Court, *per* Niki Tobi JCA, did not hesitate to declare this custom to be repugnant to natural justice, equity and good conscience. Particularly, Niki Tobi JCA<sup>70</sup> noted that:<sup>71</sup>

Nigeria is an egalitarian society where the civilised society does not discriminate against women. However, there are customs, all over which discriminate against the womenfolk, which regard them as inferior to the men folk.

<sup>63</sup> [2001] 27 WRN 142.

<sup>64</sup> Project Alert on Violence Against Women *Beyond boundaries: Violence against women* (Lagos) 109.

<sup>65</sup> This ethnic group includes the 'Bini', the Esan, the Etsako and the Ora, being separated by dialectical variations in language only.

<sup>66</sup> 160. See also the case of *Mojekwu v Mojekwu* (1977) 7 NWLR [Part 512] 288.

<sup>67</sup> (1997) 7 NWLR (Part 512) 283 (CA).

<sup>68</sup> Meaning he inherits the property of his relation.

<sup>69</sup> See also the case of *Alajemba Uke & Another v Albert Iro* [2001] 17 WRN 172, where the Court of Appeal also held that any custom that seeks to relegate women to the status of a second class citizen is unconstitutional. A custom that precludes women from being sued or being called to give evidence in relation to land subject to customary rights of occupancy is unconstitutional.

<sup>70</sup> JCA is the official abbreviation for Justice of the Court of Appeal.

<sup>71</sup> 305.

That should not be so as all human beings, male and female are born into a free world and are expected to participate freely without any inhibition on grounds of sex. Thus, any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy. The Oli-ekpe custom, which permits the son of the brother of a deceased person to inherit his property to the exclusion of his female child, is discriminatory and therefore inconsistent with the doctrine of equity.

The judgment in *Mojekwu v Mojekwu* was revolutionary and represented a definitive pronouncement on the status of some of Nigeria's cultural practices that promote gender inequality. The judgment was well received within the human rights community and formed a benchmark for the assessment of other cultural practices that are perceived to be discriminatory. However, the euphoria generated by the pronouncement of Niki Tobi JCA was short-lived. The appellant was dissatisfied with the decision and appealed to the Supreme Court. While upholding the conclusions reached by the Court of Appeal, the Supreme Court watered down the significance of the judgment by rejecting the definitive pronouncement of Niki Tobi JCA. The Court was of the opinion that the pronouncement was completely unnecessary since it did not flow from an issue arising for determination before the Court. In other words, the issue whether the *Oli-ekpe* was repugnant to natural justice, equity and good conscience was not before the Court of Appeal and therefore it was not necessary for the lower court to have declared it to be so. Uwaifo JSC pronounced that he could not 'see any justification for pronouncing that the Nnewi native custom of *oli-ekpe* was repugnant to natural justice, equity and good conscience'.<sup>72</sup> In his reasons for this finding, Uwaifo JSC observed that 'the learned Justice of Appeal was no doubt concerned about the perceived discrimination directed against women by the said Nnewi *oli-ekpe* custom and that is quite understandable'.<sup>73</sup> He then added the following:<sup>74</sup>

But the language used made the pronouncement so general and far reaching that it seems to cavil at, and is capable of causing strong feelings against, all customs which fail to recognise a role for women. For instance, the custom and tradition of some communities, which do not permit women to be natural rulers or family heads. The import is that those communities stand to be condemned without a hearing for such fundamental custom and tradition they practise by the system by which they run their native communities. It would appear, for these reasons, that the underlying crusade in that pronouncement went too far to stir up a real hornet's nest even if it had been made upon an issue joined by the parties, or properly raised and argued. I find myself unable to allow that pronouncement to stand in the circumstances, and accordingly I disapprove of it as unwarranted.

The cases examined above show inconsistency on matters dealing with

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<sup>72</sup> 3576.

<sup>73</sup> As above.

<sup>74</sup> This extract tends to suggest that under certain circumstances, the Justice of the Supreme Court supports some form of discrimination against women.

cultural discrimination against women. Apparently clear provisions of relevant human rights instruments, including the 1999 Constitution, should be the overriding guide. These decisions defy logic and are evidence of cultural authoritarianism on human rights issues. While the decision in *Ukeje v Ukeje* rejects cultural discrimination against women, *Lawal-Osula v Lawal-Osula* and *Mojekwu v Iwuchukwu* appear to endorse such discrimination. In Africa, the influence of traditional customary practices is still strong. Judges have been indoctrinated in their formative years in these discriminatory cultural practices, and their judgments are tainted by their beliefs, even when such practices are inimical to the advancement of human rights. Perhaps judges still believe in the relativist theory of human rights as opposed to the current trend towards universalist notions of human rights. That explains why Uwaifo JSC does not see anything wrong with the idea that only men may be traditional rulers.

## 7 Cultural authoritarianism and international human rights law

There is no basis for the attitude of Nigerian courts in the light of international human rights instruments to which Nigeria is a party. Those instruments enhance the principle of equality between the genders. There is no reason why courts cannot use these instruments to advance women's rights. The African Charter on Human and Peoples' Rights (African Charter or Charter) is one such instrument.<sup>75</sup> Article 18(3) of the Charter contains provisions meant to protect the rights of women. It provides that the state shall ensure the elimination of all discrimination against women and also ensure the protection of the rights of women and children as stipulated in international declarations and conventions. Even though section 42 of the Nigerian Constitution prohibits discrimination against women, it is clear that neither the Nigerian state nor the regional governments have put in place a programme of action to eliminate cultural discrimination against women, especially in burial and inheritance matters, thus violating the provisions of the African Charter.

The Charter has been incorporated into state law in Nigeria. It has also been the subject of judicial interpretation by Nigerian courts. In *Fawehinmi v Abacha and Others*,<sup>76</sup> the Court of Appeal held that the provisions of the African Charter are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria. The Court

<sup>75</sup> Domesticated as a municipal law in Nigeria under cap 10 of the Laws of the Federation of Nigeria 1990.

<sup>76</sup> (1996) 9 NWLR [Part 475] 996; [1998] 1 HRLRA 541.



held further that no government is allowed to exclude, by local legislation, its international obligations. The Charter, even though it has been domesticated by the Nigerian National Assembly, is legislation with international flavour, the provisions of which cannot be ousted by local legislation. The implication of this revolutionary judgment is that a statute such as the Wills Law must be struck down since it is inferior to the African Charter. Viewed in this context, customs denying women inheritance and burial rights cannot stand. Every custom that does not meet the goal of the Charter must be struck down.

However, and despite the provisions of the Charter and other international human rights instruments, women in Africa continue to be victims of cultural discrimination. In order to eliminate incidents of discrimination against women on cultural grounds and to address the special needs of women, the African Union, at its summit in Maputo, Mozambique, held on 11 July 2003, adopted the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Article 25 of the Protocol provides that it shall enter into force 30 days after the deposit of the fifteenth instrument of ratification. The Protocol has not yet come into force. Articles 2 and 20 of the Protocol prohibit discrimination against women. While article 2 requires state parties to combat all forms of discrimination against women through appropriate legislative, institutional and other measures, article 20 specifically confers the right on women to have an equitable share in the inheritance of their parents' and husbands' property.

The Protocol is not substantially different from the provisions of the United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) that was adopted by the UN General Assembly on 18 December 1979. Though the Convention seeks to prohibit different kinds of discrimination, articles 2 and 5 are particularly relevant. Article 5(a), for instance, provides that state parties to the Convention shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women. It is believed that when this Protocol comes into force, it will strengthen the provisions of the African Charter on the elimination of cultural practices against women, including the discrimination against women on burial and inheritance rights in the name of custom.

## **8 Conclusion**

In this paper, we have attempted an examination of the status of Esan women from the standpoint of human rights via burial and inheritance rights. This consideration was provoked by the pervasive declarations

by some scholars as indicative of Chinweizu, that African women are no victims of sexism. In our analyses, we realised that African women, especially Esan women, are clearly victims of sexism in terms of the denial of their rights as they pertain to burial and inheritance rights, orchestrated and accentuated by cultural and governmental policies or constraints. We posited that the courts have not been firm in eliminating cultural prejudices against women and have rather displayed an attitude of prevarication. We further submitted that one way of making the courts more pro-active on issues of women's rights is to use international instruments, as was demonstrated in the landmark case of *Abacha v Fawehinmi and Others*, to override domestic legislation and government policies that may be inimical to women's rights.

In the final analysis, we submit that the adoption of the Protocol may be a recognition by African leaders of the failure of CEDAW to address the cultural prejudices against African women. While CEDAW may have succeeded in Europe and America, in Africa it has failed to eliminate the various forms of cultural discrimination against women. The African response to this problem is the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. However, unless African leaders show a serious commitment to the realisation of the goals of the Protocol by putting in place the necessary legislative and institutional measures to ensure its success, the Protocol may fail to advance women's rights. One way of demonstrating this commitment is the quick ratification of the Protocol by at least 15 African states. If the necessary measures are put in place, respect for women's rights in Africa (including the elimination of the cultural barriers) will substantially increase.

## Justice for the people: Strengthening primary justice in Malawi<sup>1</sup>

*Joseph DeGabriele\**

Freelance consultant, based in Zomba, Malawi, specialising in participatory development issues

*Jeff Handmaker\*\**

PhD researcher at the Netherlands Institute of Human Rights (SIM), Law Faculty, of Utrecht University and freelance consultant in The Hague, The Netherlands

### Summary

*In Africa, primary justice, or the way people resolve disputes and access justice within their own social and cultural contexts, has, perhaps by default, been wrongly perceived as exclusively comprising 'customary justice', upheld and administered by traditional leaders. These perceptions are, however, changing with a growing realisation that people are questioning the roles of traditional leaders and developing their own community-based justice mechanisms. Primary justice involves a much broader set of stake-*

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\* BSc (Hons), STB, MA (Leuven); degabriele@sdnp.org.mw

\*\* LLB (Newcastle), LLM (SOAS, London); j.handmaker@law.uu.nl

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holders, including faith-based organisations and institutions, community-based organisations and non-governmental organisations. Extending the scope of primary justice and supporting capacity-building among primary justice organisations can enable communities to reclaim justice for themselves in ways that respect human rights, reach far more people than formal justice systems, and have the potential to be powerful and peaceful mobilising forces for social change.

## 1 Introduction

If you plan together, you can come up with solutions . . . We are not after money, but to see change!<sup>2</sup>

Fumbanane mungabayana waka: 'Ask one another or reason together, lest you kill one another.'<sup>3</sup>

Primary justice, alternatively referred to as 'legal empowerment'<sup>4</sup> or 'non-state justice',<sup>5</sup> is a misunderstood concept. Studies have assumed it to be 'informal', 'customary' or even 'community' justice, exercised outside the sphere of formal legal systems. Most studies have assessed normative systems of dispute resolution (systems that subscribe to predictable rules and standards) against a backdrop of formal justice systems only.

Furthermore, there has been a long-standing, strong association between primary justice and customary systems, drawing on studies of the historical roots of existing justice systems and administrative systems in colonial and post-colonialist governments.<sup>6</sup> Such forms of government adopted some of the mechanisms of enforcement existing at the customary level, while at the same time dismantling and/or

<sup>2</sup> Interview with Alfred Mandalawe, Director of Domasi Village to Village, a community-based organisation in Zomba District, 8 July 2003.

<sup>3</sup> DK Mphande *Tonga proverbs from Malawi* (2001) 114; <http://www.afriprov.org> (accessed 28 February 2005).

<sup>4</sup> S Golub 'Beyond rule of orthodoxy: The legal empowerment alternative' (2003) Paper No 41 *Carnegie Rule of Law Series*.

<sup>5</sup> For a bibliography of non-state justice systems in Africa, see <http://web.uct.ac.za/depts/criminology/ajap/afribibl.htm> (accessed 28 February 2005).

<sup>6</sup> Studies of this field in the context of Malawi before recent constitutional dispensations in 1994 have been undertaken by, amongst others, M Chanock 'Neotraditionalism and customary law in Malawi' (1978) 16 *African Law Studies* 80-91 and M Chanock *Law, custom and social order: The colonial experience in Malawi and Zambia* (1985). However, there has been no major study since then that takes account of the considerable social and political changes, not least the establishment of multi-party democracy, significant improvements in transport and communications and extensive external donor investment, notably in the country's justice system. Chanock's work has therefore not lost its relevance, but must be measured against a range of new developments. See JK van Donge & L Pherani 'Law and order as a development issue: Land conflicts and the creation of social order in Southern Malawi' (1999) 36(2) *Journal of Development Studies* 48-70.

ignoring indigenous and alternative methods of dispute resolution that were inconsistent with colonialist policy.<sup>7</sup>

Lacking alternative explanations, donor interventions have assumed that primary or informal dispute resolution mechanisms represent a second-best alternative to the formal system.<sup>8</sup> Stephen Golub refers to this as the 'dominant paradigm', based on 'rule of law orthodoxy', which is state-centred, top-down and principally administered by multi-lateral and bilateral (donor) agencies.<sup>9</sup> Golub considers this approach to be problematic for a variety of reasons, as it is based on 'ill-defined' and 'questionable' goals, assumptions and strategies and presupposing institutionalisation and the central role of the judiciary as the most effective means of serving the needs of society. He further criticises the tendency of donor agencies to 'underestimate the obstacles and overestimate the potential' of the institutions they aim to support.<sup>10</sup>

For various reasons,<sup>11</sup> this 'dominant paradigm' has proved to be very persuasive in forming donor agencies' policies, assuming that non-formal justice falls into the single, broad category of traditional justice mechanisms, such as traditional courts enforcing customary law<sup>12</sup> and local administrations run by traditional leaders. Consequently, these same assumptions are reflected in interventions by donor organisations, which have placed considerable emphasis on traditional institutions while ignoring or only tacitly recognising other (non-formal) justice components. A recent programme in Malawi, in which the present authors were involved, described primary justice as containing:<sup>13</sup>

... a range of traditional and non-traditional elements. Historically, traditional justice institutions have been used (and to some extent manipulated) by the colonial and post-colonial state. But, in spite of this, these institutions retain a significant degree of legitimacy and may be preferred by users.

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<sup>7</sup> L White *Magomero: Portrait of an African village* (1989) 164-165 refers to customs that, while having changed and developed over time, are nevertheless rooted in ancient practice.

<sup>8</sup> The implication is that a fully functioning formal system would dispense with the need for primary justice.

<sup>9</sup> Golub (n 5 above).

<sup>10</sup> n 10 above, 9-21.

<sup>11</sup> Golub (n 5 above) 21-25 describes some of these reasons as the central role of lawyers, the providing of improper incentives (rewards) to local institutions, inbuilt structural biases within donor agencies and a lack of applied research.

<sup>12</sup> In Malawi, 'customary law', as applied by traditional leaders, is rarely consistent and often *ad hoc*. Schärf *et al* 'Access to justice for the poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums' unpublished report by DFID-Malawi (2002) (Schärf report) 12 describe it as 'unwritten, flexible and changing in response to new conditions and attitudes', when compared to written law. By comparison, B Oomen *Chiefs! Law, power and culture in contemporary South Africa* (2003) 82 writes of the distinction in South Africa between 'living customary law [which] relates to the social practices of communities living all over' and 'official' customary law.

<sup>13</sup> DFID-Malawi 'Terms of reference, design of primary justice pilots' unpublished (2003).

As this programme served to further emphasise, few have recognised the importance of the role of hundreds of community-based organisations (CBOs), faith-based groups, marriage counsellors (*ankhoswe*) and the combined administrative and quasi-judicial roles played by traditional leaders.<sup>14</sup> We therefore distinguish between formal and primary justice;<sup>15</sup> the latter might be informal on occasion, and at times customary, but in most cases, it is resolved within the community. However, it also involves an inter-relationship with formal justice.

Where formal justice systems, in particular courts, are not accessible to the majority of the population, primary justice systems offer encouraging alternatives and, in many cases, more appropriate solutions. They should not be viewed as a substitute for the formal system, but as a dynamic complement to it. At the same time, there is a need to improve primary justice provision through capacity building, improved co-ordination and enhanced knowledge of potential legal remedies. CBOs, faith-based groups and other stakeholders involved in delivering primary justice can assist the formal sector by documenting transfers and referrals. Such collaboration will not, however, turn primary justice systems into formal systems.

## 2 Identifying primary justice issues

Being principally concerned with broadening access so that individuals and communities can make their own choices, primary justice interventions focus on issues where accessibility is particularly limited. These include the security of the person, security of property, land disputes and political violence.

Most Malawians access justice at the primary rather than the formal level. The kinds of issues handled by primary justice providers indicate that primary justice mechanisms provide both an appropriate entry point and a hierarchy of appeal or referral systems. Those most likely to use primary justice are the poor, in particular orphans and widows, women, school children, children in conflict with the law and people

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<sup>14</sup> Although they are somewhat trivialised, M Vaughan 'Recent social historical perspective' unpublished (1999) 9 nevertheless observes that the roles of such institutions ('self-help groups, credit unions, churches') represent a 'starting point' in identifying primary justice mechanisms.

<sup>15</sup> Similar distinctions have been made in E Ehrlich *Fundamental principles of the sociology of law* (1936) 493; S Roberts 'Introduction: Some notes on "African customary law"' (1984) 28 *Journal of African Law* 1; M D'Engelbronner-Kolff *A web of legal cultures: Dispute resolution processes amongst the Sambyu of Northern Namibia* (2001) 298; B Oomen 'Legal syncretism in Sekhukhune: Local law and the power of traditional leaders in northern South Africa' in WMJ van Binsbergen & R Pelgrim (eds) *The dynamics of power and the rule of law: Essays on Africa and beyond* (2003) and A Hellum *Women's human rights and legal pluralism in Africa: Mixed norms and identities in infertility management in Zimbabwe* (1999).

with HIV/AIDS. The types of disputes that most commonly affect Malawians include land issues, theft of crops or livestock and household goods, marriage and family problems, inheritance, property-grabbing and a breakdown in social harmony.

Those affected by such disputes may approach a range of structures involved in delivering justice at the primary level. Traditionally these have been marriage counsellors, family or clan heads and traditional leaders (village headmen and chiefs). However, changing social contexts mean that more people are accessing other institutions, including the churches, elements within civil society (especially CBOs and non-governmental organisations (NGOs)).

Furthermore, people use formal structures, such as the Anti-Corruption Bureau, Human Rights Commission and Ombudsman, as primary justice structures. Formalised structures, such as the Community Policing and Crime Prevention Committees, are also used for primary justice remedies. For example, the work of the police has been reshaped by the public's use of victim support units, where victims of spousal abuse reported to us that they do not want to press charges but do want the police to frighten the husband a bit. In this way, they are gradually reshaping these institutions to their own needs.

## 2.1 Security of the person

In the absence of alternatives, and in spite of various difficulties (highlighted below), people have traditionally relied on chiefs to resolve problems affecting their personal security. This has been complemented by the mediation and reconciliation role of *ankhoswe*, who are mainly tasked with ensuring that contentious issues in marriages (which can have an impact on the broader community) are resolved wherever possible. This conciliatory function is reinforced by traditional authorities, who have the power to impose fines and maintenance. Some of the primary justice issues they handle relate to the concept of *nkhanza*.

A key starting point for addressing issues relating to the security of the person is the concept of *nkhanza*, popularly understood as a lack of harmony and inevitable part of the human condition. With it goes the assumption that all try to restore harmony (at a meta-level) in themselves and their families, and (at a broader level) within their community or nation. A key finding of gender research conducted by GTZ-Malawi<sup>16</sup> is that *nkhanza*, strictly defined in English as violence, has a much wider meaning. Violence has the connotation of physical abuse, while *nkhanza* reflects broader social tensions. Examples of *nkhanza* include lack of respect and placing unreasonable demands on a spouse (such as requiring the wife to wake up in the middle of the night to cook after

<sup>16</sup> GTZ-Malawi Gender Programme unpublished presentation in Lilongwe (2003).

the husband has been drinking beer, rudeness, unreasonable temper and being unloving). It can also refer to punishing a person before they have been found to have made a mistake, or putting them under constant stress. In short, *nkhanza* issues encompass a much broader spectrum than physical abuse alone, and can adequately and appropriately be handled at the primary justice level.

*Nkhanza* can also relate to people's lack of security in their relationship with the government. Examples of the ways in which the government is perceived as perpetrating abuse include urban bias in development, politicisation of development, heavy taxation, poor health and education services, nepotism and corruption, and abuse of girls at schools.

## 2.2 Security of property

Primary justice issues involving security of property include principally land disputes (see below), property-grabbing and unlawful disposal of communal land by chiefs. Theft and destruction of property are particularly serious problems in rural agricultural districts and manifest in two main ways. Firstly, small amounts of maize and livestock (particularly during a food crisis) are stolen within the community. Secondly, large amounts of maize and livestock are stolen by criminal organisations, believed to be operating from across the border.

Proposed primary justice solutions have included banning the sale of green maize or insisting on a certificate from a village committee. Communities have also organised themselves (often together with the community policing fora) into 'crime prevention committees'.<sup>17</sup>

The themes of security of the person and property often overlap. For example, popular understanding in Malawi seldom distinguishes between security of property and security of the person. If someone steals another's maize, the injured party may feel entitled to kill the thief in self defence, as such a theft can easily lead to the family starving. Another obvious link occurs in the context of family disputes after a landowner or subsistence farmer has died and his or her relatives claim their property and/or land for themselves. Here forcible dispossession of land or property (especially crops and livestock) by family members of the deceased, otherwise known as property-grabbing, is regarded by many not only as theft, but equivalent to 'killing the entire household',<sup>18</sup> as it particularly affects widows and orphans.

<sup>17</sup> Interview with GTZ in Mulanje, 12 July 2003.

<sup>18</sup> C Msukwa 'Early harvesting — A serious threat to food security: Developing a community-based extension process against theft and its consequences in the impact area of the IFSP' unpublished report (2003) 9.



### 2.3 Land disputes

Creating legal security through registration of individual title to land has long been a prominent aspect of land and law issues in Africa. Some attempts have been made to approach the subject of land disputes from the point of view of local political and legal structures, where the requirement of group consensus creates legal insecurity.<sup>19</sup>

Disputes that relate to land mostly involve land dispossession following the death of the owner; landlessness (resulting in land encroachments) due to the establishment of national parks and reserves (as has occurred in Chikwawa and Rumphu); conflicts over land ownership; and relocation without compensation for improvements, such as houses and trees. People accused of witchcraft and other outsiders are particularly vulnerable in such a legal culture. The chiefs and the District Assembly Secretariat mainly handle these matters. However, magistrate's courts also sometimes handle cases concerning land disputes, especially if the dispute also raises issues of public order.

Following a consultative process with traditional leaders, a National Land Policy has been developed to ensure that land title ownership is made more secure, and that all citizens are able to access land by fair and equitable means.<sup>20</sup> This policy is particularly relevant to the issue of customary land ownership; firstly, because such ownership will now be legally recognised, and secondly, because mechanisms have been put in place to ensure that customary land disputes are addressed in a more systematic way.<sup>21</sup> The land policy reaffirms the jurisdiction of chiefs over customary land matters by creating structures that include chiefs and community members whose interests are affected (and exclude the courts), in the settlement of customary land disputes. However, some traditional leaders feel that this multi-stakeholder process represents a weakening of their powers and jurisdiction.<sup>22</sup>

These provisions of land policy are commendable, but can only become operational if a new land law is enacted and all the necessary

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<sup>19</sup> Van Donge & Pherani (n 6 above).

<sup>20</sup> Interview with Shaun Williams, DFID Consultant to the Malawi Ministry of Lands, June 2003.

<sup>21</sup> Until the development of the land policy, the roles and responsibilities of chiefs in relation to customary land ownership remained unclear. As a result, conflicts still arise among both primary and formal justice service providers in relation to land issues. The magistrate's courts continue to be reluctant to recognise the jurisdiction of chiefs to hear land-related conflicts. On the other hand, chiefs feel that as custodians of customary land, they should be the ones to resolve land-related conflicts.

<sup>22</sup> During the Zomba traditional leaders' training at the Staff Development Institute (14-25 July 2003), chiefs were divided. Some felt that the consultative process did not give sufficient weight to their views, while another group complained that 'taking away' their capacity to decide on land issues would deprive them of income. Another group of leaders from Rumphu expressed general satisfaction with the proposed Act.

institutional arrangements<sup>23</sup> are put in place to support implementation. These steps would require immense resources, which Malawi does not currently have. In the meantime, primary service providers continue to decide land dispossession cases in an *ad hoc* way.

An interim solution would be for primary justice service providers to ensure that training programmes for traditional leaders take due consideration of the proposed land policy implementation strategies which promote fair inheritance practices among both users and providers of primary justice (through existing CBOs and NGOs). The traditional leaders' training programmes and a course on Land Administration and Land Use Planning<sup>24</sup> address these complex issues.

## 2.4 Political violence

There have been several incidents of political violence that have been responded to by primary justice service providers, including the GTZ-sponsored Forum for Dialogue and Peace.<sup>25</sup> These incidents tend to be linked to elections in the country, in particular national elections, and conflicts often take place when political rallies are held. Primary justice organisations expected political violence to take place during the national elections in 2004.

Much of the political violence in the country is attributed to the fact that non-ruling parties are not always given access to certain areas to hold meetings. There are also reports that traditional leaders have been forced to join specific political parties and to subscribe to those parties' agendas, and are threatened with intimidation and/or dismissal if they do not comply.<sup>26</sup> There have also been allegations of violence and intimidation against opposition political party members. Several faith-based organisations and civil society organisations are involved in the resolution of conflicts arising out of political violence.<sup>27</sup>

## 3 Sources of primary justice protection

As highlighted above, there are several existing sources of primary jus-

<sup>23</sup> These would need to include District Land Registries, Traditional Land Management Areas, Village Land Committees and Land Tribunals.

<sup>24</sup> Both are supported through the DFID-MaSSAJ programme. See DFID-MaSSAJ Report (n 1 above) Annex M.

<sup>25</sup> GTZ is a programme of the German government for channelling official development assistance. This particular initiative has been very active in the run-up to general elections in the country.

<sup>26</sup> The Schärf Report (n 12 above) noted that the payment of chiefs by the President's office was one of the most unacceptable compromises concerning access to justice in Malawi.

<sup>27</sup> DFID-MaSSAJ Report (n 1 above); file notes on meetings with CCJP & PAC, Annex E.

tice protection that bode well for the future of primary justice, both as a means of accessing justice at a community level, and promoting greater access to formal justice.

### 3.1 The community

Members of the community, notably marriage counsellors, family, guardians, neighbours and so on, represent the first source of primary justice protection, which is often overlooked by those assessing access to primary justice. The community is where a primary justice complaint is generally first reported, even though the reporting of matters is problematic.<sup>28</sup> In some districts, communities have organised themselves in School Management Committees (SMCs) and Parent Teacher Associations (PTAs), which can provide useful fora in which to raise issues and seek advice, assistance and (if necessary) referrals, particularly on issues affecting children in school.

The latter can be usefully illustrated by the challenges associated with ensuring that Malawian children living in dire poverty attend school. Instead of attending school, poor children are often sent to the grinding mill, or to pick cotton, herd cattle or to perform other activities to support their family.<sup>29</sup> Furthermore, older children are often expected to look after their siblings. Other reasons for not attending school include loss of interest due to the poor quality of education or persistent absence of the teacher 'without genuine reason'.<sup>30</sup> The lack of security in school latrines is also of concern, and can lead to sexual harassment or abuse, especially of girls. Through community participation in school management committees, most of the direct and associated problems concerning school non-attendance can be deliberately confronted and dealt with far more effectively, and sustainably, than through a formal justice structure.

### 3.2 Community-based organisations

Communities have also set up CBOs, although so far they have been overlooked as a source of primary justice protection.<sup>31</sup> Their core activ-

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<sup>28</sup> There are many reasons why people are reluctant to report matters to local primary justice mechanisms or formal justice mechanisms (notably the police). These range from fear that a matter will not be handled impartially, to fear of the consequences (eg, removing an abusive husband from a household where he represents the only source of family income).

<sup>29</sup> This also raises concerns over child labour.

<sup>30</sup> Reasons suggested by school committees include the 'running of businesses' and 'beer drinking'. See DFID-MaSSAJ Report (n 1 above) Annex E, file note on meeting with School Management Committee, Chikwawa.

<sup>31</sup> They were not mentioned in the 1999 Primary Justice Study, were referred to only briefly in the 2002 Schärf report (n 12 above) and were omitted from the list of participants in the February 2003 workshop.

ities tend to be in relief and development (for example, they work in areas such as orphan care, HIV/AIDS and home-based care). However, they have increasingly found themselves handling primary justice issues associated with their core work. Examples include property-grabbing<sup>32</sup> and other land disputes, discrimination against orphans, discrimination against people with HIV/AIDS and other issues where there is dissatisfaction with other local mechanisms, especially chiefs or headmen. Other CBOs include groups of refugees and migrants, as well as groups of disabled persons.<sup>33</sup>

### 3.3 Non-governmental organisations

NGOs working in communities, as opposed to simply advocating on their behalf, have provided a range of important primary justice services to communities. These include training and capacity building to handle primary justice issues, civic education to raise awareness on primary justice issues, advice and assistance to persons with a primary justice complaint, and advocacy on primary justice issues. NGOs that work closely with CBOs have been particularly instrumental in promoting access to primary justice, and helping to facilitate access to formal justice mechanisms in a range of issues, such as labour disputes, property dispossession, discrimination and other areas.

### 3.4 Traditional leaders

Traditional leaders, especially village headmen, traditionally have been a principal source of primary justice, although their reputation and influence within communities is reported to have waned in recent years, resulting in decisions that are not accepted. While acknowledging that considerable problems exist with their role as agents of primary justice, it is nevertheless very important that they not be excluded as a potential source of primary justice protection.<sup>34</sup>

### 3.5 Faith-based organisations

Faith-based organisations, churches and mosques working in communities are actively involved in the same kinds of services and issues as NGOs and CBOs, providing advice or assistance, civic education and human rights advocacy. As with CBOs, they are also frequently overlooked. Faith-based organisations handle numerous primary justice

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<sup>32</sup> An amendment to the Wills and Inheritance Act has actually criminalised this type of conduct.

<sup>33</sup> The disabled are identified as 'most vulnerable' in DFID *Malawi country assistance plan* (2003) 5.

<sup>34</sup> C Nyamu-Musembi 'Are local norms and practices fences or pathways? The example of women's property rights' in AA An-N'aim (ed) *Cultural transformation and human rights in Africa* (2002).

complaints, including reports of political violence, especially between ruling and opposition party members, but also directed against NGOs. Faith-based organisations have also been called upon to respond to other violent clashes, including incidents associated with growing religious tensions in the country. Complaints of domestic violence, labour disputes, land and property-grabbing, and land encroachment (including the tea estates in Thyolo and Mulanje) have also received attention.<sup>35</sup> A deep understanding of *nkhanza* places primary justice within the mandate of faith-based organisations, especially those that actively follow a social policy doctrine.

### 3.6 Community policing fora and victim support units

Two broad types of community policing were identified during the process of consultation. These were projects that had been introduced by the police to facilitate greater communication and interaction with the public; and projects that had been introduced by the public to demand greater interaction with the police. Examples of the former include numerous initiatives supported by the DFID-MaSSAJ programme, notably the Community Policing Forum and Victim's Support Unit, both operating under the auspices of the (model) Lilongwe Police Station. An example of the latter type is a project run by GTZ-Malawi as part of its Integrated Food Security Programme, which operates in Mulanje District.

Further examples include Natural Resource Committees (NRCs), which were established in Rumphi District to informally police the border zone area of Vwaza and Nyika wildlife parks, and to regulate the harvesting of resources through a permit system. The NRCs are consulting with the Community Policing Forum in Rumphi to develop strategies for co-ordinating their efforts.<sup>36</sup> In addition, many Malawian NGOs, such as the Public Affairs Committee (PAC), have considerable experience in community policing and crime prevention issues.

These initiatives were created to extend the reach of the police and provide structure to unregulated (vigilante) groups that had been formed by communities in response to a marked lack of concern and/or capacity on the part of the police serving especially outlying rural areas.<sup>37</sup> As such, their legitimacy depends on the degree to which the community is meaningfully engaged.

However, these structures face numerous challenges. Firstly, community-policing facilitators are seldom trained in participatory extension

<sup>35</sup> DFID-MaSSAJ Report (n 1 above) Annex E, file note on CCJP.

<sup>36</sup> Interview with Vwaza Park Extension Officer, 21 July 2003.

<sup>37</sup> It was unfortunately beyond the scope of the consultancy's terms of reference to examine the origins and functions of these 'vigilante' groups, even though they are an important source of primary justice.

and facilitation skills, and members are not clear about their exact role and mandate. Secondly, parallel structures exist in some cases, or the village community fails to accept the community policing structure. Thirdly, CBOs have observed that the police supply limited feedback, a situation that creates an information gap, particularly on issues such as bail.

### 3.7 Local government

Local government offers a potential source of primary justice protection through district social welfare officers (especially on matters relating to children). The District Assembly is often approached for assistance, although it lacks the capacity to respond. There has nevertheless been some co-ordination of relief and development activities (including those that focus on primary justice issues) at District Assembly level, through Development and Planning sections. District education officers have also involved themselves in primary justice issues, notably through the support to the SMCs (as explained above).

### 3.8 The Anti-Corruption Bureau

The Anti-Corruption Bureau (ACB)<sup>38</sup> has three regional offices: in Lilongwe, Blantyre and Mzuzu. Most clients access the ACB through correspondence; examples of cases relate to unfair dismissal,<sup>39</sup> cheating in examinations,<sup>40</sup> relief<sup>41</sup> and other justice issues.<sup>42</sup> In some instances the ACB refers written complaints to the appropriate agencies, with the complaint attached. The reason for referring cases is because a case involving, for example, cheating in examinations may involve both a lesser charge (corruption) and a more serious charge (defilement). Corruption would fall under the jurisdiction of the ACB, whereas the latter charge should be referred to the police and Ministry of Education. The ACB requests feedback from the referral agency, and if none is forthcoming, further follow-up is done. A key advantage of the ACB is that all complaints (written and verbal) are reportedly registered and documented.<sup>43</sup>

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<sup>38</sup> Established by the Corrupt Practices Act 18 of 1995.

<sup>39</sup> Eg, allegedly to give a post to someone who has paid a bribe.

<sup>40</sup> Eg, where examination centre supervisors are alleged to demand bribes in cash or sex in exchange for allowing cheating.

<sup>41</sup> Eg, where chiefs are alleged to demand bribes in order to register a household as a beneficiary.

<sup>42</sup> Eg, where traditional leaders are alleged to favour those who have paid a bribe.

<sup>43</sup> DFID-MaSSAJ Report (n 1 above); file notes on meetings with the Anti-Corruption Bureau, Mr Liwonde (Investigation Officer) and Mrs Phombeya (Corruption Prevention Research and Intelligence Officer), 22 July 2003.

### 3.9 The Malawi Human Rights Commission

The Malawi Human Rights Commission (MHRC)<sup>44</sup> operates from Lilongwe, with most people accessing it through correspondence.<sup>45</sup> Cases brought to the MHRC include labour issues, domestic violence and property dispossession. More serious cases include police brutality, non-compliance with the 48-hour detention rule, delays in hearing the cases of persons detained,<sup>46</sup> religious intolerance and political violence. The MHRC has also received complaints on educational matters, including refusing to allow school children to write examinations.<sup>47</sup>

Cases not within the MHRC's mandate are referred to other institutions. For example, domestic violence issues are referred to the police. The MHRC also conducts public hearings, which the public and the media are encouraged to attend. The rulings of the MHRC are not enforceable.<sup>48</sup>

### 3.10 The Ombudsman

The offices of the Ombudsman<sup>49</sup> are in Blantyre, Lilongwe and Mzuzu. These offices render assistance to those who have complaints against public agents. As with the MHRC and ACB, the Ombudsman is accessed mainly through correspondence.<sup>50</sup> Primary justice issues that have been uncovered in rural communities include widows being cheated out of their husbands' death benefits (including unnecessary delays in processing payment at district level) and workers who wish to retire having the correct information withheld from them.<sup>51</sup>

## 4 Analysis of the primary justice sector in Malawi

'Chiefs believe that these new things are taking away their power.'<sup>52</sup>  
'In the past, primary justice was with *ankhoswe* and the chiefs . . . Things have

<sup>44</sup> Established by ch XI of the Republic of Malawi (Constitution) Act 20 of 1994.

<sup>45</sup> DFID-MaSSAJ Report (n 1 above); file notes on meetings with the Malawi Human Rights Commission (MHRC): Mr E Konzakapansi (Deputy Director of Investigations) and Mr H Migochi (Principal Investigations Officer), 22 July 2003.

<sup>46</sup> Persons held on remand make up about 18-25% of the prison population at any given moment. Interview with MaSSAJ Prisons Advisor, June 2003.

<sup>47</sup> File notes on meetings with MHRC (n 46 above).

<sup>48</sup> As above. The Constitution of the Republic of Malawi (n 45 above) states that the MHRC has powers to investigate and make recommendations necessary for the effective promotion of human rights, but does not have judicial or legislative powers.

<sup>49</sup> Established by ch X of the Republic of Malawi (Constitution) Act 20 of 1994.

<sup>50</sup> DFID-MaSSAJ Report (n 1 above); file notes on meeting with the Office of the Ombudsman, Mr A Msosa (Research and Education Officer, Head of Department), 22 July 2003.

<sup>51</sup> Meeting with the Office of the Ombudsman (n 50 above).

<sup>52</sup> Interview with Group Village Headman Vyalema in Rumphu District, 21 July 2003.

changed, customs and traditions have changed . . . you must march with the times!<sup>53</sup>

#### 4.1 Broadening views of primary justice

As mentioned earlier, most studies on primary justice have excluded major components of primary justice, focusing overwhelmingly on normative systems and failing to take into account the complex roles of traditional leaders, CBOs, NGOs, faith-based groups and local government institutions. Primary justice mechanisms tend to be trivialised, and perceived as 'second best' by those working within formal justice structures.<sup>54</sup> This might be broadly reflective of a widely held perception in the donor community (described by Golub as the 'rule of law orthodoxy'),<sup>55</sup> that by enhancing the rule of law, a country will attract (foreign) investment and, consequently, reduce poverty. In fact, as we explain later, in poor countries such as Malawi, the biggest threat to security is theft of crops and livestock.<sup>56</sup>

In most societies, disputes go through a number of stages for potential settlement before formal systems are resorted to. Disputants may first call upon family members, neighbours or faith institutions to try to resolve a problem.<sup>57</sup> In most cases, the primary justice system provides a solution at this level, as it is generally better suited to conflicts between people living in the same community, who will have to live and work together in future.

Locally-based solutions, including interventions by traditional leaders, can be effective forums for resolving disputes for a variety of ways. As Nyamu-Musembi writes, they:<sup>58</sup>

. . . may grant recognition to claims that the formal legal system does not entertain, or moral claims not acknowledged as 'rights' in the formal legal system.

However, Nyamu-Musembi goes on to say that, in the context of primary justice, it is important to be pragmatic:<sup>59</sup>

<sup>53</sup> Interview with JB Makwandire, former District Commissioner, 21 July 2003.

<sup>54</sup> This was a frequently heard observation in our consultations and meetings with magistrates, judges, heads of prison, police station commanders, national government officials and others working within formal structures. Some staff at DFID-MaSSAJ called for a broader understanding of primary justice, while others were more sceptical. Up until our involvement, donor concern had almost exclusively been confined to reinforcing formal justice structures of the courts, police and prisons. Similar sentiments exist with regard to traditional medicine and its relationship with modern medicine; J deGabriele 'When pills don't work — African illnesses, misfortune and *Mdulo*' Christian Engagement with African Cultural Dynamics: Theology Conference at the University of Malawi (1997).

<sup>55</sup> Golub (n 4 above) 7.

<sup>56</sup> This was also the conclusion of NSO-Malawi *Crime and victimisation survey* (2003).

<sup>57</sup> Penal Reform International *Access to justice in sub-Saharan Africa* (2000) 21.

<sup>58</sup> Nyamu-Musembi (n 34 above) 127.

<sup>59</sup> n 58 above, 143.



[A]s long as the reality of poor access to formal judicial institutions . . . persists, people will need some kind of fora to resort to when interpersonal negotiations fail.

It is also generally assumed that people resort to primary justice because of their difficulty with logistical access to the formal system: a lack of money, long distances, and limited resources and capacity on the part of formal justice structures. In fact, formal justice systems are inaccessible for more complex reasons as well, including poor cultural and social access, complex legal procedures, incomprehensible legal jargon and language difficulties. This is compounded by the fact that the language of the court is usually English, with translation generally limited to Chichewa.

#### 4.2 Primary justice and a changing social context

Primary justice is mistakenly perceived by many of those working in the formal system as subservient to the formal system.<sup>60</sup> Primary justice forms part of an ever-changing social context, both operating outside of, and in relation to, formal justice systems. People choose primary justice mechanisms for a variety of reasons, and not only because of their lack of access to the formal system. Like other social constructs, such as culture, custom and tradition, primary justice is dynamic. Underlying the pressure to change is the call by both society at large and affected communities to make primary justice more accessible and more relevant to their needs.

The forces involved in the reshaping of primary justice operate at multiple levels and involve, firstly, changing the social and cultural context. There is considerable fear that primary justice systems will suffer the same fate as the traditional courts, which were abused by the government during the Banda regime.<sup>61</sup> Secondly, laws and human rights issues need to be translated into more accessible language, and placed in an appropriate social and cultural context. (Such a process would involve much more than merely simplifying issues.) Thirdly, conflicts between tradition and modernism are frequent in rural communities in Malawi, especially where members of the younger generation are diverging from their elders' value systems and aspirations. Fourthly, there is a marked loss of confidence in traditional leaders, as a result of allegations of corruption, the deliberate politicisation of chiefs, conflicts of interest, and quasi-judicial conflicts between tradition, customary law, and human rights law.

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<sup>60</sup> Referring to people involved in making policies and drafting laws, Vilakazi is quoted as saying that 'most of them are city people who do not have an idea of what is going on in the rural areas' in B Oomen 'Tradition on the move: Chiefs, democracy and change in rural South Africa' (2000) 6 *NiZA-Cahier*.

<sup>61</sup> In this case, traditional leaders were replaced by party chairmen as leaders of the courts.

Finally, other factors limiting access to justice include a lack of mechanisms for recording decisions,<sup>62</sup> poor knowledge of referral mechanisms (within the primary system itself and between the primary system and the formal system) and an attempt to formalise primary justice mechanisms.<sup>63</sup> The latter, while in some respects understandable, nevertheless threatens to undermine such structures, precisely because they derive their legitimacy from the fact that they are managed and regulated by the communities themselves.

### 4.3 Enhancing access to formal and primary justice

The 2002 Schärf Report,<sup>64</sup> which appraised 'access to justice by the poor' in Malawi, addressed a range of issues that hamper access to formal and primary justice in Malawi. In particular, the report addressed the role that facilitative mechanisms play in enhancing links and access to formal justice, as well as customary (primary justice) fora. While by no means exhaustive,<sup>65</sup> its 330 pages nevertheless represent the single biggest attempt so far to document the current availability of primary justice in Malawi.

Schärf and his colleagues determined that complainants might be unable or unwilling to approach formal and primary justice mechanisms, for reasons ranging from a lack of awareness as to what the most appropriate forum was, to a lack of confidence that these institutions would hear their complaint. They also observed that inadequate legislation existed to harmonise the integration of subordinate and traditional courts,<sup>66</sup> and that this had resulted in several problems, ranging from disputed jurisdiction to simple incompetence.<sup>67</sup>

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<sup>62</sup> The fact that most primary justice providers do not document their cases makes it difficult to measure how many and what kinds of cases are being handled or referred to other agencies. This information has obvious relevance for co-ordination with other providers, as well as monitoring and evaluation.

<sup>63</sup> Eg, the Ministry of Gender and Community Services, which is responsible for monitoring the activities of CBOs, is developing guidelines for their operations.

<sup>64</sup> Schärf *et al* (n 12 above).

<sup>65</sup> In particular, the report did not mention the substantial role played by CBOs or faith-based organisations. It also was unclear about the precise roles and capacities of lower grade magistrates.

<sup>66</sup> There has been no replacement (as provided for in Malawi's 1994 Constitution) for traditional courts. These notorious instruments of the previous government had jurisdiction to try a range of cases, notably those of political opponents, with sweeping sentencing powers, including the capacity to issue the death sentence.

<sup>67</sup> Eg, it was reported that untrained magistrates, together with similarly untrained staff, have been handling a range of issues (not all of which they have jurisdiction over). At best, this has led to case backlogs and a lack of uniformity in decision-making and, at worst, to serious violations of human rights. The issue of the integration of subordinate courts and traditional courts remains a hotly debated and contentious theme.

The report found that little distinction exists between civil and criminal cases decided by customary structures, where the role of the chiefs or village headmen involves a fusion of their governance and judicial powers. The report also observed that the emphasis in these fora is on the harm done and compensation to the victim, with the focus on restorative rather than retributive justice. Being a negotiated process, the standards of establishing facts are handled differently. However, the report also acknowledged that these fora tend to be idealised<sup>68</sup> and that gender issues received scant attention. Furthermore, the allowance paid to chiefs (by the state) was raised as a particular area of concern. It is believed that this seriously undermines the chiefs' impartiality, as well as their availability to serve the poor, who cannot pay for their services.

Chiefs, on the other hand, lament that many matters formerly brought to their attention are now taken directly to the police or magistrates, without any opportunity for them to intervene or provide feedback. The report notes that some chiefs openly disparage *westernised* concepts of justice (for example, community police), which have diminished their own administrative powers. Many demand that they be given back their powers, especially regarding matters of detention and community service. In general, chiefs complain that their subjects often ignore their decisions and advice.<sup>69</sup>

The report also speaks of potential 'jurisdictional conflicts' between primary justice (community) justice systems and formal (state) systems, including interventions by the police, judiciary and other justice mechanisms.<sup>70</sup> A further distinction between the two systems included the criteria for identifying jurisdiction.<sup>71</sup> The report observed that these

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<sup>68</sup> One example of the deficiencies in traditional courts is that instead of the common law standards applied by the formal courts (ie burden of proof or balance of probabilities), customary justice fora regularly apply the principle of 'no smoke without fire'. Such a standard may be appropriate in most civil disputes, but (as explained later) in disputes concerning matters such as sexual harassment, defilement or property-grabbing disputes, it is highly problematic.

<sup>69</sup> Feedback to the authors from facilitators in a workshop entitled 'Traditional Leaders Training Course', held at Mpembe Institute, Malawi, July 2003. The workshop involved traditional leaders from five districts in Malawi (Lilonge, Rumphu, Chikwawa, Zomba and Ntcheu).

<sup>70</sup> It should be noted that many crimes go unreported because the affected community (rightly or wrongly) feels that it is capable of resolving the matter on its own, or because there is simply no access to formal systems. Furthermore, the most common crimes in Malawi are theft of crops and theft of livestock. In view of the fact that most of these crimes are said to have been committed by a relative, a friend or a neighbour, there is indeed internal (family) pressure for the victim not to seek recourse within the formal system; NSO-Malawi (n 56 above).

<sup>71</sup> The first test is to identify where the conflict lies. In most disputes, this will be at the community level, and will therefore initially be addressed as a primary justice issue. The second test is to identify the issue at stake and determine whether it constitutes a civil dispute or a criminal offence. In the case of the former, primary justice mechanisms are often the most appropriate fora, whereas criminal offences are required by law to be reported to formal mechanisms (such as the police).

distinctions are often unclear, depending on the type of complaint involved.<sup>72</sup>

#### 4.4 Avoiding idealisation of traditional dispute-resolution mechanisms

It is important not to idealise traditional dispute-resolution mechanisms.<sup>73</sup> Numerous training programmes notwithstanding, some providers of primary justice (notably chiefs) may not deliver better solutions, for reasons ranging from prejudice (against women and modern practices in general) and allegations of corruption to lack of capacity. Consequently, people are increasingly seeking alternative solutions by approaching other primary justice providers, notably faith-based organisations, CBOs and NGOs.

This can be usefully illustrated by the case of a church and society programme that was established in Mzuzu.<sup>74</sup> It is important to distinguish this kind of programme from an NGO programme. Churches, in fact, refuse government pressure to register and regulate these types of activities under the auspices of an NGO, as they consider justice issues to be part of their ministry. The types of cases the programme handles are interesting from a primary justice point of view; out of 92 cases handled in a 12-month period, 23% involved employment issues, 17% involved complaints about police or courts, 13% involved property-grabbing and inheritance issues and the remaining 13% concerned family and marriage issues.

While the central role of traditional leaders cannot be ignored, a greater awareness of human rights must be indicated by marked changes in behaviour. At the same time, communities ought to be empowered through greater access to information. They should be able to *claim* rights for themselves or rely on the comparative strength of CBOs, NGOs and other independent legal service providers to assist them in claiming their rights.

#### 4.5 Weaknesses in the primary justice delivery sector

While the Schärf report investigated the relationship between custom-

<sup>72</sup> Eg, in juvenile justice cases, (state) district welfare officers ought to be involved from the start as primary justice service providers. Alternatively, a magistrate might more appropriately handle issues such as property grabbing, either in situations where the chief/headman (who ought to be handling such matters impartially) displays obvious bias or favouritism, or where a simple dispute begins to lead to more widespread conflict.

<sup>73</sup> DFID *Safety, security and accessible justice: Putting policy into practice* (2000) 65 notes that stereotypes that either idealise or demonise traditional justice systems can be countered by solid empirical information. Vaughan (n 14 above) 8 rightly observes that 'people everywhere have an astounding tendency to romanticise the past'.

<sup>74</sup> Other church programmes deal with similar issues, but documentation is not always easy to come by.

ary legal systems and formal justice structures, its brief did not include a comprehensive examination of the numerous other primary justice actors. As we concluded in our consultations with organisations in June and July of 2003, there is a lack of co-ordination between providers, lack of confidence in justice providers across the spectrum, and a lack of legal knowledge, especially on the part of primary justice service providers. These factors compound the problems already described above, such as the lack of mechanisms to record decisions and refer matters appropriately.

Where co-ordination does exist (for example, in the areas of relief assistance and development), issues of primary justice are rarely taken into account. Primary justice activities that do take place are often carried out in isolation from other similar initiatives, with the inevitable consequences of duplication of efforts, competition for limited resources and/or not learning from each other's experiences. Co-ordination, however, is no easy task.

Compounding these challenges is a lack of confidence in both primary justice agencies and the formal justice system. This lack of confidence has several sources, including fear or experience of bias, intimidation, and lack of concern on the part of the primary justice provider or decision-making mechanism. Further, lack of legal knowledge among primary justice service providers means that they are not always aware of sources of legal protection. Finally, several members of the judiciary have acknowledged that there is a poor flow of information from the formal system to primary justice systems.

#### 4.6 Strengths in the primary justice delivery sector

In spite of the flaws listed above, primary justice fora have much to offer in Malawi. First and foremost, they are located within the cultural context of the community. This means that they are accessible at an intellectual and emotional level, as they are based on shared values and meanings, as well as language and procedures.<sup>75</sup> Such fora are also accessible because of their physical proximity to poor people, who have little time or money to waste. Because it is rooted in communities, primary justice delivery in Malawi can lead to the restoration of social harmony. However, it is important not to idealise the process, as the preservation of social harmony can sometimes lead to serious injustices and human rights abuses.<sup>76</sup>

<sup>75</sup> The strengths of primary justice structures have been observed by Nyamu-Musembi (n 34 above) 127, who argues that such fora are enhanced by their affordability, the fact that they are in constant motion (ie a constant state of change), that they recognise people as agents of cultural transformation, and 'may grant recognition to claims that the formal legal system does not entertain'.

<sup>76</sup> Eg, in cases where a schoolgirl is made pregnant by her teacher, the parents may drop the charge if the teacher decides to 'marry' the girl, notwithstanding Ministry of Education policy.

A key strategy for enhancing the effectiveness of primary justice structures might be to train leaders and other persons in positions of power in human rights awareness and alternative dispute-resolution mechanisms. However, it is not enough to train only the powerful. It is also essential to educate the powerless to act and to demand justice on their own behalf. In this sense, broadening access to justice and widening the range of options available to the poor might well put pressure on traditional leaders to improve their service delivery.

## 5 Social and cultural context

Culture and tradition<sup>77</sup> play a significant part in the construction and implementation of primary justice systems. Society's understanding of what is just and unjust is culturally conditioned and is determined by context and time. For example, a woman might initially consider being beaten by her husband as something normal and nothing to complain about, but might change this view after becoming aware of her rights. A custom such as inheritance can also take on new meaning. What was once considered an obligation to look after a widow and her children is now considered a right to the widow's property. Even adapting customs to suit modern times can cause problems. For example, the payment of *lobola* (so-called bride-price) in instalments has apparently contributed to the fragility of marriages in the north of Malawi.<sup>78</sup>

The impact of culture and tradition on primary justice also differs according to the nature and perspective of the service delivery organisation. For example, if we consider defilement (sex with a minor) of a schoolgirl by a teacher, responses differ dramatically. According to the formal justice system, this would constitute a serious crime, which in Malawi carries the possibility of a capital sentence. In the primary justice system, various stakeholders might respond very differently. The church might see the matter as a sin, an NGO might see it as an abuse of human rights, the affected parents might consider it to be a form of corruption, and a traditional leader might contend that nothing was wrong, countering 'That's normal, just marry the girl'.

This dynamism within the culture naturally creates tension between *progressives* (also known as modernists) and *traditionalists*. In the case of primary justice, the domain of *nkhanza* has expanded to address issues such as lack of love between spouses, lack of care, and the practice of

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<sup>77</sup> Culture in this sense is described as learnt social behaviour, as well as learnt ways of interpreting events and constructing social reality. Tradition means quite literally handing down (eg, customs or rituals). Customs are modes of behaviour that are handed on, but which may take on new meanings as circumstances change.

<sup>78</sup> It was reported by Catholic Commission on Justice and Peace (CCJP) in Malawi that only 10% of marriages in Rumphu District are monogamous. DFID-MaSSAJ Report (n 1 above), Annex E. This obviously has serious implications for the spread of HIV/AIDS.

traditions that would have been considered as *normal* only a few years ago, but which through the emergence of human rights and civic education<sup>79</sup> are increasingly being challenged. The root of these injustices can be described both as stemming from the failure to follow traditions, and as a result of following outdated practices.

Primary justice, therefore, provides a potential means of solving ordinary people's conflicts, particularly for those with restricted access to formal justice. However, access needs to be improved to serve particularly vulnerable groups, including (but by no means limited to) children in school, children in conflict with the law, orphans and widows, women and those living with HIV/AIDS.

Furthermore, the capacity and relevance of formal justice agencies are enhanced by primary justice interventions. The police service benefits from the active participation of communities in community-policing fora and victim support units.<sup>80</sup> The prison service benefits from primary justice service providers through their enhancement of the administration<sup>81</sup> of community service orders and involvement of the community in prison lay visitors schemes, while the judiciary benefits through broadening participation in the Court Users' Committees.<sup>82</sup>

## 6 Building on existing initiatives

In designing appropriate primary justice interventions, rather than initiating new activities, it is important to build on what already exists. As we discovered during our consultation process, there are numerous existing (and incipient) initiatives where primary justice can be supported and strengthened. Some of the principal structures included Community Policing Fora, Court Users' Committees, Traditional Leaders' Training and School Management Committees. Other structures that showed potential for implementing primary justice included Com-

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<sup>79</sup> Two of the most important initiatives in Malawi are the NGOs Malawi Centre for Advice and Education on Rights (CAREER) and National Initiative for Civic Education (NICE).

<sup>80</sup> These play a valuable role in addressing the anxieties that people have about approaching the police.

<sup>81</sup> Here we refer to the role of CBOs in particular in (i) identifying relevant subjects and development target areas for the implementation of community service; (ii) providing relevant information for the community service report; and (iii) promoting community awareness about the purpose of community service orders. Similar comparisons can be made with rural South Africa; J Handmaker 'Legal and socio-economic difficulties associated with the introduction of community service orders in southern Africa (with particular reference to Transkei)', unpublished LLM dissertation (1993).

<sup>82</sup> Participation in Court Users' Committees remains erratic, with limited participation from non-state agencies, which are well placed to offer perspectives on primary justice and relevant information for social enquiry reports.

munity Service Structures and Prison Lay Visitors Schemes. Finally, we observed that supporting good co-ordination between local government, faith-based organisations, NGOs and CBOs can prove critical to the success of primary justice schemes.<sup>83</sup>

It must also be stressed that these kinds of primary justice interventions should not deliberately undermine the roles of traditional leaders, but rather seek to hold them more accountable. This could be done by evaluating the impact of traditional leaders' training, evaluating training course materials and informing people of their rights. Nor should such interventions undermine efforts by the district assembly and district social welfare; rather, they should build on existing relationships.

Such interventions can strengthen the role of magistrates by providing a link with the community, as well as information on primary justice issues through Court Users' Committees and Juvenile Justice Fora. The prison service can also be strengthened by efforts to alleviate overcrowding through the promotion of community service and/or limited release mechanisms, as well as participation in emerging lay visitors schemes.

In short, broadening access through primary justice interventions allows people to 'shop for justice',<sup>84</sup> without undermining formal justice systems. Such interventions are driven (and measured) by the extent to which they meet the demands of civil society for accessible justice, through participatory development methodologies.

## 7 Conclusion: Legal empowerment

As we have tried to illustrate in this article, a broader understanding of primary justice is needed, especially on the part of donor agencies seeking to enhance these structures through direct interventions. What donors have so far been missing in developing appropriate interventions are more recent, country-specific sociological analyses of existing primary justice mechanisms that engage with communities through participatory methodologies. This particular study represents an attempt to address this gap, though caution must be taken; our study refers to a specific programme in a particular socio-economic and political context. Therefore it cannot be seen as a model simply

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<sup>83</sup> Depending on the conditions in a particular district, this will involve identifying key stakeholders, existing primary justice activities and areas for potential feedback and follow-up. The latter might include capacity building, applied participatory research and participatory monitoring and evaluation. In some districts, organisations are already well co-ordinated on relief and development activities, but co-ordination on primary justice issues might remain elusive. In order to promote better co-operation between stakeholders, at this level (ie as an emerging service), it will be necessary to identify why this is so.

<sup>84</sup> Penal Reform International (n 57 above) 167.



to duplicate elsewhere, without engaging in a further study using participatory methodologies that engage with community structures.

What we concluded in our study is that primary justice is a useful concept, being the principal means by which people resolve disputes, address issues and access justice within their own social and cultural context, using their own resources. It enables communities to take control of their own lives and is closely related to poverty alleviation.

Primary justice involves, first and foremost, enhancing access to justice by Malawian individuals, families, groups or communities. It also principally affects the poor, since in most cases a person's resources will determine whether or not they have access to formal justice systems.<sup>85</sup>

Secondly, primary justice tends to focus more closely on the process that is followed than the strict letter of the law. Most primary justice issues will in fact never reach the formal justice authorities (the police, judiciary and prison system). As it is rooted in community structures, the language of dispute resolution is generally more relaxed and relevant to primary justice issues and the majority of Malawian citizens.

Thirdly, primary justice aims to enhance the capacity of facilitative mechanisms or sources of primary justice — civic organisations, district officials, traditional leaders, faith-based organisations and others — to provide access to justice at community level, and ensure better access to formal justice.

As primary justice is in fact based on a far broader range of stakeholders than traditionally has been assumed, an alternative to the 'dominant paradigm' of the rule of law orthodoxy could be Golub's 'legal empowerment alternative'. Such an approach would focus more on the *underlying reasons* why people lack access to justice, rather than on the under-resourced and inefficient institutions that struggle to provide formal justice. In particular, a legal empowerment approach would recognise the 'central role' of civil society and form part and parcel of a broader policy of poverty alleviation.<sup>86</sup>

Finally, while formal justice systems stand to benefit from a strengthened primary justice system, it should be emphasised that the primary system exists autonomously, having arisen to meet the needs of the community. It does not exist simply because of flaws in the formal system of justice delivery. Primary justice is where most access to justice issues arise, and where they are resolved. By recognising the wide range of organisations involved in providing primary justice and supporting them, access to justice can be broadened and strengthened for ordinary Malawians, thus responding to their concerns and promoting social change.

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<sup>85</sup> Eg, rather than relying on the police, wealthier citizens can hire private security agencies to protect their interests. They are also able to hire lawyers to represent their interests.

<sup>86</sup> See Golub (n 4 above) 27-29.

# Circumcision and the rights of the Kenyan boy-child

*Patricia Mande Nyaundi\**

Programme Manager, Child Legal Aid Centre; Advocate of the High Court of Kenya

## Summary

*The adoption of the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child strengthened the protection of the rights of children. Although Kenya has ratified both instruments and enacted the Children's Act, all instruments prohibiting practices that are prejudicial to the rights of children, circumcision of the boy-child for purely cultural reasons still takes place in the country, sometimes with severe consequences, such as deaths. This article demonstrates that the circumcision of non-consenting boys under the age of 18 violates their basic human rights, particularly the right not to be discriminated against, the right to health, the right to privacy and bodily integrity, and the right not to be subjected to cruel and inhuman treatment. The article concludes that the human rights implications stemming from male circumcision necessitate positive action against this practice by the government.*

## 1 Introduction

In recognising the child as an individual holding and exercising rights independently of adults, the United Nations (UN) Convention on the Rights of the Child, 1989<sup>1</sup> (Convention) represents a clear departure from the past where parents were the right bearers through whom the rights of the child were conceived. The rights of children are no longer to be subsumed in the rights of adults. Children are no longer mere

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\* LLB (Hons) (Nairobi), LLM (Cape Town); chilac1@multitechweb.com

<sup>1</sup> GA Res 44/25, Annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49(1989) entered into force 2 September 1990; signed by Kenya on 26 January 1990; ratified on 30 July 1990.

objects of concern, but are now owners of rights enforceable against the state and other individuals.<sup>2</sup>

The Convention has restated rights that were already protected by other international instruments, such as the International Covenant on Civil and Political Rights (CCPR), tailoring them to the needs of children. To encourage adoption by member states, the Convention is framed in general terms with a proviso enabling state parties to provide for greater protection in their regional and domestic legislation.<sup>3</sup>

The African Charter on the Rights and Welfare of the Child, 1990 (Children's Charter)<sup>4</sup> draws inspiration from, among other regional and international instruments,<sup>5</sup> the Convention,<sup>6</sup> and seeks to offer an African perspective on the rights of the child. The Charter, therefore, addresses some issues that are of particular concern to African children. These include early marriages,<sup>7</sup> the fate of children under apartheid,<sup>8</sup> children involved in armed conflict,<sup>9</sup> poor and unsanitary conditions which threaten survival,<sup>10</sup> discrimination against female children,<sup>11</sup> children in prison with their mothers<sup>12</sup> and duties of children to their family and society.<sup>13</sup> The Children's Charter also commits state parties to eliminate cultural, traditional and religious practices that infringe on the rights of the child.<sup>14</sup>

Kenya has ratified both the Convention and the Children's Charter without reservation.<sup>15</sup> In doing so, it has signified its commitment to the rights of the child as pronounced in the two treaties. It therefore has a duty to ensure that its laws and the culture and traditions of its citizens do not infringe on the rights now guaranteed. As a first step in this process, Kenya has enacted the Children's Act, 2001 (the Act).<sup>16</sup> In its Preamble, the Act states the following:

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<sup>2</sup> G van Bueren (ed) *International documents on children* (1998) xv-xvi.

<sup>3</sup> Art 41.

<sup>4</sup> OAU Doc CAB/LEG/25.9/49 (1990), entered into force 29 November 1999; ratified by Kenya on 25 July 2000.

<sup>5</sup> Such as the OAU Heads of State and Government Declaration on the Rights and Welfare of the African Child, 1979 (AHG/ST 4 (XVI) Rev 1); the International Covenant on Civil and Political Rights, entered into force 23 March 1976; the International Covenant on Economic, Social and Cultural Rights, entered into force 3 January 1976.

<sup>6</sup> Para 9 Preamble & art 46.

<sup>7</sup> Art 21(2).

<sup>8</sup> Art 26.

<sup>9</sup> Art 22.

<sup>10</sup> Art 14(2).

<sup>11</sup> Art 21.

<sup>12</sup> Art 30.

<sup>13</sup> Art 31.

<sup>14</sup> Art 1(3).

<sup>15</sup> See [http://www.sahrc.org.za/afr\\_sec\\_charter\\_an-the\\_child.PDF](http://www.sahrc.org.za/afr_sec_charter_an-the_child.PDF) and <http://www.unhchr.ch/pdf/report.pdf> (accessed 14 March 2005).

<sup>16</sup> Entered into force March 2002.

An Act of Parliament to . . . give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes.

The Act guarantees to the Kenyan child without discrimination the rights provided for under the Convention and the Children's Charter. Of direct relevance to this paper, it defines childhood as ending on the attainment of the age of 18 years<sup>17</sup> and prohibits cultural rites, customs and traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development. The Act specifically prohibits female circumcision, but does not deal with the situation of men or boys.<sup>18</sup> Both male and female circumcision is practised in Kenya. Depending on the community, the age of initiation candidates ranges from eight to 16 years.

In this paper, it is intended to demonstrate that male circumcision, when practised on boys under the age of 18 for non-medical purposes, constitutes a violation of the rights of the boy-child. The article's focus is on male circumcision as a procedure done purely for cultural reasons on non-consenting boys. The mutilation of male or female genitalia for other than medical necessity is a violation of their basic human rights.

This paper firstly points out the similarities between female and male circumcision and then shows how male circumcision violates the rights of the boy-child. The campaign against female circumcision has been successfully conducted on the 'rights' platform. The paper seeks to establish that both female and male circumcision negatively impact on the rights of the child. A balanced approach to children's rights requires that equal protection be afforded children irrespective of sex.

## 2 Features of the rite of circumcision<sup>19</sup>

With the exception of the Turkana, Luo and two sub-tribes of the Luhya,<sup>20</sup> all the tribes in Kenya regard circumcision as the rite of passage from childhood to adulthood. In terms of numbers, more boys are circumcised than females. Historically, the age of circumcision was between 14 to 16 years, as this ceremony marked and prepared one

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<sup>17</sup> Sec 2 defines a child as any human being under the age of 18 years.

<sup>18</sup> Sec 14 provides: 'No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.'

<sup>19</sup> The author is Kenyan and most of the information in this section is through first-hand experience, and information obtained through informal interviews with senior citizens from various tribal communities.

<sup>20</sup> K Tanaka 'Medical anthropological study in Western Kenya and its implications for community health development' March 2000, <http://www.idcj.or.jp/4Publications/wpss.pdf> (accessed 31 March 2005).

for marriage. Marriage fully transformed an individual into an adult. However, children are currently being circumcised at an earlier age. The majority are circumcised between the ages of eight to 12 years, and in some cases even soon after birth.<sup>21</sup> The ceremony has, to a large extent, been reduced to the cutting or branding of the genitalia. Other aspects that were previously part of the ritual, such as family and life-skills education, are no longer practised.

There are a number of arguments for the reduction of the age of circumcision. Firstly, the younger the initiate, the faster the healing. Secondly, the fee of the circumcisor is higher for mature candidates, and lastly, where the procedure is performed without anaesthesia, it is easier to intimidate young children into submission.<sup>22</sup>

Circumcision involves the cutting off of otherwise healthy genital tissue. There are three types of female circumcision, namely *sunna*, excision (or clitoridectomy) and infibulation. The form practised most in Kenya is *sunna* and involves the removal of the tip of the clitoris and the prepuce.<sup>23</sup> For boys, the operation consists of cutting away in part the skin of the penis that goes beyond the glans (prepuce). The prepuce is a vital part on the male sexual organ. When the infant is incontinent, the prepuce fulfils an essential function, to protect the glans.<sup>24</sup> The foreskin is more than just penile skin necessary for a natural erection; it is specialised tissue, richly supplied with blood vessels, highly innervated, and uniquely endowed with stretch receptors. The foreskin contributes significantly to the sexual response of the intact male.<sup>25</sup>

In rural communities, the operation is usually carried out under unhygienic conditions using crude tools. No anaesthesia is administered. Each year there are reports of deaths and severe irreversible damage caused to children.<sup>26</sup> In the urban centres, the operation is performed by medical personnel, either in hospital or at the home of the initiate, and anaesthesia is used.

For both female and male circumcision, the consent of the child is never sought. Circumcision is regarded as something done for children and not something done to them. Through the use of myths, folklore

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<sup>21</sup> My informant is Samson Ombongi, aged 80 years, who lives in Machoge Location within Gucha District, Kisii, Kenya.

<sup>22</sup> *East African Standard* 3 August 2001 featured a story of an 18 year-old initiate who attacked the circumcisor with a stick in the middle of the operation.

<sup>23</sup> J Kabeberi-Macharia 'Female genital mutilation and the rights of the girl-child in Kenya' in W Ncube (ed) *Law, culture, tradition, and children's rights in Eastern and Southern Africa* (1998) 250.

<sup>24</sup> D Gairdner 'Fate of the foreskin' (1949) 2 *British Medical Journal* 1433-1437.

<sup>25</sup> M Milos 'Circumcision: Male — Effects on human sexuality' in VL Bullough & B Bullough (eds) *Human sexuality: An encyclopedia* (1994) 119-121.

<sup>26</sup> Eg reports appearing in *Daily Nation* on 20 and 27 December 2001 spoke of seven boys who died after undergoing traditional circumcision in Keiyo District and six boys admitted in critical condition in Kapsabet District having developed tetanus.

and peer pressure, the child is conditioned to look forward to the rite with positive anticipation.

In all tribes, different words exist to distinguish between the circumcised and the uncircumcised. The word to describe the uncircumcised is derogatory. Among the Abagusii, a circumcised male is referred to as 'omomura' (meaning young man), while the uncircumcised as 'omoi-sia' (meaning small boy). The circumcised female is referred to as 'enyaroka' (a cut one) and the uncircumcised as 'egesagane' (uncut). Among the Maasai, a circumcised male is referred to as 'ol-murani' (young warrior) and the uncircumcised as 'olayoni' (small boy). The circumcised female is referred to as 'esingaki' (maiden) and the uncircumcised as 'entito' (small girl).

The initiates are secluded away to heal and during this period they are educated on their role within the community as men and women. The actual rite and what is involved is surrounded in mystery and initiates are bound on oath not to divulge what has happened to them. This way, the next group of initiates is not aware of what awaits them. The male parent (or guardian) is responsible for preparing the male candidate and likewise the female parent (or guardian) will prepare the female candidate and present him or her for initiation. After the healing, the 'coming out' ceremony is marked with festivity and there are gifts for both the initiates and their families.

In terms of features, therefore, there is no difference between male and female circumcision. The other issue for consideration is whether circumcision violates the rights of the boy-child.

### 3 Circumcision and the rights of the boy-child

#### 3.1 Non-discrimination

The right not to be discriminated against is enshrined in the following provisions: article 2 of the Convention, article 3 of the Children's Charter, articles 2 and 3 of the African Charter on Human and Peoples' Rights 1981, (African Charter),<sup>27</sup> article 24 of the International Covenant on Civil and Political Rights, 1966,<sup>28</sup> articles 1, 2 and 7 of the Universal Declaration of Human Rights, 1948<sup>29</sup> and Principle 1 of the UN Declaration of the Rights of the Child 1959.<sup>30</sup> These provisions ensure to the child the right to protection and enjoyment of guaran-

<sup>27</sup> Adopted 27 June 1981, OAU Doc CAB/LEG/67/3 REV 5, (1982) 21 *International Legal Materials* 58, entered into force 21 October 1986; ratified by Kenya on 23 January 1992.

<sup>28</sup> GA Res 2200 A (xxi), 21 UN GAOR Supp (No 16) 52, UN Doc A/6316(1966), 999 UNTS 171 entered into force 23 March 1976; acceded to by Kenya on 1 May 1972.

<sup>29</sup> Adopted and proclaimed by Gen Ass Res 217A(III) of 10 December 1948.

<sup>30</sup> GA Res 1386 (xiv), 14 UN GAOR/ Supp (No 16) 19, UN Doc A/4354 (1959).

teed rights irrespective of, amongst others, sex and age. As illustrated in the discussion below, the injury is common to both sexes. Secondly, the practice discriminates against the boy-child on account of his age. The same operation conducted on an adult without his consent is a criminal offence. There have been reports of adults who prefer criminal charges of assault against those who forcibly circumcise them.

### 3.2 Health

Article 21(1) of the Children's Charter provides:

State Parties to the present Charter shall take appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the children and in particular:

- (a) those customs and practices prejudicial to the health of children; and
- (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

Article 24(3) of the Convention requires state parties to take all effective measures with a view to abolishing traditional practices prejudicial to the health of children.

The following is a list of physical damage that may result from male circumcision:<sup>31</sup>

- *Haemorrhage* due to the many veins crossing the penis. If undetected, this can be fatal. Some children are affected by hereditary haemophilia, making it difficult to stop haemorrhaging. In fact, it has been said that 90% of youths who die after undergoing circumcision suffer from this undetected bleeding disorder.<sup>32</sup>
- *Infection of the injury*. The injury caused by circumcision may be exposed to urine and faeces, provoking infection, thereby damaging the urethra and its stricture. An operation may be necessary to widen the opening. In the absence of antibiotics, the infection can lead to diseases such as tetanus, gangrene, meningitis and diphtheria.
- *Urinary infection*. This can be caused by the trauma of the operation, from surgical dressings and from pain associated with attempts to urinate. A urinary retention, which if not cured, can lead to a renal disease.
- *Necrosis of the glans*. This is the death of body tissue. This may happen to the glans following circumcision due to an overly tight bandage.
- *Injury and loss of glans*. Occasionally, the glans can be injured or cut off during circumcision.

<sup>31</sup> Sami A Aldeeb Abu-Sahlieh *Male and female circumcision among Jews, Christians and Muslims. Religious, medical, social and legal debate* (2001) 154-155.

<sup>32</sup> *East African Standard* 1 May 2003, quoting Dr Walter Mwanda, Chairperson of the Kenya Haemophilia Association.

- *Excessive penile skin loss.* Any loss of skin on the penis is an irretrievable loss. The damage will vary according to the quantity of amputated skin. Some circumcisors pull the skin and cut as much as they can. This may result in penile bowing and pain at the time of erection.
- *Penis concealed.* The penile shaft following circumcision may retreat into the surrounding skin and fatty area and cannot be seen. This problem must be corrected by surgery, and often skin grafting, to produce a normal looking penis.
- *External deformity of the penis.* The healing of the circumcision wound is not always pretty. It may result in an unpleasant external aspect, or even a cyst or keloid.
- *Loss of penis.* This may be as a result of mishandling the circumcision or as a result of an infection.
- *Death.* Depending on the severity of some of the injuries above, the operation may lead to death.

As with female circumcision, in the long term, owing to the damage to the genitals, the male's ability to perform and enjoy sex is adversely affected.

### 3.3 Privacy and bodily integrity

As with female circumcision, the rite violates the child's right to privacy, which right is protected by article 16 of the Convention and article 10 of the Children's Charter. The right to privacy and bodily integrity has been defined as the right to be protected from unwelcome interference with one's body without consent.<sup>33</sup> The government is under an obligation to prevent childhood mutilations of either gender. The act of marking a child with a ritual mutilation, particularly upon the genitals, takes away that individual's right to a functional body and his right to choose whether to be marked with the scars of that particular culture.

### 3.4 Protection from cruel and inhuman treatment

Both the Convention<sup>34</sup> and the Children's Charter<sup>35</sup> provide that the child should be protected from torture or other cruel, inhuman and degrading treatment and punishment. The excruciating pain which the children are subjected to, especially where no anaesthesia is applied, cannot be justified in modern society. No objective observer who has witnessed a circumcision can dispute that the procedure inflicts severe pain or suffering on the child.

<sup>33</sup> See the decision in *Planned Parenthood of South Eastern PA v Casey* 505 US 833 (1992), cited with approval in the decision in *Roe v Wade* 410 US 113 (1973).

<sup>34</sup> Art 37.

<sup>35</sup> Art 16.



One newspaper report<sup>36</sup> gave a detailed account of how the ceremony is marked among the Bukusu, a sub-tribe of the Luhya in Western Kenya. The actual cutting is preceded by week-long activities of festivity. On the actual day, the candidate is woken up very early and escorted to a stream by a large crowd. There, his body is covered with mud as an uncle extolls the virtue of bravery and urges the young boy to face the knife with courage. From the river, the procession heads back home. This for the boy is the final leg to manhood.

... At home, he was received by his two uncles and his father, who led him to a prepared spot, around which the crowd of onlookers waited with bated breath. Makokha strutted around and then stood still, arms akimbo. Suddenly, a circumciser emerged from the crowd, flashing a traditional knife, *leukaemia*, with two aides in tow. He completed the operation in one swift move before stepping back to allow elders to examine his work. When they pronounced it well done, ululations rent the air as a new round of celebrations began. Makokha raised his right fist to acknowledge the cheers from onlookers, friends and the relatives he had done proud. The crowd mobbed him singing '*Oh khwera omurwa, yaya khwera omurwa!*', which means 'the job is done'.

Not only is pain suffered at the time of the operation, but also during the healing, which may on average take a week.

The foregoing analysis has shown that circumcision is practised as a cultural rite and that it infringes the rights of the boy-child. The Convention<sup>37</sup> and the Charter<sup>38</sup> have provided direction as to what should happen in the event that there is tension between the rights of the child and culture, as will be discussed in the next part of this article.

#### 4 Culture and the rights of the child

Culture may be defined as '[t]he customs and beliefs, art, way of life and social organisation of a particular society or group' and '[t]he beliefs and attitudes about something that people in a particular group or organisation share ...'<sup>39</sup> Tradition is defined as 'a belief, custom or way of doing something that has existed for a long time among a particular group of people'.<sup>40</sup>

Following the adoption of the Convention and the Children's Charter, it is now accepted that children have rights. This marks a development from a time when parents, especially the father, had absolute rights over children. Under the current dispensation, children are recognised as individuals in their own right with indivisible and inalienable rights that they enjoy as members of the human family.

<sup>36</sup> 'Elaborate passage into manhood' *Daily Nation* 11 August 2004.

<sup>37</sup> Art 24 (3).

<sup>38</sup> Art 1(3).

<sup>39</sup> *Oxford advanced learners' dictionary*, 6th edition.

<sup>40</sup> As above.

These international instruments and the Kenyan legislation have charted out the course to be followed towards the improvement of the status of children. In the fifth paragraph of the Preamble, the Convention recognises the family as the fundamental group of society, and in the twelfth paragraph it acknowledges that due account should be taken of the tradition and cultural values of each people for the protection and harmonious development of the child.

In the sixth paragraph of the Preamble, the Children's Charter also recognises the 'virtue of . . . cultural heritage, historical background and the values of the African civilisation, which should inspire and characterise their reflection on the concept of the rights of the child'.

The definition and perception of childhood under both the Convention and the Children's Charter represent a complete departure from that of traditional African culture. Under these instruments and the Children's Act, adulthood is attained on reaching a specific predetermined age. However, under customary law, age has no relevance in determining childhood or adulthood.<sup>41</sup> Adulthood is marked by physical changes marking puberty, capacity to perform adult duties, completion of initiation stages and marriage. It is evident therefore that in certain cultures maturity may be attained before the age of 18, contrary to the provisions of the Convention and the Charter.

Further, the Convention and the Children's Charter are revolutionary in that the child is not to be perceived of as a right-less object of the law, but rather as a possessor of rights in his or her own right enforceable against family, community and state. In other words, children as human beings have the same inherent value as adults. This vision of a child as an autonomous being is at odds with the cultural perception of a child where children are viewed as resources with parents having a duty to protect and provide for them.<sup>42</sup>

The basic premise of the whole Convention is that its provisions shall be applied with the best interests of the child as a primary consideration,<sup>43</sup> and in the case of the Children's Charter as the primary consideration.<sup>44</sup> In seeking to determine the best interests of the child in any case, the standard to be applied are the provisions in these instruments and the discouragement of any act that would seek to undermine the rights of the child.

Certain aspects of culture left unchecked would work to undermine the advances made as far as children's rights are concerned. The Convention and the Children's Charter are therefore clear as to what should

<sup>41</sup> C Himonga 'The right of the child to participate in decision-making. A perspective from Zambia' in Ncube (n 23 above) 97.

<sup>42</sup> B Rwezaura 'Law, culture and children's rights in Eastern and Southern Africa: Contemporary challenges and present-day dilemmas' in Ncube (n 23 above) 294.

<sup>43</sup> Art 3(1).

<sup>44</sup> Art 4 (1).

happen when there is a clash between the rights of the child and culture. The Convention in its Preamble only recognises those traditional and cultural values that act for the protection and harmonious development of the child. The Children's Charter is unambiguous and provides that 'any custom, traditional or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged'.<sup>45</sup>

There can be no doubt therefore that where culture undermines or curtails the rights of the child, state parties are bound in the words of the Children's Charter to 'discourage' that culture. The use of the word 'discourage' is intentional. The drafters of the Children's Charter were alive to the fact that when dealing with traditional, cultural and social issues, the approach to adopt is to discourage and provide an acceptable substitute to the community. This is the approach that has been adopted in the campaign against female circumcision where alternative rites have been introduced.

Both the Convention and the Children's Charter do not tolerate practices prejudicial to the rights of children and call for their abolition. The Kenyan Act adopts a similar stand and as a deterrent attaches a criminal sanction.<sup>46</sup> The Convention and the Children's Charter, together with the Act, spell out the basic standards to which culture and tradition must measure up. Whereas recognition is given to culture, only those practices that are positive and contribute to the welfare, dignity, normal growth and development of the child are to be accommodated.

From the foregoing, it is clear that the cultural rite of circumcising boys runs foul of the express provisions of the Convention, the Children's Charter and the Children's Act.

## 5 Conclusion

The provisions of the Children's Act are very clear. A careful reading of its provisions<sup>47</sup> would appear to prohibit circumcision of boys as a rite of passage into adulthood. It pronounces that a child only becomes an adult on the attainment of the age of 18.<sup>48</sup> By doing so, it renders

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<sup>45</sup> Art 1(3).

<sup>46</sup> Sec 14 (n 18 above). Sec 20: 'Notwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in sections 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine.'

<sup>47</sup> As above.

<sup>48</sup> Sec 2.

incompetent any cultural practices that seek to confer adulthood at an earlier age. Further, the Act provides as follows:<sup>49</sup>

No person shall subject a child to female circumcision, early marriage or *other cultural rites, customs or traditional practices* that are likely to negatively affect the child's life, health, social welfare, dignity or psychological development.

Clearly as has been suggested above, male circumcision, when performed on under-age boys who are unable to give their consent, is in breach of this provision. The government of Kenya is acting illegally in facilitating circumcisions through, for example, public health facilities, and in failing to prevent these violations, whether carried out by public or private actors. So as to fulfil its obligations under human rights treaties that it has ratified and the Act, the Kenyan government must take positive action against male circumcision.

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<sup>49</sup> Sec 14 (my emphasis).

### Statement from seminar on Social, Economic and Cultural Rights in the African Charter

The African Charter on Human and Peoples' Rights (African Charter) is often lauded as the first international human rights instrument to include socio-economic and cultural rights alongside civil and political rights, without drawing any distinction between the justiciability or implementation of the two 'categories of rights'.<sup>1</sup> In two of its findings, *Purohit and Moore v The Gambia*<sup>2</sup> and *The Social and Economic Rights Action Centre and Another v Nigeria*,<sup>3</sup> the African Commission on Human and Peoples' Rights (African Commission) has demonstrated the practical application of the principle that these Charter provisions are justiciable, and has held that 'no right in the African Charter cannot be made effective'.<sup>4</sup>

At a meeting (or seminar) of members of the African Commission, government officials and members of NGOs, held from 13 to 17 September 2004 in Pretoria, an effort was made to clarify the content of the social, economic and cultural rights in the African Charter. In the previous issue of this *Journal*, Sibonile Khoza provided a background to this meeting, and highlighted some of the discussions during the seminar.<sup>5</sup> A full text of the statement adopted at the conclusion of the seminar is provided here:

### Statement on social, economic and cultural rights in Africa

Pretoria, 17 September 2004

In conformity with its mandate under article 45 of the African Charter on Human and Peoples' Rights to promote and protect human rights in

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<sup>1</sup> See eg F Ouguerouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 200.

<sup>2</sup> Communication 241/2001, Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights.

<sup>3</sup> Communication 155/96, Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights.

<sup>4</sup> Communication 155/96, para 68.

<sup>5</sup> S Khoza 'Promoting economic, social and cultural rights in Africa: The African Commission holds a seminar in Pretoria' (2004) 4 *African Human Rights Law Journal* 334.

Africa, the African Commission on Human and Peoples' Rights in collaboration with the International Centre for Legal Protection of Human Rights (Interights), the Cairo Institute for Human Rights Studies and the Centre for Human Rights, University of Pretoria, held a Seminar on Economic, Social and Cultural Rights in Pretoria, South Africa, from 13 to 17 September 2004. The participants at the workshop, who included members of the African Commission, representatives of 12 African states, civil society organisations, national human rights institutions, academics and representatives of UN organisations and regional economic communities, adopted the following statement, which is recommended for consideration and adoption by the African Commission on Human and Peoples' Rights at its next ordinary session:

### **Preamble**

**RECALLING** that the African Charter enshrines economic, social and cultural rights, in particular the right to property in article 14, the right to work in article 15, the right to health in article 16, the right to education in article 17 and the cultural rights in articles 17(2) and (3), 18(1) and (2) and 61;

**RECOGNISING** the existence of regional and international human rights standards that stress the indivisibility, interdependence and universality of all human rights. Among these are the African Charter, the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Universal Declaration of Human Rights, the Declaration on the Right to Development, the International Covenant on Economic, Social and Cultural Rights and the Convention for the Elimination of All Forms of Discrimination Against Women;

**RECOGNISING** also that the objectives and principles of the Constitutive Act include a commitment to the promotion and protection human and peoples' rights, respect for democratic principles, human rights, the rule of law and good governance and the promotion of social justice to ensure balanced economic development;

**NOTING** that despite the consensus on the indivisibility of human rights, economic, social and cultural rights remain marginalised in their implementation;

**CONCERNED** that there is resistance to recognising economic, social and cultural rights that results in the continued marginalisation of these rights, which excludes the majority of Africans from the full enjoyment of human rights;

**APPRECIATING** the vast positive impact that information and communication technologies (ICTs) can have on the promotion, protection and realisation of economic, social and cultural rights;

**RECOGNISING** that there are several constraints that preclude the full realisation of economic, social and cultural rights in Africa;

**DEEPLY DISTURBED** by the ongoing and longstanding conflicts in the regions of Africa, which impede the realisation of economic, social and cultural rights;

**DISTURBED FURTHER** by the lack of human security in Africa due to the prevailing conditions of poverty and under-development and the failure to address poverty through development;

**FURTHER RECOGNISING** the urgent need for human rights, judicial and administrative institutions in Africa to promote human dignity based on equality and to tackle the core human rights issues facing Africans, including food security, sustainable livelihoods, human survival and the prevention of violence;

#### **THE PARTICIPANTS STATE:**

- 1 States parties to the African Charter on Human and People's Rights have solemnly undertaken to respect, protect, promote and fulfil all the rights in the Charter, including economic, social and cultural rights.
- 2 By doing so, states parties have agreed to adopt legislative and other measures, individually or through international co-operation and assistance, to give full effect to the economic, social and cultural rights contained in the African Charter, by using the maximum of their resources. States parties have an obligation to ensure the satisfaction of, at the very least, the minimum essential levels of each of the economic, social and cultural rights contained in the African Charter.
- 3 States are therefore called upon to address with all appropriate measures their obligations in relation to the full realisation of economic, social and cultural rights as well as tacking the following constraints:
  - lack of good governance and planning and failure to allocate sufficient resources for implementation of economic, social and cultural rights;
  - lack of political will;
  - corruption, misuse and misdirection of financial resources;
  - poor utilisation of human resources and absence of effective measures to curtail brain drain;
  - failure to ensure equitable distribution of income from natural resources;
  - trafficking in women and children;
  - continued outflow and existence of refugees and internally displaced persons;
  - illiteracy and lack of awareness,
  - conditionality of aid and unserviceable debt burdens,
  - privatisation of essential services;

- cost recovery, including access fees and charges for essential services;
  - lack of support for and recognition of the work of civil society organisations;
  - lack of implementation of obligations assumed under international law into national law,
  - under-development of social amenities;
  - limited engagement with human rights on the part of some judges;
  - lack of protection of African indigenous knowledge;
  - failure to enforce some judicial decisions against the state;
  - the adverse effects of globalisation
- 4 States parties have also undertaken to eliminate all forms of discrimination, including all forms of discrimination against women, and to promote the equal enjoyment of all human rights. Non-discrimination and equal treatment are the key components of economic, social and cultural rights, since vulnerable and marginal groups, including refugees and internally displaced persons, are disproportionately affected by a failure of the state to respect, protect and fulfil these rights.
- 5 The right to property in article 14 of the African Charter relating to land and housing entails among other things the following:
- protection from arbitrary deprivation of property;
  - equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women;
  - adequate compensation for public acquisition, nationalisation or expropriation;
  - equitable and non-discriminatory access to affordable loans for the acquisition of property;
  - equitable redistribution of land through due process of law to redress historical and gender injustices;
  - recognition and protection of lands belonging to indigenous communities;
  - peaceful enjoyment of property and protection from arbitrary eviction;
  - equal access to housing and to acceptable living conditions in a healthy environment.
- 6 The right to work in article 15 of the Charter entails among other things the following:
- equality of opportunity of access to gainful work, including access for refugees, disabled and other disadvantaged persons;



- conducive investment environment for the private sector to participate in creating gainful work;
  - effective and enhanced protections for women in the workplace including parental leave;
  - fair remuneration, a minimum living wage for labour, and equal remuneration for work of equal value;
  - equitable and satisfactory conditions of work, including effective and accessible remedies for work place-related injuries, hazards and accidents;
  - creation of enabling conditions and taking measures to promote the rights and opportunities of those in the informal sector, including in subsistence agriculture and in small scale enterprises activities;
  - promotion and protection of equitable and satisfactory conditions of work of women engaged in household labour;
  - the right to freedom of association, including the rights to collective bargaining, strike and other related trade union rights;
  - prohibition against forced labour and economic exploitation of children, and other vulnerable persons;
  - the right to rest and leisure, including reasonable limitation of working hours, periodic holidays with pay and remuneration for public holidays.
- 7 The right to health in article 16 of the Charter entails among other things the following:
- availability of accessible and affordable health facilities, goods and services of reasonable quality for all;
  - access to the minimum essential food which is nutritionally adequate and safe to ensure freedom from hunger to everyone and to prevent malnutrition;
  - access to basic shelter, housing and sanitation and adequate supply of safe and potable water;
  - access to reproductive, maternal and child health care based on the life cycle approach to health;
  - immunisation against major infectious diseases;
  - education, prevention and treatment of HIV/AIDS, malaria, tuberculosis and other major killer diseases;
  - education and access to information concerning the main health problems in the community including methods of preventing and controlling them;
  - training for health personnel, including education on health and human rights;
  - access to humane and dignified care of the elderly and for persons with mental and physical disabilities;

- 8 The right to education in article 17 entails among other things the following:
- provision of free and compulsory basic education that will also include a programme in psycho-social education for orphans and vulnerable children;
  - provision of special schools and facilities for physically and mentally disabled children;
  - access to affordable secondary and higher education;
  - accessible and affordable vocational training and adult education;
  - addressing social, economic and cultural practices and attitudes that hinder access to education by girl children;
  - availability of educational institutions that are physically and economically accessible to everyone;
  - development of curricula that address diverse social, economic and cultural settings and which inculcate human rights norms and values for responsible citizens;
  - liberty of parents and guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down by the state, and to ensure the religious and moral education of their children in conformity with their own convictions;
  - continued education for teachers and instructors, including education on human rights and the continuous improvement of the conditions of work of teaching staff;
  - education for development that links school curricula to the labour market and society's demands for technology and self-reliance.
- 9 The right to culture in articles 17(2) and (3), 18(1) and (2) and 61 entails among other things the following:
- positive African values consistent with international human rights realities and standards;
  - eradication of harmful traditional practices that negatively affect human rights;
  - participation at all levels in the determination of cultural policies and in cultural and artistic activities;
  - measures for safeguarding, protecting and building awareness of tangible and intangible cultural heritage, including traditional knowledge systems;
  - recognition of and respect of the diverse cultures existing in Africa.
- 10 The social, economic and cultural rights explicitly provided for under the African Charter, read together with other rights in the Charter, such as the right to life and respect for inherent human

dignity, imply the recognition of other economic and social rights, including the right to shelter, the right to basic nutrition and the right to social security.

11 Having highlighted the core contents of economic, social and cultural rights under the African Charter, participants make the following recommendations:

**(a) The African Union should:**

- (i) urge member states that have not done so, to ratify the human rights treaties mentioned in the Preamble, in particular the Protocol on Women's Rights;
- (ii) provide sufficient funds for African human rights institutions to enable them to effectively fulfil their mandate;
- (iii) establish the African Court on Human and Peoples' Rights without further delay;
- (iv) urge member states that have not done so to ratify the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, and to make the necessary declaration under article 34(6) of the Protocol;
- (v) establish the Human Rights Fund as recommended by the First AU Ministerial Conference on Human Rights held in Kigali, Rwanda, in May 2003;
- (vi) strengthen the Secretariat to enhance the functioning of the African Commission;
- (vii) urge the AU Peace & Security Council to adopt urgent measures to address the conflicts in Africa in order to create a conducive environment for the respect of economic, social and cultural rights;
- (viii) call upon the organs of the AU to encourage member states to uphold economic, social and cultural rights and to hold them accountable for violations economic, social and cultural rights;
- (ix) integrate the monitoring of economic, social and cultural rights into the work of relevant AU institutions as well as the CSSDCA Peer Review Mechanism and New Partnership for Africa's Development (NEPAD)'s African Peer Review Mechanism process;
- (x) follow up recommendations of the African Commission to ensure implementation of its decisions by member states.

**(b) The African Commission should:**

- (i) elaborate principles and guidelines on economic, social and cultural rights and establish a working group for this purpose;

- (ii) integrate economic, social and cultural rights into the mandates of existing Special Rapporteurs and Working Groups;
- (iii) urge states to duly submit their reports to the African Commission under article 62 of the African Charter;
- (iv) address economic, social and cultural rights during the examination of state reports under article 62 during questions and concluding observations;
- (v) review its guidelines for state reporting pertaining to economic, social and cultural rights;
- (vi) consider alternative means of examining implementation of provisions of the Charter by a state that is in perpetual default of its reporting obligations under article 62 of the Charter;
- (vii) provide substantive recommendations to the AU Assembly on economic, social and cultural rights;
- (viii) undertake studies and research under article 45 on specific economic, social and cultural rights;
- (ix) pay special attention to economic, social and cultural rights during promotional visits to states;
- (x) ensure effective dissemination of relevant decisions and resolutions of the Commission in collaboration with relevant governmental and non-governmental national and sub-regional institutions;
- (xi) further elaborate the economic and social rights implicit in the African Charter;
- (xii) urge the AU to establish the African Human Rights Court without further delay and those states that have not done so, to ratify the Protocol establishing the Court and to make the necessary declaration under article 34(6) of the Protocol.

**(c) States should:**

- (i) ratify, if they have not done so, the treaties mentioned in the Preamble, especially the Protocol on the Rights of Women;
- (ii) incorporate into domestic law and fully implement the provisions of regional and international treaties on economic, social and cultural rights;
- (iii) establish constitutional protection of economic, social and cultural rights subject to non-discrimination and equality;
- (iv) come up with national plans of action, which set out benchmark indicators for the progressive realisation of social, economic and cultural rights;
- (v) take effective measure to ensure budgetary processes are transparent and consultative;

- (vi) involve civil society in meaningful consultations in policy-making and in the implementation of social, economic and cultural rights generally;
- (vii) review all national policies, which undermine the realisation of specific social, economic and cultural rights;
- (viii) provide reports under article 62 of the Charter on how far they have gone in making social economic and cultural rights both accessible and non-discriminatory;
- (ix) adopt measures for the prudent use of resources, including the investigation of affordable alternatives for health drugs, eg generic vs patent medicines;
- (x) ensure effective citizen participation in government through credible electoral processes, liberalisation of the mass media and in the formulation of legislation and policies;
- (xi) adopt special measures for women and address the economic, social and cultural rights of vulnerable and marginalised groups, including children, indigenous peoples, displaced persons, refugees, persons living with HIV/AIDS and the disabled;
- (xii) develop mechanisms to hold non-state actors, especially multi-national corporations and business, accountable for violations of economic, social and cultural rights in such matters relating to child labour, industrial safety standards, protection against forced evictions and low wages, protection of the environment, including global warming and its impact on ecosystems, livelihood and food security;
- (xiii) strengthen the capacity of state institutions to produce disaggregate data that would provide an accurate assessment of the implementation of economic, social and cultural rights;
- (xiv) promulgate and implement comprehensive ICT policies and programmes;
- (xv) consult with civil society organisations in the nomination and election of members of the African Commission and judges of the African Court;
- (xvi) ratify the Protocol on the African Human Rights Court and make the declaration under article 34(6) of the Protocol allowing individuals and non-governmental organisations to file cases, if they have not done so;
- (xvii) nominate and elect judges of the African Human Rights Court so that it may be established without further delay;
- (xviii) take necessary measures to reduce military spending significantly in favour of increasing spending on the implementation of economic, social and cultural rights;

- (xix) ensure that economic, social and cultural rights take primacy in the negotiations of bilateral and multilateral trade and economic agreements;
- (xx) create independent, impartial and well-resourced national human rights institutions and if they already exist to strengthen their independence and impartiality.

**(d) Civil society should:**

- (i) play a more pro-active role in the nomination of and lobby for the election of candidates to the African Commission who are conversant with economic, social and cultural rights;
- (ii) advocate for states to ratify the Protocol of the African Human Rights Court and to make the declaration allowing NGOs and individuals to file cases;
- (iii) advocate for the African Human Rights Court to be established without further delay;
- (iv) prioritise monitoring of economic, social and cultural rights in their advocacy work;
- (v) play a role in raising public awareness of economic, social and cultural rights and the obstacles to fulfilment of these rights, in particular harmful cultural practices;
- (vi) actively participate in the budgetary process, both in terms of formulation and analysis;
- (vii) develop partnerships with both the state and private sector, where possible, for the protection of economic, social and cultural rights;
- (viii) compile and submit to the Commission shadow reports on economic, social and cultural rights;
- (ix) improve networking amongst NGOs and their support activities of the African Commission and its Special Rapporteurs and Working Groups;
- (x) bring more cases on economic, social and cultural rights to the African Commission, the African Committee on the Rights and Welfare of the Child, national courts, and the African Human Rights Court, when it is established;
- (xi) become involved in specific projects in the implementation of economic, social and cultural rights, especially in the rural areas;
- (xii) advocate for comprehensive national and regional ICT policies and programmes, and to incorporate ICT training, provision and access in their work plans.

**(e) National human rights institutions should:**

- (i) undertake studies, monitor and report on social, economic and cultural rights;

- (ii) scrutinise existing laws and administrative acts and make submissions to parliament on bills relating to economic, social and cultural rights;
- (iii) publish and distribute their reports on economic, social and cultural rights;
- (iv) establish regional networks/coalitions and involve NGOs in these coalitions;
- (v) apply for affiliate status with the African Commission, if they have not done so;
- (vi) raise awareness on economic, social and cultural rights among particular groups such as the public service, the judiciary, the private sector and the labour movement and encourage the government to integrate human rights in the school curricula;
- (vii) examine complaints of infringements of economic, social and cultural rights and make recommendations on redress, and where possible file cases before national courts;
- (viii) conduct follow up activities in the implementation of recommendations of international treaty bodies and publicise their reports, especially on economic, social and cultural rights;
- (ix) advocate for states to ratify the Protocol of the African Human Rights Court and to make the declaration allowing NGOs and individuals to file cases;
- (x) advocate for the African Human Rights Court to be established without further delay;

**(f) International and regional entities should:**

- (i) pay particular attention to African needs related to development and the realisation of economic, social and cultural rights;
- (ii) cancel the unserviceable debt burdens of African states;
- (iii) ensure that bilateral and multilateral trade and economic agreements conform to international treaty obligations relating to economic, social and cultural rights;
- (iv) play a role in the implementation of economic, social and cultural rights including through assistance and co-operation with African states;
- (v) take measures to regulate trade in extractive industries (such as oil, mining) that are exploitative, corrupt and fuel conflicts in Africa;
- (vi) co-operate with African countries in their efforts to repatriate money and cultural artefacts that have been unlawfully removed from African countries;

- (vii) ensure compliance with the principles of corporate social responsibility.

In conclusion, the African Union, its member states, international and national organisations and non-state actors should fully recognise human rights as a fundamental objective of development and that development has to achieve the full realisation of all human rights. Economic, social and cultural rights should therefore be integrated into development planning and implementation so that African needs and aspirations are fully addressed.





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- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34 above) 243.

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  - 2
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Centre for Human Rights  
Faculty of Law, University of Pretoria  
Pretoria 0002, South Africa  
Tel: (27) 012 420 3810/3034  
Fax: (27) 012 362 5125  
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Position as at 31 December 2004

Compiled by: I de Meyer

Source: <http://www.africa-union.org> (accessed 31 March 2005)

	African Charter on Human and Peoples Rights	OAU 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
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Algeria	01/03/87	24/05/74	08/07/03	22/04/03
Angola	02/03/90	30/04/81	11/04/92	
Benin	20/01/86	26/02/73	17/04/97	
Botswana	17/07/86	04/05/95	10/07/01	
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98
Burundi	28/07/89	31/10/75	28/06/04	02/04/03
Cameroon	20/06/89	07/09/85	05/09/97	
Cape Verde	02/06/87	16/02/89	20/07/93	
Central African Republic	26/04/86	23/07/70		
Chad	09/10/86	12/08/81	30/03/00	
Comoros	01/06/86	02/04/04	18/03/04	23/12/03
Congo	09/12/82	16/01/71		
Côte d'Ivoire	06/01/92	26/02/98		07/01/03
Democratic Republic of Congo	20/07/87	14/02/73		
Djibouti	11/11/91			
Egypt	20/03/84	12/06/80	09/05/01	
Equatorial Guinea	07/04/86	08/09/80	20/12/02	
Eritrea	14/01/99		22/12/99	
Ethiopia	15/06/98	15/10/73	02/10/02	
Gabon	20/02/86	21/03/86		14/08/00
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99
Ghana	24/01/89	19/06/75		
Guinea	16/02/82	18/10/72	27/05/99	
Guinea-Bissau	04/12/85	27/06/89		
Kenya	23/01/92	23/06/92	25/07/00	04/02/04
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03
Liberia	04/08/82	01/10/71		
Libya	19/07/86	25/04/81	23/09/00	19/11/03



	African Charter on Human and Peoples Rights	OAU 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
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Madagascar	09/03/92			
Malawi	17/11/89	04/11/87	16/09/99	
Mali	21/12/81	10/10/81	03/06/98	10/05/00
Mauritania	14/06/86	22/07/72		
Mauritius	19/06/92		14/02/92	03/03/03
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04
Namibia	30/07/92		23/07/04	
Niger	15/07/86	16/09/71	11/12/99	17/05/04
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03
Sahrawi Arab Democratic Rep.	02/05/86			
So Tomé and Príncipe	23/05/86			
Senegal	13/08/82	01/04/71	29/09/98	29/09/98
Seychelles	13/04/92	11/09/80	13/02/92	
Sierra Leone	21/09/83	28/12/87	13/05/02	
Somalia	31/07/85			
South Africa	09/07/96	15/12/95	07/01/00	03/07/02
Sudan	18/02/86	24/12/72		
Swaziland	15/09/95	16/01/89		
Tanzania	18/02/84	10/01/75	16/03/03	
Togo	05/11/82	10/04/70	05/05/98	23/06/03
Tunisia	16/03/83	17/11/89		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01
Zambia	10/01/84	30/07/73		
Zimbabwe	30/05/86	28/09/85	19/01/95	
<b>TOTAL NUMBER OF STATES</b>	<b>53</b>	<b>45</b>	<b>35</b>	<b>20</b>